

Legal Tweaks

*that would change NSW
and the nation.*



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Our Mission

The New South Wales Society of Labor Lawyers aims, through scholarship and advocacy, to effect positive and equitable change in substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid, and legal education.

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Legal Tweaks

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Congratulations to NSW Labor Lawyers for this seventh edition of *Legal Tweaks*.

This publication is a fantastic resource for Labor, as we begin to set out our priorities in the Attorney-General's portfolio should we win government at the 2019 election.

As we enter the campaign phase, and beyond, I will count on contributions like these from lawyers and academics friendly to the Labor cause to drive a meaningful law reform agenda. I am proud to say that under Bill Shorten, Labor in Opposition has been a party of ideas. We have worked hard on some difficult policy areas, and made announcements that have not always been easy sells. We have done so because we believe in important reform for the long-term benefit of our country, and we're not afraid of doing the hard work to convince Australians such changes are necessary. We will maintain this approach if we were to win government, including in the Attorney-General's portfolio.

Since the last *Legal Tweaks*, we have had a new Attorney-General but sadly no improvement in the legal reform agenda. Christian Porter's proposed family court amalgamation – is a lesson in how not to do reform. If government embarks on major changes without talking to the people who are most affected by them, those changes are doomed to fail.

This year's *Legal Tweaks* has produced a wealth of ideas for legal reform, and I thank the contributors for the thought they have put in. It is a reminder of the hard yet rewarding work that lies ahead.



Mark Dreyfus QC MP
Federal Shadow Attorney-General
Member for Isaacs

Foreword

MARK DREYFUS QC MP



It is always a pleasure to provide a foreword for NSW Labor Lawyers' *Legal Tweaks*. With an approaching State Election in March 2019, it's an ideal time to discuss possible ideas and proposals for law reform by an incoming Labor Government.

Legal Tweaks has always attracted a wide and broad range of contributions that provide an array of ideas for debate. That debate will always lead to better policy development.

Progressive law reform and robust debate around it has always been at the centre of the labour movement and at the core of successful Labor Governments. NSW Labor Lawyers has been an important component in those debates in recent years.

The Editors of *Legal Tweaks* and those involved in the preparation of this year's edition should be thanked and commended. I'm sure this edition will be as useful for progressive reform as previous editions.

**Paul Lynch MP
NSW Shadow Attorney-General
Member for Liverpool**

Foreword

PAUL LYNCH MP



Editors' Note



There has never been a more important time for progressive law reform, with 2018 seeing unprecedented attacks on vulnerable members of society and continued threats to access to justice, both in Australia and around the world.

At the same time, progressive lawyers, policy makers and advocates can take heart at stories of communities coming together to fight for fairness and equality.

This year's edition of *Legal Tweaks* is no exception, culminating in over 40 law reform ideas in areas as diverse as defamation, family, labour, immigration, criminal and public law. At the core of each tweak is a central tenet of making the law more accessible, levelling the playing field between parties regardless of their socio-economic background and using the law to make society fairer.

The number and depth of this year's tweaks amply demonstrates the strength of our society and the expertise of our members and supporters. As editors, we have taken great joy in the process of reading and refining the submissions, and trust that you will also be impressed and encouraged by the breadth of ideas on offer.

On behalf of the NSW Society of Labor Lawyers, we sincerely thank all of this year's contributors to *Legal Tweaks*. This year's edition is our biggest since publication began, and will be sure to provide incoming Labor governments at the federal and state level with a strong progressive law reform agenda to pursue.

The 2018 Editors of *Legal Tweaks* are Janai Tabbernor, Elise Delpiano and Blake Osmond



Professor George Williams
DEAN & ANTHONY MASON PROFESSOR, UNSW LAW

If you could change one particular section or regulation, what would it be?

Amend s 93 of the *Commonwealth Electoral Act 1918* (Cth) to extend the vote to 16 and 17-year-olds on a voluntary basis.

Why does this section or regulation need to be changed?

It is notoriously difficult to get 18 year olds to enrol and vote, in part because this can be a time of great upheaval in their lives. Many are moving from school to university or into employment, often out of home, and are forming new relationships. On the other hand, 16 and 17-year-olds tend to be in a more stable family environment, and still at school. One key advantage of allowing them to vote is that joining the electoral roll and voting for the first time can be combined with civics education. It is a better age for gaining the knowledge and forming the habits needed to be an engaged Australian citizen.

Voting at 16 would be consistent with

other changes and opportunities at this age. People under 18 can leave school, get a job, drive a car and pay taxes. They can also enlist in the Australian defence forces, become a parent and, in exceptional circumstances, get permission to marry. They should also be entitled to vote.

It is notoriously difficult to get 18 year olds to enrol and vote, in part because this can be a time of great upheaval in their lives.





Stephen Lawrence
BARRISTER, BLACK CHAMBERS

If you could change one particular section or regulation, what would it be?

Amend the legal profession legislation to abolish the title of 'Senior Counsel' and replace it with a rigorous system of specialist accreditation.

Why does this section or regulation need to be changed?

Legal costs are largely unregulated and often prohibitive. One determinant of them is whether a barrister has the title of 'Senior Counsel'.

In privately funded matters the title operates informally, but powerfully, to allow certain barristers to charge much higher fees. In publicly funded matters the mere holding of the title often entitles one to a higher payment.

The title is a general one, regardless of speciality. Once bestowed the title is permanent, irrespective of performance.

Appointments for life are anathema to Labor values, as are distorting and anti-competitive market fetters, that serve the elite to the detriment of the ordinary person.

The reality is that abolishing "silk" will reduce legal costs, increase efficiency and encourage diversity in the profession and the judiciary.



The reality is that abolishing 'silk' will reduce legal costs, increase efficiency and encourage diversity in the profession and the judiciary. The Office of Fair Trading in the UK concluded as much in 2001. In its place there should be a rigorous system of specialist accreditation and recognition, that provides solicitors and consumers a real guarantee of quality and performance.



Lucy Mannering

LABOR CANDIDATE FOR OATLEY & SENIOR MANAGER, PRIVACY AND CYBER SECURITY

If you could change one particular section or regulation, what would it be?

Amend s 4 of the *Government Information (Public Access) Act 2009* (NSW) ('GIPA Act') to expressly capture any corporation where one or more ministers of the Crown are majority shareholders.

Why does this section or regulation need to be changed?

The GIPA Act currently applies to any public service agency, minister, public authority, public office, local authority, court, or person or entity allowed for pursuant to the regulations. It does not currently apply to corporations, which means that the state's access laws do not apply, for example, to the Sydney Motorway Corporation ('SMC'), a private company limited by shares and established under the *Corporations Act 2001* (Cth) on behalf of the state of NSW. Its three shareholders are cabinet ministers, and it is responsible for delivering one of the most expensive motorway projects in Australia's history, Westconnex.

This situation is a travesty for open government. Westconnex is estimated to cost at least \$16.8 billion, and the public has no legislated right to know anything which the SMC does not wish to tell them.

It should not be open to governments...to circumvent the state's GIPA laws...



It should not be open to governments, of any persuasion, to circumvent the state's GIPA laws simply because they may be inconvenient, a point made by the now Premier, Gladys Berejiklian in June 2009 when attacking the Labor Government on this issue. It is ironic that almost ten years later and sitting on the other side of the House, Ms Berejiklian has not been able to practice what she preached. A future Labor Government must close this loophole, and ensure that \$2 corporations cannot be used to bypass legitimate public scrutiny. This tweak will ensure that the applicability of the GIPA Act to corporations controlled by government ministers as shareholders is unambiguous.



Stephen Dametto

BARRISTER, BANCO CHAMBERS (PREVIOUSLY DETECTIVE SUPERINTENDENT, AFP)

If you could change one particular section or regulation, what would it be?

There should be a 'bounty system' or reward system in Australia to assist whistle-blowers coming forward. Under such a scheme, a whistle-blower may be entitled to a percentage of the proceeds of crime recovered as a result of the information they provided.

Why does this section or regulation need to be changed?

The government needs to look at introducing legislation to allow workers to be rewarded if their whistleblowing results in a successful prosecution. This legislation is needed because a whistle-blower is taking a risk by reporting potential illegal activities of their employer. This could lead to them suffering financial loss, reducing their promotional prospects or even losing their job.

The introduction of such 'bounties' would lead to an increase in reporting of illegal activity, bring about the provision of higher

quality information and would lead to a higher standard of corporate governance in Australia. This would greatly incentivise workers to come forward and balances the playing field against larger corporations. These changes have already proved themselves in the United States, where similar laws which give whistleblowers a cut of fines imposed on companies has led to an increase in disclosures and prosecutions.

These changes should be part of broader whistle-blower protections...



The Joint Parliamentary Committee on Corporations and Financial Services recommended a reward system was needed. The committee advised that the courts should determine the amount of any reward. These changes should be part of broader whistle-blower protections to rid Australia of fraud, corruption and other serious misconduct.



Josh Gibson

PHD CANDIDATE, AUSTRALIAN HUMAN RIGHTS INSTITUTE, UNSW LAW

If you could change one particular section or regulation, what would it be?

Implement protective costs orders ('PCOs') for public interest litigants. This could, for example, be introduced into Division 5 of the *Judiciary Act 1903* (Cth), as well as equivalent state and territory legislation that deals with costs.

