



LEGAL TWEAKS

THAT
WOULD
CHANGE
NSW
AND
THE
NATION



2014

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BIBHU AGGARWAL

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NEW SOUTH WALES SOCIETY OF LABOR LAWYERS

**DESIGN BY**

PETER HONG

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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New South Wales Society of
Labor Lawyers



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FOREWORD

THE HON PAUL LYNCH MP

Progressive law reform has always been at the heart of successful Labor Governments. Developing policies and identifying avenues for reform can't be done in a vacuum.

The re-establishment in recent years of the NSW Society of Labor Lawyers is a useful step in the reinvigoration of NSW Labor. Legal Tweaks is part of that journey.

It's important that it's not a narrow or purely partisan exercise. It must involve proper analysis and intellectual engagement beyond just Party Members. Over several years this is something that Legal Tweaks has done well. The Editor and Labor Lawyers should be congratulated.

The variety of contributors and topics is a very attractive aspect of this endeavour involving academic, practitioners and ex, current and aspirant parliamentarians.

Whether everyone supports every "tweak" proposed is not the point. There needs to be discussion and

debate about reform and this is a useful contribution.

Removing the right to silence, the introduction of mandatory sentencing and giving licence to bigots is a melancholy list of where Australia and New South Wales should not be going. Legal Tweaks helps give a much more sensible direction.

It's particularly important with hopelessly conservative Governments currently in power in Canberra and Sydney.

Removing the right to silence, the introduction of mandatory sentencing and giving licence to bigots is a melancholy list of where Australia and New South Wales should not be going. Legal Tweaks helps give a much more sensible direction.

Paul Lynch is the Shadow Attorney-General and Shadow Minister for Justice for NSW.

FOREWORD

MARK DREYFUS QC MP



It is a pleasure to introduce the 2014 edition of *Legal Tweaks*. I congratulate the NSW Society of Labor Lawyers on this excellent publication, now in its third year.

Progressive law reform is of course a vital part of Labor tradition. Justice is a key Labor value, and the reform of our laws and our legal system is essential to our broader mission of building a fair and prosperous society.

Legal Tweaks is a reminder of the social good which can be achieved by even small 'tweaks' to our laws.

The hard work of lawyers and academics friendly to the Labor cause is indispensable in developing and prosecuting a meaningful, progressive law reform agenda, and I have been delighted to see the NSW

Society of Labor Lawyers flourishing in recent years.

This work is perhaps even more vital when Labor is in Opposition. While conservative governments in NSW and federally have little to offer in the way of law reform, *Legal Tweaks* is a reminder of the social good which can be achieved by even small 'tweaks' to our laws.

I hope that this edition, like its predecessors, will encourage further debate and discussion in Labor circles and beyond about the potential for law reform. You might not agree with every suggestion, but the wide range of issues canvassed by the contributors to this publication, many of them recognised experts in their field, shows us the work which lies ahead of us.

Mark Dreyfus is the Federal Shadow Attorney-General and Shadow Minister for the Arts.

EDITOR'S NOTE

BIBHU AGGARWAL



These are challenging times. A time where a “budget emergency” threatens to compromise the egalitarian streak that defines Australia. A time where the rights of bigots are championed, and minorities diminished. A time where we trade in our civil liberties in an attempt to secure our safety. At times like this, the project of law reform can seem immense and overwhelming. Where do we start? What can we do?

Because sometimes small changes can trigger larger scale reform. A concrete idea can give substance to a broader ideal.

Perhaps this publication provides something of an answer. We asked progressive lawyers from across the profession - silks to law students, seasoned commercial lawyers to academics - to pick a section or regulation that they would change. Just one. Why? Because sometimes small changes can trigger larger scale reform. A concrete idea can

give substance to a broader ideal.

You may not agree with everything in this publication. Our aim is not to drive a particular agenda or pitch a particular idea. It is simply to start a conversation. What unites the impressive list of contributors in this year's edition is not a common commitment to a particular political party, but a common commitment to the project of law reform.

These are challenging times. We can meet those challenges, not by using the power of the law to divide and demonise, but by using the power of the law to unite and protect.



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TONY BOWEN

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

I would like to see ss.25(1A) and (2A) of the *Anti-Discrimination Act 1977* (NSW) repealed.

Why does this section/regulation need to be changed?

Section 25 makes it unlawful for an employer to discriminate against a person on the ground of sex. However, both these sections provide a carve out of s.25 when it comes to pregnant women seeking employment, promotion, training, or transfer or who are dismissed, if they were pregnant at the time they applied for employment.

It is a commendable fact of life that our society and economy promotes equality of opportunity for women in employment and career advancement. In my view, these provisions are inconsistent with that foundation...

It is hard to believe legislation such

as this still exists in this day and age. Both ss.25(1A) and (2A) provide an out for an employer to discriminate against a female employee on the grounds that at the date the woman applied for employment, she was pregnant. It is trite to observe that (obviously) these carve outs can only apply to women. They are not to be found in similar Commonwealth legislation.

It is a commendable fact of life that our society and economy promotes equality of opportunity for women in employment and career advancement. In my view, these provisions are inconsistent with that foundation as they permit discrimination against women in the workplace environment. Worse, they apply in the particularly stressful circumstances of negotiating employment during or in contemplation of pregnancy. They need to go.

Tony Bowen is a Barrister who practises in Commercial, Insurance and Common law.

LEWIS HAMILTON



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

The burden of proving reasonableness in indirect discrimination law cases should be harmonised across Commonwealth legislation. Currently, the *Racial Discrimination Act 1975* (Cth) places the burden on the complainant to prove unreasonableness, while the *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), and *Age Discrimination Act 2004* (Cth) all place the burden on the respondent.

Why does this section/regulation need to be changed?

It is unexplainable why in the *Racial Discrimination Act 1975* (Cth) the burden of proving reasonableness lies on the person alleging indirect discriminatory conduct, while in other areas of discrimination law – be it age, sex, or disability discrimination – the burden of proving reasonableness lies with the respondent.

The respondent imposes the condition or requirement, and it follows that they should have to prove it is reasonable. Concomitantly,

the complainant lacks access to the reasons why the condition or requirement was imposed. Given this asymmetry of information, complainants should not have to bear the burden of proving that a condition or requirement is unreasonable.

Racial discrimination claims are already difficult to prove. A different burden of proof in racial discrimination law as opposed to other anti-discrimination statutes makes such claims even more challenging. The current legislative burden says on the face of it that we do not have the same impetus to address discrimination based on race as we do discrimination based on age, sex, or disability. This, in a multicultural society such as ours, is wholly unacceptable.

Lewis Hamilton is a Juris Doctor student at the University of Sydney and Secretary of the Sydney University Law Society (SULS).



SENTHORUN RAJ

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

NSW should amend the broad religious exceptions arising under its anti-discrimination laws to prevent publicly funded organisations from discriminating against people on the basis of sexual orientation and gender identity.

Why does this section/regulation need to be changed?

NSW anti-discrimination law has broadly defined religious exceptions. In particular, section 56(d) of the *Anti-Discrimination Act 1977* (NSW) lawfully excuses discrimination against sexual and gender minorities where it is deemed necessary to avoid injuring “religious susceptibilities.”

Freedom of religion is a fundamental human right. However, the exercise of such freedom should not come at the expense of LGBT people.

Governments are increasingly outsourcing the administration of social services to non-government

organisations. Many of these NGOs are affiliated with particular religious denominations. These bodies can lawfully discriminate against lesbian, gay, bisexual, and transgender people when hiring staff or providing services.

Freedom of religion is a fundamental human right. However, the exercise of such freedom should not come at the expense of LGBT people. No one should have to pretend that they are straight in order to foster a child or hide their relationship status to access aged care.

Exceptions also create a problematic dichotomy between religion and sexuality. Many faith-based organisations do not discriminate. Moreover, exceptions are wide-ranging, used at individual discretion, and do not need to be advertised. The existence of such legislative exceptions undermines accountability by shielding public activities from public scrutiny. Such exceptions must be significantly narrowed.

Senthorun Raj is a PhD researcher at the Sydney Law School.



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

I would add a new subsection to section 51 of the Commonwealth Constitution: “The Parliament shall not have power to make laws that are inconsistent with Australia’s international human rights law obligations.”