Why does this section or regulation need to be changed?

Public interest cases are those that have broad social impact that extends beyond the private litigation matters. Such cases often include those dealing with human rights or constitutional issues, affecting many in the Australian community. While such cases are hugely important, many potential litigants may be discouraged from bringing such actions due to the risk of exorbitant costs that may follow.

The conventional costs paradigm in Australia is that of the indemnity rule, which means the litigation 'winner' receives costs from the

'loser'. Further, adverse costs orders operate to deter potential frivolous or vexatious litigants. For these reasons, NGOs and individuals may not bring important cases to court. As Patrick Keyzer has outlined, rules relating to costs do not deter governments, but they do deter poor litigants.

...we should be open to civic engagement that questions the nature and relations of public power.



In a democratic country like Australia we should be open to civic engagement that questions the nature and relations of public power. In order to keep our governments accountable, and to ensure that those who raise such issues are not discouraged from doing so, there is an imperative that PCOs or an instrument like a PCO are legislated to protect potential public law litigants from the inordinate costs that may follow when public law issues are raised.



Jane Spencer
LAW STUDENT, UNIVERSITY OF SYDNEY

If you could change one particular section or regulation, what would it be?

Amend the definition of ‘conduct’ in s 150.1(7) of the *Criminal Code Act 1995* (Cth) which provides for an exception to the offence of impersonating a Commonwealth body.

Why does this section or regulation need to be changed?

The aim of the offence is to criminalise scams where people impersonate Commonwealth bodies such as tax officials. However, as currently drafted, the section unduly risks limiting the ability of individuals to engage in political satire that targets Commonwealth bodies.

The offence provides for an exception for “conduct engaged in solely for genuine satirical, academic or artistic purposes.” The word ‘solely’ is too restrictive because satire is rarely, if ever, engaged in without some form of political purpose. The word ‘genuine’ creates uncertainty because there is little

legal precedent on the difference between genuine and non-genuine satire nor on what test should be applied to determine this.

Satire that criticises government is an important part of freedom of speech and expression in a democratic society.



The removal of these two words so that the section provides an exception for “conduct engaged in for satirical, academic or artistic purposes” is necessary so that it can operate effectively. This is especially important given that the offence allows for imprisonment of up to two years.

Satire that criticises government is an important part of freedom of speech and expression in a democratic society, and any unjustified restriction on this must be carefully considered in Australia because of the absence of a bill of rights.



Greg Jones
FORMER BARRISTER

If you could change one particular section or regulation, what would it be?

Amend the *Australian Constitution* establishing Australia as a republic, with a President elected by popular vote, and vested only with ceremonial powers and repealing all sections referring to the Queen and Governor-General.

Why does this section or regulation need to be changed?

Under our *Constitution* the Queen and Governor-General's powers, unless excised, will prevent our country from maturing into an independent nation whose head of state is an Australian. The Queen is officially recognised as Australia's head of state as s 61 vests executive power in her, albeit exercised by the Governor-General. Any notion that the Governor-General's exercise of such power is conventionally undertaken was dramatically dispelled by Kerr's sacking of the Whitlam Government pursuant to s 64. The Queen can interfere with our parliamentary process as under

s 59 she can disallow any law within one year from the Governor-General's assent. It is farcical that that before our parliamentarians can take their seat they must swear their allegiance to the Queen.

Under our *Constitution* the Queen and Governor-General's powers, unless excised, will prevent our country from maturing into an independent nation...



Echoing Malcolm Turnbull, as long as we have a British Queen as our head of state other nations will regard us as somewhat less than independent. A parliamentary republic whereby the president exercises merely ceremonial powers whilst the executive powers rests with our Prime Minister is the system that we should now adopt.



Mackenzie Waugh
LAW STUDENT, UNIVERSITY OF TECHNOLOGY

If you could change one particular section or regulation, what would it be?

Amend s 44(i) of the *Australian Constitution* to read simply that all prospective members of Federal Parliament must be Australian citizens.

Why does this section or regulation need to be changed?

In short, s 44(i) of the *Constitution* prevents members of Federal Parliament from being citizens of another country. In the current parliament, over a dozen politicians have fallen victim to the provision. A 1996 Parliamentary Inquiry found that the provision was “archaic”, citing the exclusion of dual citizens from the parliamentary process, the often cumbersome steps required for renunciation, and the number of Australians unaware of their dual citizenship status.

Waves of immigration over the last 70 years have diversified the range of nationalities represented in our Parliament; dual citizenship is no longer reserved for an insignificant number of Australians. Requiring our

politicians to solely be Australian citizens is out of step with the globalised world and the communities that they represent.

The concept of a shrinking world, free trade and movement between countries was not in the contemplation of the drafters of the Constitution.



The concept of a shrinking world, free trade and movement between countries was not in the contemplation of the drafters of the *Constitution*. Further, suspicions of treason that were a product of their time are no longer relevant given the proliferation and commonality of dual citizenship. This amendment would be appropriate recognition of the shift in the nature of Australian society and would pave the way for modern legislative protections against undue influence from other countries.



Jill Hunter
PROFESSOR, UNSW LAW

If you could change one particular section or regulation, what would it be?

Reform and re-invigorate the Coroner's Court of New South Wales ('Coroner's Court') beginning with s 3 of the *Coroners Act 2009* (NSW). Resourcing improvements would be also part of my reform package.

Why does this section or regulation need to be changed?

For decades, perhaps forever, coronial inquiries have been under-powered and under-resourced. Yet their judicial and legal infrastructure - a quirk of our historical inheritance - has the potential to reduce unexpected and inadequately-understood deaths and to educate politicians, the community and industry. This tweak would require a coroner to investigate whether a reported death was preventable and, if so, whether system failure contributed to that death.

For good measure, the Coroner's Court should also be a stand-alone jurisdiction

that is truly well-supported. Then, each black death in custody, death during a police car chase, preventable death in an aged care home, drug-related death at a music festival, construction industry or pharmaceutical-related death, and more, would be a tragedy that heralds enhanced understanding of how to avoid repetition.

For decades, perhaps forever, coronial inquiries have been under-powered and under-resourced.



With the right tweaking, better-resourced, much-empowered coroners would provide optimal advice to governments on improving conditions at work, at home, in gaols, regionally and in cities. Suicide might be better understood. Overall, these changes could significantly improve safety in our society.

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Professor Jenny Hocking

Emeritus Professor, Monash University

The dismissal of the Whitlam government and the secret 'Palace Letters'

Hocking v Director-General National Archives of Australia

Sealed and secured, away from the prying eyes of the Australian public, is a cache of secret letters between the Queen and the Governor-General, Sir John Kerr, regarding one of the most controversial and significant episodes in our political history - Kerr's dismissal of Gough Whitlam's Labor government on 11 November 1975. Although these 'Palace letters' are held by the National Archives in Canberra, they are not open for public access or even for historical inquiry, despite their undoubted significance to our history.

The 'Palace letters' are part of Sir John Kerr's extensive papers held by the Archives, most of which were opened for public access by 2008 under the statutorily required '30 year rule'. The Palace letters however remain closed until at least 2027 and, even after that date, can only be opened with the approval of the Queen's private secretary. It is possible that they will never be opened. These access conditions were put in place, according to Government House, 'at her Majesty the Queen's instructions'.

The reason for this enduring denial of access to the letters is simple, a single word - 'per-

sonal'. Correspondence of this kind between the Queen and the Governor-General, her representative in Australia, is designated 'personal' records rather than Commonwealth records and carries its own specified access provisions. This designation is critical as it places the Palace letters outside the reach of the *Archives Act 1983* (Cth) ('Archives Act'), which relates to 'Commonwealth records', and as a result it also leaves no easy way to pursue access to them. The usual avenue for appeal against a refusal of access, the Administrative Appeals Tribunal, is not available for a refusal of access to personal records. With this impenetrable 'Catch 22', the only way to challenge the Archives' refusal of access to the letters is the more demanding one of a Federal Court action against the National Archives.

Although Archives had denied access to the Palace letters on the grounds that they were personal, it was clear during proceedings that this view of the letters as personal was one that held regardless of the content of the letters. Archives considers all letters of this kind between Governors-General and the Queen as 'personal' rather than Commonwealth records and this was the basis

on which they were deposited by Mr David Smith in 1978, in a sealed bundle carrying their own specified terms of access.

The essential categorisation of the Queen's correspondence with the Governor-General as 'personal' followed simply because it had always been so and not because the content of the letters supported such a description according to any specified criteria. This highlights the need for an amendment to the Archives Act to enable an appeal to the Administrative Appeals Tribunal against a refusal of access to any record held by Archives, including 'personal' records.

Two concerns drove my determination to pursue this case - the principle of open access to our national archives, and the critical role played by archival material in uncovering the real story of the dismissal of the Whitlam Government which I detail in *Gough Whitlam: His Time*. The Federal Court action was only made possible thanks to the commitment of the legal team, all working on a pro bono basis: barrister Tom Brennan, senior barrister Antony Whitlam QC at trial and Bret Walker SC at the appeal, with Corrs Chambers Westgarth instructing. The case has also been supported through a major crowd-funding campaign on Chuffed, 'Release the Palace letters' and has attracted significant public interest from those who believe that Australians should have access to critical documents in our history and should not be beholden to the Queen for that access.

In November 2016 the Palace letters case, *Hocking v Director-General National Archives of Australia* commenced in the Federal Court before Justice Griffiths. At the heart of the case is the central question of whether the Palace letters are Commonwealth records as defined in s 3 of the Archives Act or, as Archives contend, 'personal and private' - a description which politically and anecdotally doesn't pass 'the pub test'. How is it possible that these formal written communications,

'despatches' as Kerr himself described them, between two positions at the apex of our system of Constitutional monarchy, the Queen and her vice-regal representative, can ever be considered 'personal'? As Antony Whitlam QC argued to the Court, 'It cannot seriously be suggested that there was a personal relationship between the Queen and Sir John Kerr'. Whitlam contended that 'personal' records would be 'unrelated to the performance of Sir John's official duties', and would not extend to Kerr's correspondence with the Palace relating to his dismissal of the Whitlam Government.

Whitlam contended that 'personal' records would be 'unrelated to the performance of Sir John's official duties'...



The Archives' position is that letters of this kind between the Monarch and the Governor-General have always been considered personal, and that this remains the case notwithstanding the passage of Archives Act, nor indeed the 1931 Statute of Westminster, or the 1986 Australia Acts. Tom Howe QC, for Archives argued that, 'in sending to the Queen, and receiving from the Queen, the personal and private communications in question ... Sir John was acting personally and privately'. The Governor-General's correspondence with the Queen, Archives proposed, was the 'personal property' of Sir John Kerr.

Several intriguing snippets about the letters and the vice-regal relationship emerged during the trial, adding to our knowledge of the letters themselves and of the events surrounding the dismissal. Kerr wrote frequently

to the Palace, at times writing four times a day, and there are approximately 50 letters in total regarding Whitlam's dismissal. It was revealed at trial that Kerr's letters included attachments such as newspaper articles about the political situation then unfolding in Australia, political and legal commentaries, and other people's correspondence with Kerr. This is important since, given the intense polarisation surrounding the events leading up to Whitlam's dismissal and that Kerr kept so much of his own actions secret, the question of just what version of those dramatic events were passed on to the Queen assumes unusual significance.

I remain confident that the Palace letters will be released and that all Australians will have access to this important part of our national historical estate...



It was also revealed during proceedings that the Governor-General's official secretary, David Smith, had assisted Kerr in writing these dispatches and reports to the Queen, suggesting that the drafting of the Palace letters reflected the respective formal roles of the Governor-General and his official secretary which also pointed to their status as 'official records'.

The case has generated great interest at Buckingham Palace. The Queen's private secretary has been in contact with Government House throughout proceedings and has even made public some of these 'personal' letters – bizarrely in order to support the Archives' case that the Palace

letters should not be made public. In this strange twist of events, while Archives have insisted at all times that Kerr's access terms are irrevocable and cannot be changed and that the letters cannot be released, the Queen and Buckingham Palace did just that. In March 2018, the Queen's private secretary wrote to Government House agreeing to release two of the Palace letters which in their view would be 'relevant and useful' to the court proceedings. Those two letters, being part of the 'Palace letters' to which I have been denied access, were then released and adduced into evidence.

On 16 March 2018 Justice Griffiths ruled in favour of the National Archives ([2018] FCA 340), finding that the 'Palace letters' are 'personal' and not Commonwealth records. The Queen's embargo therefore remains. While Griffiths J acknowledged the 'clear public interest in the content of the records', he found that 'the legal issues ... do not turn on whether there is a public interest in the records being published'. Our efforts to secure the release of the Palace letters continues and an appeal against this decision, led by Bret Walker SC, will be heard by the full bench of the Federal Court on 28 November 2018.

I remain confident that the Palace letters will be released and that all Australians will have access to this important part of our national historical estate under Australian law, and not as a gift of the Queen.

Jenny Hocking is emeritus professor at Monash University, Distinguished Whitlam Fellow at the Whitlam Institute at Western Sydney University and author of the award-winning 2-volume biography of Gough Whitlam - *Gough Whitlam: A Moment in History and Gough Whitlam: His Time*. Her latest book is *The Dismissal Dossier: Everything You Were Never Meant to Know about November 1975 – The Palace Connection*.



Dr Julia Quilter

ASSOCIATE PROFESSOR, UNIVERSITY OF WOLLONGONG LAW SCHOOL

If you could change one particular section or regulation, what would it be?

Repeal two related provisions of the *Crimes Act 1900* (NSW): s 25A ‘Assault causing death’ and s 25B ‘Assault Causing death when intoxicated—mandatory minimum sentence’.

Why does this section or regulation need to be changed?

This offence was hastily introduced in 2014 off the back of a series of alcohol-fuelled one-punch attacks in inner city Sydney. Constituting the first major change to homicide offences since the 1950s, it was enacted without any public consultation or expert input. In the haste of enactment, the offence has been poorly drafted and is unnecessary given unlawful and dangerous act manslaughter already covers the field.

While the law was justified as addressing and preventing alcohol-fuelled, public one-punch violence, it is missing its mark operating to ‘net widen’ by drawing other

homicides within its frame including those committed in the home, by juveniles and at workplaces. The law has unsettled the hierarchy of homicide crimes, and is having unintended and uneven effects on pleas, alternative charges and alternative verdicts. Finally, the law has the capacity for great injustice: the basic offence with its lower maximum penalty to manslaughter may under-criminalise while the aggravated offences may over-criminalise by proscribing a mandatory minimum sentence of eight years without taking into account the subjective or objective features of the offence.

The law has unsettled the hierarchy of homicide crimes, is having unintended and uneven effects on pleas, alternative charges and alternative verdicts.





Tahnee De Souza

GRADUATE LAWYER, CORRS CHAMBERS WESTGARTH

If you could change one particular section or regulation, what would it be?

I would amend section 61HA of the *Crimes Act 1900* (NSW) so that the definition of consent in sexual assault offences requires the presence of a 'yes' rather than the absence of a 'no'.

Why does this section or regulation need to be changed?

Under s 61HA, a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse. This is problematic as section 61HA can be misconstrued to mean that a lack of active resistance constitutes "reasonable grounds" to assume that consent has been given. This is unduly complex and makes it extremely difficult to prove the absence of consent. More importantly, the definition fails to protect victims who suffer from a freeze response (which is common in the face of fear) and do not do or say anything to indicate consent. Further, crimes of a sexual nature are inherently challenging to prove

beyond reasonable doubt, particularly as eyewitnesses are unlikely to be present.

...the definition fails to protect victims who suffer from a freeze response (which is common in the face of fear).



Following the international success of #MeToo movement, attitudes towards sexual assault and consent have begun to rapidly change and law reform needs to adopt the same momentum. A stronger message needs to be sent that consent is not given by a person if they merely submit to a sexual act. Whilst many may argue this approach may be overreaching, it is the overreach which makes the approach valuable. Rather than perpetuating ambiguity, an amendment to this section which requires active consent will instil a clear boundary for the community about whether a sexual encounter is consensual or not.



Farah Daher

GRADUATE LAWYER

If you could change one particular section or regulation, what would it be?

Amend s 37 of the *Crimes Act 1900* (NSW) to simplify the elements of the offence of choking, suffocation and strangulation particularly when committed in the context of domestic violence.

Why does this section or regulation need to be changed?

Section 37 was reformed in 2014 after 70 per cent of assaults involving strangulation were being prosecuted as common assault or assault occasioning actual bodily harm under lesser charges, with a maximum sentence of two years. However, the legislation has been under utilised and the offence did not adequately address this issue with its elements being difficult to prove.

The current s 37 requires the strangulation to have been committed during the course of an indictable offence, or for victims to have been rendered unconscious, insensible or incapable of resistance. This excludes

a range of other serious injuries that victims could suffer, which in some cases are not noticeable immediately after the attack.

...simplifying the elements of the offence would increase perpetrator accountability...



As a lethal form of domestic violence, and an act that commonly precedes intimate partner murders, simplifying the elements of the offence would increase perpetrator accountability and reduce rates of domestic violence reoffending. Studies show that in NSW alone, one quarter of all domestic homicide victims were subject to strangulation prior to their deaths.

An amendment to simplify the current s 37 by addressing the subjective element of intent and the objective features of the offence in cases of domestic violence would make the operation of this legislation more effective.



Nicholas Cowdery AM QC
ADJUNCT PROFESSOR OF LAW & FORMER DIRECTOR OF PUBLIC PROSECUTIONS

If you could change one particular section or regulation, what would it be?

Repeal subsections (2), (3), (4) and (5) of section 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and insert instead:

“(2) A court must not sentence an offender to imprisonment for six months or less and must consider instead making an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation, or a conditional release order, a community correction order or an intensive correction order.”

Why does this section or regulation need to be changed?

Requiring sentences of six months or less to be served is counterproductive for the offender and society. Once classification has occurred in prison, there is not sufficient time available for the prisoner to be joined in therapeutic, educational or industrial programs that are available in prison,

so the prisoner is simply warehoused and discharged with no benefits achieved – and at the community’s expense.

Aboriginal offenders, especially, are disadvantaged by the existing provisions.



The sentencing reforms introduced on 24 September 2018 now enable courts to deal with prisoners at this level of offending without requiring their useless incarceration. Aboriginal offenders, especially, are disadvantaged by the existing provisions.