Why does this section/regulation need to be changed?

Australian Parliaments, conservative and progressive, have too often legislated to infringe fundamental human rights, from authorising racial discrimination in the Northern Territory, to illegally imprisoning tens of thousands of refugees, to enacting excessive national security laws. The drafters of the Constitution naively trusted that democratic parliaments would not violate basic rights, even though at the time they were busy excluding Asians.

True democracy is not just what a populist majority in parliament wants. The protection of basic rights and liberties is also essential...

True democracy is not just what a populist majority in parliament wants. The protection of basic rights and liberties is also essential to sustaining a healthy democracy, preventing abuse of government and private power, and maintaining an ethical society that respects the dignity and equal worth of every person. My amendment would cunningly import a constitutional bill of rights without getting bogged down in endless, agonising partisan debates about the scope of each individual right. Constitutional rights protection is necessary because statutory human rights acts are too easily ignored or overridden by rapacious politicians.

Pretty much every other liberal democracy in the world has a bill of rights. Australians deserve no less. Admittedly, this is more of a legal revolution than a legal tweak!

Dr Ben Saul is a Professor of International Law and is internationally recognised as a leading expert on global counter-terrorism law, human rights, the law of war, and international crimes.



PHILIP BONCARDO

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

I would reverse the Coalition government's recent amendments to section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) that commenced on 16 December 2013, so that the extreme step of arrest without warrant is used by Police only as a measure of last resort to ensure a person, otherwise presumed to be innocent, attends Court to answer criminal charges.

Why does this section/regulation need to be changed?

The Coalition government, without conducting a public review or consulting stakeholders (other than police and the Department of Justice and Attorney-General), radically amended section 99 – enacted by the former Carr government to enshrine arrest without warrant as a measure taken in specific circumstances, predominantly where there was a suspicion, on reasonable grounds, that the person would not attend Court. In its original form, section 99 curtailed and delineated the exercise of the power of arrest in recognition of the ignominy and fear intrinsic to the

deprivation of a citizen's liberty by the Police.

The amended Act markedly expands the circumstances in which Police can arrest a person and reposes a broad discretion in Police to arrest. The power is framed as a means to deter or prevent crime as opposed to ensuring someone's attendance at Court to answer criminal charges.

The new power encourages more arrests, in circumstances where the radical intervention of Police oftentimes inflames situations and leads to potential arrestees being charged with further offences, like resisting arrest and assault of a police officer in execution of their duties.

The new section misconceives the extreme power of arrest as a deterrent and preventative measure. Re-calibrating the use of the power to what it has been historically, is imperative to ensuring that the fundamental human right of liberty is not readily infringed by the coercive arm of the state.

Philip Boncardo is a solicitor who practices in the areas of criminal law, civil litigation and, care and family.

PROFESSOR

NICHOLAS COWDERY AM QC



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

I would repeal section 12 of the *Drug Misuse and Trafficking Act 1985* (NSW) which makes it a criminal offence, punishable by up to 2 years' imprisonment, to administer or attempt to administer a prohibited drug to oneself.

Why does this section/regulation need to be changed?

Repeal of section 12 is just the beginning of a process to reform drug laws throughout Australia, creating a regime of legislation to regulate, control and tax all drugs, not just alcohol and nicotine. Section 12 creates the absurdity of criminalising even an attempt (successful or not) to administer a prohibited drug to oneself and provides a serious punishment for doing so.

Drugs will always be sought by people to alter mood in various ways and where there is demand there will be supply. The problem with prohibiting any drug is that supply becomes illegal and suppliers increase prices to compensate for the

risk of punishment. Profits enlarge, corruption occurs (because it can be afforded), there is no quality control and sickness and death are possible outcomes of ingestion. Use is driven underground, away from competent advice and assistance.

Drug use is a health and social problem, not one that criminal justice can address.

The only effective way to reduce the direct and indirect harms of drug use is to eliminate criminal profits and install state control, bringing it out in the open. Other countries are moving in that direction and Australia also needs to do so. Drug use is a health and social problem, not one that criminal justice can address.

Nicholas Cowdery AM QC is a Professor of Law, Consultant and Barrister.