Joe Blackshield

SOLICITOR, LEVITT ROBINSON LAWYERS

If you could change one particular section or regulation, what would it be?

Amend the *Criminal Procedure Act 1986* (NSW), adopting an equivalent of s 60 of the *Criminal Procedure Act 2009* (Vic), allowing judicial officers to indicate a likely sentence at first mention.

Why does this section or regulation need to be changed?

Section 60 of the *Criminal Procedure Act 2009* (Vic) reads:

“At any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily, the Magistrates’ Court may indicate that, if the accused pleads guilty to the charge for the offence at that time, the court would be likely to impose on the accused—

(a) a sentence of imprisonment that commences immediately; or

(b) a sentence of a specified type.”

Such a change would, as shown in Victoria, create significant efficiency savings.



As a solicitor who has practiced in criminal law on the border of NSW and Victoria, this is one element of Victorian criminal law which I believe we would benefit from adopting. Many matters which may proceed to a lengthy and highly expensive trial due to a fear that the result of a guilty plea or verdict would be imprisonment could be effectively prevented by a declaration from the judicial officer that imprisonment is unlikely to be the penalty they choose to impose. Such a change would, as shown in Victoria, create significant efficiency savings.



Kieran Fitzgerald

SOLICITOR, OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS NSW

If you could change one particular section or regulation, what would it be?

Amend the *Bail Act 2013* (NSW) to prohibit the use of electronic monitoring devices in either determining whether to grant bail, or as a condition of bail.

Why does this section or regulation need to be changed?

Electronic monitoring devices are increasingly being used as a condition of bail in NSW. The use of these devices is flawed for a number of reasons:

- They are reliant on a number of technical features to ensure effective operation, and often fail to work as desired. For example, signals can be cut off when using a train;
- They potentially require police to be on call 24 hours a day to monitor an individual's movements, which is not practical;
- They effectively contract out law enforcement to private third party providers, who do not have the same government

oversight as public agencies; and

- The reliability of reports provided by these private third parties cannot be guaranteed, and the delay in notifications can be substantial.

...prohibit the use of electronic monitoring devices in either determining whether to grant bail, or as a condition of bail.



These devices are expensive to install and maintain, costing upwards of \$25,000. This creates a two-tiered bail system, where those who can afford these devices may be granted bail while those who are without the means are denied bail in otherwise similar circumstances.



Blake Osmond

GRADUATE LAWYER, CORRS CHAMBERS WESTGARTH

If you could change one particular section or regulation, what would it be?

Ensure the regulations supporting s 316A(6) of the *Crimes Act 1900* (NSW) do not list 'religious ministry' as a vocation that requires approval before prosecutions for concealing child sexual abuse can be commenced.

Why does this section or regulation need to be changed?

As part of the Royal Commission into Institution Responses to Child Sexual Abuse, recommendations were made by the Commission that each state and territory government introduce a criminal offence of failing to report child sexual abuse. The Commission explicitly recommended members of the religious ministry should not be exempt from this offence, meaning any information relating to child sexual abuse obtained during the religious confessional would be required to be reported.

The recommendation followed evidence

that suggested some priests were repeatedly told of child abuse during the confessional but failed to report that behaviour to police. Despite this, the NSW Government did not accept this recommendation, and this failure assists offenders continue their abuse of vulnerable children. While the NSW Government introduced a new offence of "concealing child abuse", the legislation gives the accompanying regulations the power to prescribe a list of professions which would require the Director of the DPP to approve any prosecutions for concealing child abuse. Both the Premier and Attorney-General have publicly stated that the seal of confession should be considered by COAG, despite it being primarily a state issue.

Ensuring that the regulations do not include members of the religious ministry as a listed profession will ensure that priests who conceal information disclosed during the confessional and do not report it to the authorities will more easily be prosecuted under the new offence, as originally recommended by the Royal Commission. This will send an unequivocal message that the safety of children is more important than the seal of the confessional.



Aloysius Robinson
SOLICITOR, BLAIR CRIMINAL LAWYERS

If you could change one particular section or regulation, what would it be?

Amend s 229 of the *Criminal Procedure Act 1986* (NSW) to include a power for a magistrate to order costs on an adjournment of a return of subpoena against the person who has not complied with the subpoena.

Why does this section or regulation need to be changed?

For Local Court defence practitioners the most common person named in a subpoena is the Commissioner of Police of the New South Wales Police Force. Police non-compliance with subpoenas is commonplace and causes huge delays, wastes court time when hearings need to be vacated to allow for further time for compliance and erodes access to fair proceedings. Currently the only action that may be taken if a person does not comply with a subpoena is the issuing of a warrant for the arrest of the person named in the subpoena. Seeking an arrest warrant for the Commissioner is nearly always an inappropriate and ineffec-

tive remedy. Because ordering the arrest of the Commissioner is such a practical and political 'nuclear option' for a magistrate, in practice it is simply never used. This leaves no useful or appropriate remedy to encourage the timely compliance with subpoenas.

Police non-compliance with subpoenas is commonplace and causes huge delays, wastes court time when hearings need to be vacated to allow for further time for compliance and erodes access to fair proceedings.





Niamh Joyce

GRADUATE LAWYER & AQSN REPRESENTATIVE

Luke Niforos

LAW AND PSYCHOLOGY STUDENT

If you could change one particular section or regulation, what would it be?

Eliminate discrimination and ambiguity in sexual assault matters by deleting the words 'female' and 'vagina' from the *Crimes Act 1900* (NSW), section 61H(1)(a), to give dignity to transgender and other gender diverse people.

Why does this section or regulation need to be changed?

'Sexual intercourse' is currently defined in part as "penetration... of the genitalia (including a surgically constructed vagina) of a female person". This does not include someone who is not, or does not identify as female, nor a woman, and has their genitalia penetrated non-consensually.

Transgender and gender-diverse people experience high rates of sexual assault, and should be respected and protected by the law. Those whose identity may not be covered by the current legislation include:

- transgender men;

- non-binary people;
- people with some intersex variations; and
- those with a vagina, labia majora or 'female genitalia' but who do not identify as 'female'.

For example, it does not provide for the penetration of the vagina of a transgender man. The current legislation does not protect transgender men and gender diverse people, and requires that they be defined as a 'female person' as a complainant and in court. This would be discouraging and humiliating. This tweak recognises diversity and encourages complainants.

The current legislation does not protect transgender men and gender diverse people.



The law should be tweaked to "the genitalia (including surgically altered genitalia) or the anus, of any person".



Rawan Arraf
HUMAN RIGHTS LAWYER

If you could change one particular section or regulation, what would it be?

Amend ss 268.121 and 268.122 of Schedule 1 of the Commonwealth Criminal Code, attached to the *Criminal Code Act 1995* (Cth).

Why does this section or regulation need to be changed?

Australia has given effect to the concept of universal jurisdiction having codified offences of grave international concern. We have an obligation to investigate and prosecute war crimes, crimes against humanity and genocide.

These provisions contain the procedural requirements relating to the consent of the Attorney-General to commence prosecutions against those with alleged involvement. The provisions also provide that the Attorney-General's decision is final and is not subject to judicial review. The Attorney-General's ultimate consent also means that they have the power to prevent a

private prosecution from progressing. The Attorney-General's approval and consent continues to present a difficult barrier in the prosecution of international crimes. The Labor Party's 2007 National Platform recognised there were gaps and was committed to 'closing the loopholes.'

Politicising the prosecution of international crimes undermines the mechanisms available to seek justice and accountability...



Section 268.121 should be amended to limit the Attorney-General's broad discretion. Politicising the prosecution of international crimes undermines the mechanisms available to seek justice and accountability and end impunity. At the very least, the right to seek judicial review needs to be upheld, therefore s 268.122 needs to be repealed in its entirety.



Kirk McKenzie

SOLICITOR, HAYLEN MCKENZIE SOLICITORS

If you could change one particular section or regulation, what would it be?

Amend s 18(3) of the *Director of Public Prosecutions Act 1983* (Cth) ('DPP Act') to increase the term of appointment of the federal DPP.

Why does this section or regulation need to be changed?

The federal Director of Public Prosecutions is appointed for a period "not exceeding seven years" and is "eligible for re-appointment" (s 18(3) of the DPP Act).

It seems that the short term of appointment of the federal DPP means that the person occupying the position is not sufficiently independent of the executive government and may be susceptible to pressure. This arises from possible damage to the prospects for reappointment or appointment to (say) a judicial position.

Section 18(3) could be amended to provide for the appointment of the DPP until the age of 70 years on the same terms as to tenure,

removal and remuneration as set out in s 72 of the *Constitution* for federal Judges.

...the short term appointment of the federal DPP means that the person occupying the position is not sufficiently independent...

My attention was drawn to this section after reading about the questionable decision of the current federal DPP in preferring to charge Witness K and Bernard Collaery rather than the perpetrators of the illegal bugging of the East Timor cabinet. Nicholas Cowdery QC has expressed the view that where different persons may be guilty of offences arising from the same sub-stratum of facts, the DPP should select the more serious offenders to charge, if that choice has to be made.



Rose Khalilizadeh
BARRISTER, FORBES CHAMBERS

If you could change one particular section or regulation, what would it be?

Amend s 87 of the *Crimes Act 1900* (NSW) to allow for a defence of necessity where there are reasonable grounds to believe the child was at risk of harm.

Why does this section or regulation need to be changed?

Child abduction is undoubtedly a serious crime. However, the offence is also used to charge parents of children who remove a child from out-of-home-care ('OOHC') where the child is in the care of the Minister, even if the parent observes or fears abuse or harm to the child and removes the child momentarily. Currently, such an act would not necessarily give rise to the common law defence of necessity.

Given the under-resourcing of services working in the area (such as Family and Community Services), a notification of a concern of abuse or harm does not result in swift action, or results in police intervention

that can further the traumatic effect upon the child. The offence disproportionately affects Aboriginal parents and children, as there is a growing representation of Aboriginal children in OOHC (as at 2017, Aboriginal and Torres Strait Islander children are 9.8 times more likely to be placed into OOHC).

This amendment would reflect the complexity of families and care arrangements... and the fact that the system is far from perfect.



This amendment would reflect the complexity of families and care arrangements, the importance of family and kinship, the reality of abuse and harm that occurs in OOHC, and the fact that the system is far from perfect.



Joellen Riley
DEAN, SYDNEY LAW SCHOOL

If you could change one particular section or regulation, what would it be?

Amend s 12 of the *Independent Contracts Act 2006* (Cth) ('IC Act') to ensure that the arrangements under which ride-share drivers are engaged can be reviewed to ensure fair terms.

Why does this section or regulation need to be changed?

Presently, it is not clear that the contracts between ride-share drivers and platforms (such as Uber) are a 'contract of service' as defined by s 5 of the IC Act because the contracts used by these platforms are drafted as contracts for the provision of telecommunications services to the drivers. They are nevertheless clearly arrangements under which workers provide personal services for an organisation which profits from their labour. These drivers often make significant investments in their jobs (by taking out finance leases on vehicles), and can be seriously disadvantaged if they lose access to the platform.

...it is not clear that the contracts between ride-share drivers and platforms (such as Uber) are a 'contract of service'...



The typical contract permits precipitate termination, without any right to fair process (see *Oze-Igjehon v Rasier Operations BV* [2016] WADC 174 (9 December 2016)). Drivers need an effective avenue for review of unfair terms in their contracts. Ideally, significant amendments to the IC Act should be enacted to ensure that all gig economy workers who are not employees have an inexpensive and accessible means for redress if they are treated unfairly in their working arrangements.



Adam Guy

BARRISTER, HB HIGGINS CHAMBERS

If you could change one particular section or regulation, what would it be?

Amend s 67(1) of the *Fair Work Act 2009* (Cth) ('FW Act') which requires 12 months of service with an employer before an employee can access unpaid parental leave.

Why does this section or regulation need to be changed?

Section 67(1) of the FW Act restricts an employee's right to access unpaid parental leave until they have completed at least 12 months continuous service with their employer immediately before the birth or placement of their child.

If an employee has not completed at least 12 months continuous service with their employer prior to the birth or placement of their child they are not eligible for benefits under Division 5 – Parental Leave and related entitlements of the National Employment Standards ('NES'), in particular, s 84 – Return to work guarantee.

Such an approach is manifestly unfair on parents, in particular women who find themselves unexpectedly pregnant. The section also creates additional difficulties for women who may have been made redundant or terminated while pregnant in obtaining secure, long term employment prior to the birth or adoption of their child.

Such an approach is manifestly unfair on parents, in particular women who find themselves unexpectedly pregnant.



The requirement that a parent have 12 months of continuous service prior to the birth or adoption of their child should be abolished to allow all parents to have access to basic unpaid parental leave rights under the NES.



Nikhil Mishra

WORKPLACE RELATIONS ADVISER

If you could change one particular section or regulation, what would it be?

Delete s 9(d) of the 'objectionable term' definition in, and delete s 353 of, the *Fair Work Act 2009* (Cth) ('FW Act').

Why does this section or regulation need to be changed?

The existence of these two sections results in bargaining service fees being precluded from being collected or being included as a term of an industrial instrument.

Record low union membership levels are having a significant impact on wage growth and collective bargaining in Australia. A key objective of the FW Act is to encourage collective bargaining at the enterprise level. Such an objective is growing more and more distant as union membership, and with it collective power, shrinks.

Where collective bargaining has resulted in the bargaining of an enterprise agree-

ment, the free rider effect has seeped into that enterprise. Some workers benefit from collective bargaining yet do not contribute to that collective power. This results in diminished bargaining power in the long run.

Introducing bargaining service fees into industrial instruments, particularly enterprise agreements, will result in increased bargaining power for workers.



Introducing bargaining service fees into industrial instruments, particularly enterprise agreements, will result in increased bargaining power for workers. Eliminating the free rider effect will shift the worker from a libertarian to a collective mindset.



Lewis Hamilton

LAWYER, MAURICE BLACKBURN

If you could change one particular section or regulation, what would it be?

Amend s 570 of the *Fair Work Act 2009* (Cth) ('FW Act') to exclude representative proceedings brought under Part IVA of the *Federal Court of Australia Act 1979* (Cth) from the operation of the provision.

Why does this section or regulation need to be changed?

Section 570 of the FW Act operates to restrict the Federal Court of Australia from ordering costs against a party to a proceeding brought under the FW Act, unless there are special circumstances for making such an order, including that the proceeding was brought vexatiously. The rationale for the provision is to, quite rightly, prevent employees from being subject to an adverse costs order for attempting to assert their workplace rights.

In a representative proceeding the cost dynamics are different. The applicant is often indemnified from adverse costs. Rather than providing an incentive for an applicant to

assert their rights, the reverse is true. The provision acts as a deterrent to bringing a class action proceeding under the FW Act because not only do such proceedings take significantly longer, on average, than individual claims, at the end of the proceeding there is also no prospect for the lead applicant obtaining a costs order in their favour.

The provision acts as a deterrent to bringing a class action proceeding under the FW Act.



Excluding class actions from the provision would also prevent uncertainty arising from its application – see for example *Bywater v Appco Group Australia Pty Ltd* [2018] FCA 707 at [147] where His Honour Justice Wigney did not order costs to the successful party in the application but instead reserved judgment on the question pending further submissions.



Elise Delpiano

LAW STUDENT, UNIVERSITY OF NEW SOUTH WALES

If you could change one particular section or regulation, what would it be?

Insert a new provision into the *Fair Work Act 2009* (Cth) prohibiting pay secrecy clauses in employment contracts.

Why does this section or regulation need to be changed?

Despite some progress over the past few decades, the gender pay gap continues to be a pervasive issue in Australia. Australian women working full-time are paid approximately 15% less than men on average. This equates to about \$27,000 less per year.

Last year, the World Economic Forum reported that Australia is going backwards in its efforts to close the gender pay gap. Current estimates predict Australia is still 49 years away from closing the gender pay gap.

Urgent action needs to be taken to ensure Australia has the right policies in place to close the gender pay gap.

Women in the same roles as men are often paid less, however many women are never aware of this discrepancy due to the existence of pay secrecy clauses which prohibit the discussion of salary levels.

This tweak will ensure...companies can no longer rely on secrecy clauses to hide gender discrimination in the workplace.

Pay secrecy clauses are common in employment contracts, particularly in higher management positions. Unfortunately, these managerial positions are often where the gender pay gap is most pronounced.

This tweak will ensure transparency lies at the heart of pay negotiations, and guarantee companies can no longer rely on secrecy clauses to hide gender discrimination in the workplace. Both outcomes are critical steps in closing the gender pay gap.



Andreea Kardamis

LAW STUDENT, UNIVERSITY OF NEWCASTLE

If you could change one particular section or regulation, what would it be?

Amend the Model Term determined by the Fair Work Commission Decision [2018] FWCFB 3936, being the *4 yearly review of modern awards – Family and Domestic Violence Leave* from “unpaid family and domestic violence leave” to “paid family and domestic violence leave”.

Why does this section or regulation need to be changed?

The majority in the March Decision found that domestic and intimate partner homicides represent the highest proportion of any category of homicides in Australia, with at least one woman a week killed by a partner or a former partner. Family and domestic violence is also the leading contributor to death, disability and ill-health among Australian women aged between 15 and 44. One in four Australian women in Australia have experienced family and domestic violence which negatively impacts children and family and has broader

employment and financial consequences for women who are experiencing such violence. A PwC report found that all violence against women, including physical violence, sexual violence, emotional abuse (by a partner) or stalking by any person perpetrated against women (excluding male victims) in the years 2014/15 cost the economy \$21.6 billion.

Despite this and the acknowledgement that employment is an important pathway out of violent relationships, the model term to include ‘unpaid’ was still chosen. The government should be following our New Zealand neighbours who have legislated to grant victims of domestic and family violence ten days paid leave, which will come into force on 1 April 2019. Implementing a similar change in Australia is an essential and practical step to financially assist those escaping family and domestically violent situations.



Janai Tabbemor

LEGAL ASSOCIATE, FAMILY COURT OF AUSTRALIA

If you could change one particular section or regulation, what would it be?

Introduce new laws to harmonise existing state and territory surrogacy legislation, either through model legislation to be passed by each state and territory or the referral of surrogacy law to the Commonwealth to be administered through amendments to the *Family Law Act 1975* (Cth) ('FL Act').

Why does this section or regulation need to be changed?