GREG JONES

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

I would insert a new subsection between existing subsections (3) & (4) of s. 99 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) giving a Court a further discretion to award costs.

Why does this section/regulation need to be changed?

To ameliorate the unjustness that occurs where a person in need of protection (PINOP), instead of making an application for an apprehended domestic violence order (ADVO) themselves, arranges for a police officer to make such an application on their behalf to avoid the risk of having costs awarded against them where the court finds (pursuant to subsection (3)) that the ADVO application was frivolous or vexatious.

There was a case several years ago where a man arranged for the police to make an application for an ADVO against his ex-wife, a

schoolteacher. The ex-wife defended the proceedings and retained the services of a solicitor and barrister as she reasonably apprehended that if an ADVO was made against her, it could prejudice her future employment as a schoolteacher. Despite the Court finding that the application for the ADVO was frivolous and vexatious, the Court could not award costs in favour of the wife and against the PINOP.

Accordingly, a new subsection in the following terms should be inserted:

“Where a police officer makes an application for an ADVO, a Court may order costs against the PINOP upon being satisfied that:

- (1) the application is frivolous or vexatious; and**
- (2) the PINOP materially influenced the police officer’s decision to make the application.”**

Greg Jones is a barrister based in Sydney. He practises in commercial, criminal, administrative and personal injury law and has an ongoing interest in human rights law.

MIIKO KUMAR



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

I would insert a section into Part 5, Division 1 of the *Criminal Procedure Act 1986* (NSW) that prevents defence from filing subpoenas compelling complainants of sexual offences from producing documents, without first seeking leave of the court.

Why does this section/regulation need to be changed?

A subpoena on a rape victim compelling them to produce personal documents in a rape trial could be deeply upsetting as an invasion of privacy. The subpoena could also be used to intimidate and inflict further trauma. There is no legislation that specifically limits the issue of a subpoena for production on sexual assault victims.

A subpoena on a rape victim compelling them to produce personal documents in a rape trial could be deeply upsetting...

I would insert a section that makes it clear that an accused (or his/her lawyers) is prevented from filing a subpoena in a registry or in a court that seeks the production of documents from a complainant in sexual offence proceedings, except with the leave of the court. The section could be drafted as follows:

Prohibition on issuing a subpoena for production on the complainant

- (1) Except with leave of the court, a person cannot seek to compel (whether by subpoena or any other procedure) a complainant in a sexual offence proceeding to produce a document.
- (2) A subpoena to produce that has been issued without leave is invalid.
- (3) Leave is not to be granted unless the court is satisfied that there are special reasons why the alleged victim should, in the interests of justice, produce the document.

Miiko Kumar is a Barrister, Jack Shand Chambers and Senior Lecturer, Faculty of Law, University of Sydney



STEPHEN ODGERS SC

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

If I could change a NSW statutory provision it would be s 293 of the *Criminal Procedure Act 1986*, which deals with the admissibility of evidence relating to sexual experience.

Why does this section/regulation need to be changed?

This section needs to be changed because it is arbitrary and unjust. While well-intentioned – designed to protect sexual assault victims from irrelevant and offensive inquiry into their sexual history – it has gone too far because it leaves no judicial discretion permitting a court to admit evidence where it is probative and essential to the presentation of a legitimate defence and hence to a fair trial. All other jurisdictions in Australia and similar countries permit a degree of judicial discretion in this area.

We must not maintain an arbitrary rule that creates the real risk that an innocent person will be convicted or,

indeed, may prevent the prosecution from relying on evidence that could be crucial to prove guilt.

It should not be assumed that NSW judges are incapable of making proper judgments about the relevance of sexual history and incapable of balancing the conflicting interests which bear on whether such evidence should be admitted. It is possible to give numerous examples of evidence which is excluded under the current provision and yet, on any reasonable view, should be admitted. We must not maintain an arbitrary rule that creates the real risk that an innocent person will be convicted or, indeed, may prevent the prosecution from relying on evidence that could be crucial to prove guilt.

Stephen Odgers is a Senior Counsel who practices in criminal law.

HANNAH QUADRIO



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

At present, section 65 of the *Fair Work Act 2009* (Cth) grants employees in particular circumstances a right to request flexible working arrangements. The focus is on parents and carers.

It might be a good idea to amend section 65 so that the right to request flexible working arrangements is available to all employees.

Why does this section/regulation need to be changed?

In its “Supporting Working Parents” report (2014), the Australian Human Rights Commission (AHRC) found that negative stereotypes about ‘the pregnant employee’, and ‘the employee with family or caring responsibilities’ are prevalent in Australian workplaces. The stereotypical ‘flexible worker’ is not the ‘ideal worker’.

These stereotypes can have damaging effects, particularly for pregnant women or mothers who are assumed to be more likely to need, want or choose flexible working arrangements. The ‘flexibility stigma’ can discourage employees from requesting flexible work, and discourage employers from granting requests for flexible work. It can also result in

those who choose to work flexibly being given poorer quality work and less responsibility. The ‘flexibility stigma’ also discourages fathers from asking for flexible work arrangements that would allow them to share the parenting load more equally with their female partners. The AHRC’s survey of fathers found that only one in five fathers who returned to work after the birth of a child, requested some adjustment to their working arrangements.

Extending the right to request flexible working arrangements to all employees may help to address the ‘flexibility’ stigma. A general right to request flexible work would:

- disassociate ‘flexibility’ from parenting and caring roles that have historically been seen as a ‘woman’s work’;
- challenge the idea that flexible work is ‘non-standard’, perhaps encouraging more male employees to request flexible working arrangements that allow them a more active parenting/caring role.

Hannah Quadrio is a solicitor at Gilbert + Tobin and the President of the NSW Society of Labor Lawyers.



PROFESSOR
JOELLEN RILEY

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

If I could add just one thing to our federal legislation to improve the field of employment law, I would borrow the objects clause from the New Zealand *Employment Relations Act 2000* – or at least the following bit of it:

3 Object of this Act

The object of this Act is—

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
- (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; . .

Why does this section/regulation need to be changed?

The reason? It would establish an expectation of good faith and fair dealing in Australian employment law. The High Court recently held that the duty of ‘mutual trust and confidence’, which is an established

part of UK law, forms no part of Australian common law. This leaves legislative intervention as the only avenue to embed an obligation of mutual trust, confidence and good faith into the employment relationship.

Australian employers... bear a responsibility to promote decent, respectful behaviour in their workplaces.

A legislated obligation of mutual trust, confidence and good faith may go some way to communicating a message to Australian employers that they do bear a responsibility to promote decent, respectful behaviour in their workplaces. Over time, we may witness an improvement in Australian workplace culture, and save employees and employers alike a great deal of personal grief, and business time, finances and resources.

Joellen Riley is the Dean of the Sydney Law School and a Professor of Labour Law.

INGMAR TAYLOR SC



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

Amend s 596 of the *Fair Work Act 2009* (Cth) to allow a person the right to be represented by a lawyer if they choose.

Why does this section/regulation need to be changed?

...an individual employee or employer may have to appear without representation at a hearing against a legally trained advocate of a well resourced corporation or union...

Currently the Fair Work Act requires that a person obtain the permission of the Fair Work Commission if they want to be represented by a lawyer. There is an exception (s 596(4)) that allows a legally trained advocate of a corporation or registered organisation to appear without permission. This means an individual employee or employer may have to appear without representation at a hearing against a legally trained advocate of a well resourced

corporation or union, or at the very least may only find out at the hearing if their lawyer will be permitted to appear in their place.

The need for this change is highlighted once it is appreciated that important rights relating to employment, income, industrial action and right of entry are determined at these hearings.

An amendment that dispenses with the requirement to obtain permission would bring the jurisdiction into line with other jurisdictions which also have the power to affect important rights. It would also have the effect of increasing the level of assistance the Commission receives from skilled advocates who are subject to professional ethical duties.

Ingmar Taylor SC is a barrister at State Chambers in the areas of industrial and employment law and occupational health and safety law.



JOE EFREM

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

I would change section 190B(5)(c) of the *Native Title Act 1993* (Cth) so that the words “the native title claim group have continued to hold” are replaced with “the native title claim group continue to hold”.

Why does this section/regulation need to be changed?

The more Aboriginal people suffered, the less compensation they are entitled to. This is plainly and manifestly unjust.