Currently the legality or otherwise of surrogacy is determined by state-based legislation with different regimes for the recognition and transferral of parentage. The situation is particularly dire in the Northern Territory, where the lack of laws means that surrogacy is neither legal nor illegal.

Section 60HB of the FL Act recognises parentage of intended parents where an order to that effect has been made under a prescribed law of a state or territory. For

children whose parentage has not been recognised in this way however, current Australian law only recognises the parentage of the birth mother, regardless of whether or not she is the biological mother of the child. While s 69VA of the FL Act gives the court power to make an order declaring parentage of a child, the outcome of pursuing this path is far from certain.

It is clear that the legislative framework surrounding surrogacy is unnecessarily complex and has failed to keep pace with changing social notions of family. Harmonised surrogacy laws should be introduced to minimise the difficulties associated with recognition of the intended parents, while also protecting surrogates, donors and the children of surrogacy. National surrogacy laws would also allow law makers to better deal with broader legal policy and legal questions concerning both altruistic and commercial surrogacy in Australia or internationally (which, although illegal in Australia, is still accessed by intended parents) and streamline the conferral of Australian citizenship on children of intended parents who are Australian citizens.



Neil Jackson

BARRISTER, FREDERICK JORDAN CHAMBERS

If you could change one particular section or regulation, what would it be?

Transfer the state jurisdiction related to the care and welfare of children in respect to the state Children's Court to the Federal Family Law Courts ('FFLCs'), (being the Family Court of Australia and the Federal Circuit Court of Australia).

Why does this section or regulation need to be changed?

Section 91B of the *Family Law Act 1975* (Cth) states that the FFLCs may request the intervention in the proceedings of an officer of a state being the officer who is responsible for the administration of the laws of the state in which the proceedings are being heard that relate to child welfare. Further, where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

The necessary appearance of the state Department of Family and Community

Services in the FFLCs have involved potential confusion associated with two different but not dissimilar statutory laws (Commonwealth and state) and legal principles. There are also clearly different cultures that lawyers who regularly participate in the FFLC, compared with the lawyers who regularly appear in the state Children's Court.

Ultimately, there is a uniform object that both jurisdictions strive to achieve: the best interests of children.



Ultimately there is a uniform object that both jurisdictions strive to achieve: the best interests of children. Hence the need for a singular forum to determine issues in dispute.



Dr Senthoran Raj
LECTURER IN LAW, KEELE UNIVERSITY

If you could change one particular section or regulation, what would it be?

Amend the *Migration Act 1958* (Cth) to include explicit references to the UN Refugee Convention.

Why does this section or regulation need to be changed?

In 2014 the Australian Parliament amended the *Migration Act 1958* (Cth) to remove references to the 1951 United Nations Convention relating to the Status of Refugees and associated 1967 Protocol. This effectively severed international refugee law from domestic application, allowing Australia to legislate a skewed understanding of its international obligations.

Successive governments have passed legislation to make the asylum process enormously cumbersome, if not impossible, for people who seek protection from persecution. Laws that mandate the detention of people who arrive by boat without prior authorisation, forced returns of people to

places where they face risk to their lives or liberties, indefinite offshore detention, narrow definitions of a well-founded fear of persecution, ongoing refusals to offer durable protection to those who need it, and prohibitions on family reunion are just a few examples of Australia's failure to uphold its international obligations to people who seek asylum. It is vital that Australia re-introduce references to the UN Refugee Convention and also give binding effect to them. There is nothing radical or naïve about complying with international law.

This effectively severed international refugee law from domestic application, allowing Australia to legislate a skewed understanding of its international obligations.





Ned Hirst

TIPSTAFF, LAND AND ENVIRONMENT COURT

If you could change one particular section or regulation, what would it be?

Amend s 197C of the *Migration Act 1958* (Cth) which allows the Minister to exercise the power under s 198 to order the removal of “an unlawful non-citizen” irrespective of “whether Australia has *non refoulement* obligations in respect of an unlawful non-citizen”.

Why does this section or regulation need to be changed?

Since the Refugee Convention was signed in 1951, the principle of *non-refoulement* has been at the core of the international refugee regime. It is a great humanitarian achievement of international law and one of the high-points of the post-WWII international consensus to protect fundamental human rights.

The obligation not to “expel or return” any person to a territory where his or her “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” is now such a well-established principle

that it is generally considered to be a part of customary international law meaning it will bind even countries that are not signatories to a treaty which incorporates it.

Section 197C must be changed, most importantly, on humanitarian grounds to prevent Australia being complicit in delivering refugees to death or torture...



Section 197C must be changed, most importantly, on humanitarian grounds to prevent Australia being complicit in delivering refugees to death or torture, but also because it evinces a positive intent on the part of the Australian legislature to ignore and circumvent its international commitments. It is unconscionable and inimical to international cooperation.



Douglas McDonald-Norman
BARRISTER, 9 SELBORNE CHAMBERS

If you could change one particular section or regulation, what would it be?

Amend s 500(1) of the *Migration Act 1958* (Cth) so that personal determinations by the Minister for Home Affairs that a visa should be cancelled on character grounds are reviewable by the Administrative Appeals Tribunal ('AAT').

Why does this section or regulation need to be changed?

Currently, the AAT can only review a determination that a person's visa should be cancelled because they do not pass the character test when that decision is made by a Delegate of the Minister. When the Minister personally exercises this same power under s 501 of the *Migration Act 1958* (Cth), that determination is not subject to merits review.

There may be a role for ministerial discretion at some stages in the visa application process (like the Minister's power to substitute a more favourable decision for

that of the AAT). But exercises of power in individual cases should not ordinarily be shielded from review. Merits review is a source of transparency and accountability, allowing applicants to plead their case in an open, quasi-judicial setting. It promotes better decision-making, both because of the AAT's procedural safeguards and as a spur to the Minister to make decisions that will withstand scrutiny on the merits. And it removes the temptation for Ministers to exercise these powers personally (instead of their delegates) in order to shield decisions from review.

...exercises of power in individual cases should not ordinarily be shielded from review.





Jeremy Styles

MANAGING ADVOCATE, ABORIGINAL LEGAL SERVICE

If you could change one particular section or regulation, what would it be?

As a privileged white male lawyer - I would float the following idea for consultation with First Nations People and Lawyers. These ideas for legislation may not be novel – but are worth continuing to talk about.

Mandatory consideration of the unique position of First Nations People could be legislated. This could be in a dedicated act with overarching provisions, or as amendments to particular acts. The following ends could be legislated:

- In providing individual justice the justice system should consider the unique systemic and background factors of Aboriginal and Torres Strait Islander People.
- In considering or applying the law, constitutional or common law choices which minimise the negative effect of laws on Aboriginal and Torres Strait Islander Peoples should be preferred, where such choices are open.

Why does this section or regulation need to be changed?

First Nations people have suffered prejudice, dispossession and removal in the white legal and political system. This is a unique prejudice forced upon a class of citizens. There is a demonstrated gap in health and wellbeing targets for First Nations people, and a real gap in justice effects and outcomes.

Mandatory consideration of the unique position of First Nations People could be legislated.



The white legal system now needs to work to remedy past wrongs, including the disproportionate removal and incarceration of First Nations people. White Lawyers need to walk with our First Nations friends on a journey towards improving justice.



Hannah Quadrio

BARRISTER AND SOLICITOR, NORTHERN TERRITORY LEGAL AID COMMISSION

If you could change one particular section or regulation, what would it be?

Amend s 23 of the *Social Security Act 1991* (Cth) (regarding the eligibility age for the age pension), to lower the age pension eligibility age for Aboriginal and Torres Strait Islander (‘ATSI’) Australians to 55 years of age. I would recommend this as a temporary measure, until the life expectancy of ATSI Australians rises to a level comparable to that of Non-Indigenous Australians.

Why does this section or regulation need to be changed?

As of 1 July 2017, Australians born on or after 1 January 1957 (ie. aged 61 and under) need to be 67 before they are eligible for the age pension.

This ‘one size fits all’ approach to the age pension significantly disadvantages ATSI Australians because it fails to take into account lower ATSI life expectancies.

The Australian Bureau of Statistics tells us

that the median age of death for ATSI Australians was 58.8 years in 2014-2016; more than 23 years lower than the median age of death for Non-Indigenous Australians. Most ATSI Australians are not living to pension age and few are able to enjoy the support of the pension through their retirement years. One of my Aboriginal clients recently described the situation to me in this way:

“I’m 59 now. None of my family ever made it to 60. I’ve been working, mostly labouring jobs, since I was 14 and my body’s tired. I’m riddled with health problems. I want to be on the pension now... I won’t live till 67.”

Lowering the pension age for ATSI Australians would allow for differential treatment, until such time as the life expectancies of ATSI and non-Indigenous Australians are comparable. This change would be permitted under the *Racial Discrimination Act 1975* (Cth) as a ‘special measure’ that is necessary in order to achieve substantive equality.

Similar changes could be considered in relation to the preservation age for superannuation.



Dr Lucas Lixinski

ASSOCIATE PROFESSOR, UNSW LAW

If you could change one particular section or regulation, what would it be?

Update the *Aboriginal Cultural Heritage Act 2003* (NSW) ('ACH Act').

Why does this section or regulation need to be changed?

The ACH Act is an outdated piece of legislation that does not fully comprehend the nature of Indigenous heritage, which is both tangible and intangible. As such, it also falls short of enabling control by communities over their own heritage, and sidelines them in a lot of decision-making.

There is currently a Bill being discussed, but it has a fairly ambiguous relationship with Indigenous control over their own heritage, and frames it against other interests (particularly development) that stand in potential tension with Aboriginal cultural heritage. Because it privileges the encounter between Aboriginal heritage and other segments of society, it never quite gives Indigenous communities the breathing

room to make fundamental decisions about the whats, whys, and hows of their heritage. It is clear that this legislation in urgent need of reform.

The [Act] is an outdated piece of legislation that does not fully comprehend the nature of Indigenous heritage, which is both tangible and intangible.





Jack McNally

LAW STUDENT, UNIVERSITY OF NEW SOUTH WALES

If you could change one particular section or regulation, what would it be?

Amend the *Anti-Discrimination Act 1977* (NSW) to remove ss 49ZO(3), 49ZH(3)(c), 38K(3) and 38C(3)(c); all of which permit 'private educational authorities' to discriminate against students and staff on the basis of their sexuality or gender identity.

Why does this section or regulation need to be changed?

NSW private schools have the broadest powers in the country to actively discriminate against LGBTIQ+ students and staff, and are legally able to refuse or terminate enrolment or employment on the basis of sexual orientation or gender identity. As a matter of principle, no organisation which receives public funding should be able to discriminate against individuals based on their sexuality; which is private, personal and ultimately innate. Private schools effectively act as an extension of the government in the provision of educational resources, and as such they should have

no right to refuse enrolment or terminate employment to some of the most vulnerable individuals within our society based on their personal characteristics.

Though cases of students being expelled on the basis of their sexuality or gender identity are increasingly rare, the knowledge that a student's school can expel them because they are gay or trans means that the ability to discriminate on the basis of religion is held by society in a higher regard than the right of the child to be who they are. No child should ever face repercussion or even fear consequence from their educational provider for expressing their true self.

LGBTIQ+ children deserve to be able to find themselves and express their sexuality and gender without discrimination or impediment from their educational provider. And their teachers and support staff deserve a workplace that values them based on their teaching and care for students, not who they choose to love.



Alastair Lawrie

SENIOR POLICY OFFICER, PUBLIC INTEREST ADVOCACY CENTRE

If you could change one particular section or regulation, what would it be?

Replace the protected attributes of 'homosexual and transgender' with 'sexual orientation, gender identity and sex characteristics' in the *Anti-Discrimination Act 1977* (NSW).

Why does this section or regulation need to be changed?

The *Anti-Discrimination Act 1977* (NSW) is out-dated, especially in relation to anti-discrimination protections for the lesbian, gay, bisexual, transgender and intersex (LGBTI) community.

By using 'homosexual' as a protected attribute, NSW has the only anti-discrimination law in Australia that does not cover bisexual people against adverse treatment. It should be replaced with the more-inclusive 'sexual orientation', using the *Sex Discrimination Act 1984* (Cth) (SDA) definition.

The attribute of 'transgender' is also no longer best practice, and does not adequately protect people with non-binary gender

identities against discrimination. It should be replaced with 'gender identity', again based on the SDA definition.

Updating these protected attributes would be a significant improvement on current anti-discrimination law.



Finally, the *Anti-Discrimination Act 1977* (NSW) does not protect intersex people against discrimination. 'Intersex status' has been included in Commonwealth, Tasmanian, ACT and South Australian anti-discrimination legislation. NSW should introduce an attribute of 'sex characteristics', as advocated by intersex organisations.

Updating these protected attributes would be a significant improvement on current anti-discrimination law, although ultimately the entire *Anti-Discrimination Act 1977* (NSW) requires review and re-write to ensure it is fit-for-purpose in the 21st century.



Cassandra Taylor
LAWYER, MAURICE BLACKBURN



Amy Zhang
SENIOR ASSOCIATE, HARMERS LAWYERS

If you could change one particular section or regulation, what would it be?

Amend s 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth), so that the six month time limit for lodging sexual harassment complaints is extended.

Why does this section or regulation need to be changed?

In 2017 the timeframe for making complaints to the Australian Human Rights Commission (‘AHRC’) was reduced from twelve to six months. Although there is a discretion regarding complaints lodged outside of the six month period, the time limit is unreasonably and unnecessarily short, particularly when compared to:

- time limits in other areas of law, for example, six years for contract and misleading and deceptive conduct claims, and adverse action in employment claims; one year for defamation claims); and
- time limits for discrimination complaints to state and territory bodies.

The AHRC’s most recent statistics demonstrate that 22 per cent of women and 5 per cent of men have experienced sexual harassment at work. However, only 16 per cent of victims made a formal complaint to their employer. Sexual harassment victims often have significant and legitimate reasons for delaying making complaints. An arbitrary six month time limit makes it more difficult for discrimination and sexual harassment complaints (including pervasive, systemic and historical misconduct) to be properly ventilated.

At a time when the #MeToo movement is finally shining a spotlight on sexual harassment, including the barriers preventing victims from speaking up and victim’s legitimate fear of reprisal from employers, it is important that the option of complaining to an independent body remains available for a reasonable period. Given the beneficial purpose of anti-discrimination legislation, it would be apposite to make it less, rather than more, difficult for complainants to lodge complaints about discriminatory behaviour. As such, extending the time frame for complaints, perhaps to six years, would significantly enhance the efficacy of this legislation.



Rose Khalilizadeh
BARRISTER, FORBES CHAMBERS



Tom Kelly
FORMER PUBLIC SOLICITOR FOR NSW

If you could change one particular section or regulation, what would it be?

Amend s 19 of the *Victims Rights and Support Act 2013* (NSW) to provide compensation for victims of all crimes including those where there is no mens rea, where compensation is not otherwise available.

Why does this section or regulation need to be changed?

Tom's friend Charlie, then aged 79, walked out of his apartment to go to the supermarket. He had walked 25 metres along the footpath when he was struck by a cyclist, who was cycling furiously along the footpath of an intersecting side street. Charlie fell to the footpath, hit his head and suffered severe brain damage. Ever since then, Charlie has languished in the high care section of a nursing home. He cannot walk at all, or move or eat without great assistance. He has little use of his arms and hands. He cannot talk properly or control his body. He requires costly medical attention, which is depleting his limited resources.

The cyclist pleaded guilty to wanton and furious riding, pursuant to s 53 of *Crimes Act 1900* (NSW). Sadly, as there was no intent to cause harm, there was no victims compensation available. If Charlie had been deliberately punched, he would have been compensated under the legislation. Had it been struck by a motor vehicle, he would have had rights to third party compensation. The cyclist was homeless and not worth suing in tort.

Sadly, when Charlie fell to the footpath, he also fell through the cracks in the *Victims Rights and Support Act 2013* (NSW).

Sadly, when Charlie fell to the footpath, he also fell through the cracks in the *Victims Rights and Support Act 2013* (NSW).



David Rolph

PROFESSOR IN DEFAMATION, UNIVERSITY OF SYDNEY

If you could change one particular section or regulation, what would it be?

Amend the statutory defence of contextual truth under the national, uniform defamation laws to allow a defendant to plead back the plaintiff's own imputations as part of the defence.

Why does this section or regulation need to be changed?

As currently drafted, the statutory defence of contextual truth cannot operate as it should. The previous version of contextual truth (s 16 the *Defamation Act 1974* (NSW)), allowed a defendant to plead back the plaintiff's own imputations as part of the defence. This practice of 'pleading back' was important to the complementary operation of the defences of truth and contextual truth.

The current version of contextual truth, enacted under the national uniform defamation laws and in operation across Australia since the beginning of 2006, attempted to simplify

the wording of the defence and, in doing so, unintentionally changed the defence. Indeed, for the first few years of the national, uniform defamation laws being in operation, no one thought that any change had occurred. Now, as a result of the New South Wales Court of Appeal's decision in *Besser v Kermode* (2011) 81 NSWLR 157; [2011] NSWCA 174, it is clear that that is the effect.

**As currently drafted...
contextual truth
cannot operate as it
should.**



Given that Australian defamation law remains broadly more favourable to plaintiffs rather than defendants, it is important to ensure that there are as many viable defences available to defendants as possible. This reform could be achieved by simple, straightforward redrafting. It would be easier to achieve than the larger, more fundamental and equally pressing problem: a comprehensive review of Australia's defamation laws.



Michelle Rowland MP

FEDERAL MEMBER FOR GREENWAY & SHADOW MINISTER FOR COMMUNICATIONS

If you could change one particular section or regulation, what would it be?

Amend the *Broadcasting Services Act 1992* (Cth) to mandate minimum television audio description requirements for blind and vision-impaired Australians, consistent with our obligations under the United Nations Convention on the Rights of Persons with Disabilities.

Why does this section or regulation need to be changed?

Australia lags behind the rest of the world in serving the human rights of over 350,000 blind and low vision Australians who require audio description (‘AD’) to access television services. Australia is the only English speaking country in the OECD without AD.

AD is a verbal narrative track that can be switched on to describe key visual elements in a television program, such as facial expressions, scenery and action sequences. Without AD, it can be extremely difficult for a blind person to understand what what is going on.

In Government, Labor legislated for the captioning of television services for the deaf community and funded an AD trial on the ABC for the blind community. In the five years since, there’s been another AD trial and a working group to examine options for delivery of AD. In short: no real progress.

Australia is the only English speaking country in the OECD without AD.



Persons with disability, the elderly and people on low incomes are amongst the most digitally excluded in our community, so the free-to-receive and ubiquitous broadcast platform is the fairest way of promoting media access with AD television.

The cost and complexity of implementing AD over the broadcast platform is not insignificant, so legislation is necessary to address this area of market failure and ongoing discrimination.



Eliza Perrier

DATA ANALYST, AUSTRALIAN LABOR PARTY

If you could change one particular section or regulation, what would it be?

I would introduce an *Ethical Artificial Intelligence Act* to provide a framework to guide and inform regulation of algorithms and artificial intelligence ('AI').

Why does this section or regulation need to be changed?

AI will have among the most profound, far-reaching and unparalleled impacts upon human society. While AI offers the potential for immense social and economic gain, it comes with risks. Regulation of this technology must be undertaken in a careful, considered but also agile context given its rapid advancement. AI technology is too complex, ubiquitous and dynamic to be regulated by a single Act and will instead require a multitude of legislative responses. Nevertheless, a consistent approach to regulation of AI that facilitates regulatory coordination across public and private sectors will benefit citizens, industry and government alike. Australia currently lacks a consistent principled approach

to AI governance. An overarching ethical AI framework would help achieve this.

AI will have among the most profound, far-reaching and unparalleled impacts upon human society.

The framework should stipulate key ethical principles that regulation of AI should enshrine: (a) safety-critical (safe, trustworthy and under the ultimate control of humans); (b) human-centred (prioritise maximising employment through human-AI interfaces); (c) ownership (prevent concentrated ownership of AI technologies); (d) fairness and transparency (openness about use, non-discriminatory, detect/correct for biases); accountability (a clear chain of accountability and explanation); law and human rights (consistency with civil liberties). It should contain principles regarding the use of AI by government (including 'RegTech') and mechanisms for benchmarking other legislation and reporting milestones.



Carolyn Adams

SENIOR LECTURER IN PUBLIC LAW & OPEN GOVERNMENT, MACQUARIE UNIVERSITY

If you could change one particular section or regulation, what would it be?

Amend s 6 of the *Privacy Act 1988* (Cth), which contains the definition of APP entity.

Why does this section or regulation need to be changed?

The Australian Privacy Principles ('APPs') in the *Privacy Act 1988* (Cth) regulate the collection, use and disclosure of personal information by federal agencies and private sector organisations. The legislation does not apply to state and territory agencies. Instead, many of the states and territories have developed their own privacy legislation and set or sets of privacy principles, which are similar but not identical to the APPs.

There is abundant evidence that this inconsistency and fragmentation in the Australian privacy landscape gives rise to confusion and risk aversion when dealing with personal information (see, for exam-

ple, the Australian Law Reform Commission report: *For Your Information: Australian Privacy Law and Practice* (Report 108, 2008)). Information is not being handled correctly or appropriately "because of the privacy act".

There is no principled reason why the privacy principles should be different in different jurisdictions.



There is no principled reason why the privacy principles should be different in different jurisdictions. They are based on the same set of OECD guidelines for the protection of personal information. Information does not recognise borders and the same privacy principles should apply across our federation.



James Evans
ADVISOR, NSW OPPOSITION

If you could change one particular section or regulation, what would it be?

Amend Part 2, Division 3 of the *State Environmental Planning Policy (Affordable Rental Housing) Act 2009* (NSW) ('ARHSEPP') to include a rent control provision.

Why does this section or regulation need to be changed?

The ARHSEPP was introduced in 2009 with the aim of preserving existing affordable housing stock and providing an increase in the supply and diversity of affordable and social housing in NSW. However, some elements of the State Environmental Planning Policy ('SEPP') have been more successful than others, and the provisions relating to boarding houses have attracted particular criticism.

While the SEPP defines affordable housing using the commonly accepted "very low, low, or moderate income households" classification, it contains no requirement that units in boarding house developments are reserved

for households meeting this definition.

[The ARHSEPP] needs to ensure that boarding houses are not simply a way for developers to skirt around planning regulations which would otherwise apply.

The lack of a rent control provision has led to the current situation where developers, enticed by generous concessions in the ARHSEPP into building boarding houses, are advertising units as 'designer studios' and attracting market rent. If the ARHSEPP is going to live up to its name, it needs to ensure that boarding houses are not simply a way for developers to skirt planning regulations which would otherwise apply, maximising their profits while providing no additional affordable housing.



Michael Baker

ADVISOR, NSW OPPOSITION & LAW STUDENT, UNIVERSITY OF NEW SOUTH WALES

If you could change one particular section or regulation, what would it be?

Expand the operation of *State Environmental Planning Policy No 65* ('SEPP65') to include streetscapes and other public spaces.

Why does this section or regulation need to be changed?

Perhaps one of the most understated achievements of the Carr Labor Government was the implementation of minimum design standards for the development of residential apartment blocks. Compliance with minimum standards for ceiling heights, sunlight hours, and now even energy efficiency, are all statutory requirements for apartment developments – thanks to the humble SEPP 65.

What is urgently needed now, as our cities' built form continues to grow, is a vast improvement in the quality of the public realm. For this, legislation and regulation can play an equally important role.

Minimum requirements for tree canopies on nature strips in suburban Sydney, minimum sunlight hours for streets with high-rise, walkway and balustrade design around public infrastructure – all of these seemingly insignificant details make up a whole streetscape, and all can be codified in regulation.

What is urgently needed now...is a vast improvement in the quality of the public realm.



By introducing minimum requirements for our public spaces, a future Labor government would - in a single stroke - contribute more to the design outcomes of NSW than any architect could in a lifetime.

Populists, demagogues and celebrities – challenges for progressive campaigning in the age of Trump

Extract from the 2018 Annual Frank Walker Lecture delivered by Bruce Hawker

I knew Frank Walker and Frank Walker was no populist. In fact, his reforms were directed squarely at helping the people certain populist leaders seek to pillory and isolate. If there is a common denominator to the reforms Frank introduced it is that they were aimed at improving the lot of the men, women and children in our society who are least able to defend themselves - the dispossessed and marginalised minorities. The very people who Donald Trump targets, defames and demonises.

In all my years in politics, I cannot recall another state politician with such a consistently strong record of empowering the powerless. And this conviction made Frank a difficult person for his own cabinet colleagues to handle. There weren't many votes to be garnered introducing the first state based land rights legislation in Australia. Or repealing laws that had criminalised prostitution and truancy. Nor did he spark a popular chorus of approval when he gave legal protections to young offenders, wards of the state and the mentally and physically infirm. But I would argue

that it is these types of groundbreaking reforms which gave that Labor administration a special character. When elected in 1976 it was seen as a youthful, socially progressive government, whose premier, Neville Wran QC, was prepared to take on vested interests – including corrupt cops.

Mind you, the Wran slide election victories of 1978 and 1981 and the solid win in 1984, were proof that it was also a remarkably popular government. In very large part that was because Neville Wran and his senior group of ministers understood that a mix of both the popular measures and the harder reforms - the ones that Frank usually sponsored - was necessary to satisfy a broad spectrum of voters and Labor values. They were willing to lose some support with the tough changes because they knew they had a deep well of goodwill from which to draw. And it's telling that so many of Frank's reforms, controversial as they were back then, have stood the test of time. Land rights, criminal law reform, child welfare, juvenile justice and adult guardianship laws have in large part endured.

Like many of you here tonight, I was a friend of Frank. But more than that, I was lucky to be a member of his staff when he was Attorney-General and in his other portfolios, including youth and community services and housing. I have to say, it was a great start in politics.

Over the last thirty-five years I've been privileged to have worked and campaigned with some of the most impressive people in the modern Labor Party – two prime ministers, twenty-one premiers and chief ministers and I can't remember how many opposition leaders. And it all started with Frank Walker in 1982.

With the benefit of hindsight, I have to say that he, above all others, was the enduring influence on my subsequent career as an adviser and Labor campaigner. Frank taught me that what counts is the long game and now, having played my own

very long game in politics, I understand how right he was. Diatribes against the enemy of the day, tweeted at three o'clock in the morning are not the long game – they are the daily distraction.

But I also understand what Frank told me so many years ago – that the reforms worth losing skin over, the ones that promote fairness and equity and go to the core of Labor values, will come under constant attack. In a sense, it is an incredibly long game - because there is no end to that contest – it goes on and on.

Bruce Hawker is an Australian political strategist, commentator and chairman of Campaigns & Communications Group. He was a staff member to the late Frank Walker QC, Attorney-General of New South Wales from 1976 to 1983.



Our present ascendancy in the Parliament of our nation has been won only by years of immense effort and dedication, often in the face of seemingly insurmountable odds. Our continued success depends upon maintaining that effort and dedication. The continuing struggle has always had two aspects: first, the resistance of the conservative Right, the men born to rule, against accepting Labor's legitimacy within the parliamentary system. And second, the historic divisions of opinion within the Labor movement about the effectiveness of Parliament as the instrument for the advancement of our cause. This has always been one of the most fundamental questions for the Australian Labor movement. The greatest challenge - though certainly not the first - to Labor's faith in the parliamentary system came in 1975. At the height of the crisis of 1975, Gough Whitlam summed up two aspects of Labor's



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