The unfortunate effect of the current wording of section 190B(5)(c) is that it requires proof of a continuous connection between a particular piece of land and a particular group of Aboriginal people from 1788 through to the present day, the idea being that native title was extinguished once the link between a people and a piece of land was broken. This means that the reference point for a native title claim is, in essence, how successful the

Colonial States were in committing genocide against the Aboriginal people, which would necessarily have destroyed their traditional link to the land. The more Aboriginal people suffered, the less compensation they are entitled to. This is plainly and manifestly unjust.

My proposed change would allow for a native title claim to be established if it can be shown that:

- there was a link between a particular people and a piece of land from the earliest existing records; and
- there is an ancestral connection between the current occupants of the land and those who originally occupied the land.

This would mean that successful genocide can no longer be used as a justification for the denial of the basic land rights of Indigenous Australians.

Joe Efrem is a solicitor in Sydney and a recipient of the David Burnett Memorial Award.

DARYL MELHAM



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

I would amend s 51(xxvi) of the Constitution.

Why does this section/regulation need to be changed?

...it is highly likely that the section can be used to enact “special laws” that are detrimental to Aboriginal people.

While this section of the Constitution was amended in 1967 to allow the Commonwealth Parliament to help Aboriginal people, it is highly likely that the section can be used to enact “special laws” that are detrimental to Aboriginal people. In my view, section 51(xxvi) in its present form retains the

original power as of 1901, the power of Parliament to legislate beneficially or detrimentally in relation to Aboriginal people. To prevent Parliament from exacerbating Indigenous disadvantage by enacting unfair laws, section 51(xxvi) should be amended to make it clear that this head of legislative power is limited to the enactment of beneficial legislation.

Daryl Melham is a former Public Defender and was a Member of Parliament for 23 years.



PAT GARCIA

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

I would introduce a common statement on acceptable titles for foreign qualified lawyers.

Why does this section/regulation need to be changed?

Many Australian legal firms today are international businesses. Their operations reflect two trends - the internationalisation of the law and the globalisation of commercial practice. Australian firms these days transfer expertise across multiple jurisdictions and many Australian lawyers spend time in London, New York or Hong Kong honing their legal skills and advising foreign concerns. Similarly, many firms seek counsel from lawyers with foreign legal expertise in Australia.

...there is a degree of uncertainty concerning the titles that may be used by foreign qualified lawyers practicing in Australia.

Australian firms are not restricted from employing or contracting with overseas qualified lawyers, but restrictions do apply on how they are deployed and how they are promoted in Australia. Unfortunately there is a degree of uncertainty concerning the titles that may be used by foreign qualified lawyers practicing in Australia. The regulators of the profession throughout the country should agree to a set of permitted titles for overseas admitted professionals like the Legal Practice Board of Western Australia has done. They have agreed to titles such as Associate (Admitted in [place of admission] not admitted in Australia) and Consultant (Admitted in [place of admission] not admitted in Australia).

Pat Garcia is a Solicitor and Councillor of the Law Society of New South Wales

PETER PEREIRA



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

I would amend rule 42 of the UCPR to permit the recovery of legal costs when a successful party is represented on a pro bono basis.

Why does this section/regulation need to be changed?

The issue when a successful party is represented on a pro bono basis is whether the successful party is under a legal liability to pay costs to the solicitor.

Australian law has largely adopted the English approach to costs, namely that “costs follow the event”. Costs are typically ordered by way of indemnity to the successful party: they are neither a punishment for the losing party nor a bonus to the successful party. The indemnity principle is satisfied where a successful client

has a legal liability to pay his or her solicitor, no matter how remote the prospect of recovery is. The issue when a successful party is represented on a pro bono basis is whether the successful party is under a legal liability to pay costs to the solicitor.

As the power to award costs is a statutory power, the best way to address this issue is through statute. Western Australia has done this: Order 66, Rule 8A of the Rules of the Supreme Court 1971 (WA) allow a party represented pro bono to recover costs in the same manner as if the services were provided for reward.

A similar rule in NSW would encourage more pro bono representation, recognise that pro bono representation is not costless and most importantly, provide greater access to justice.

Peter Pereira is a solicitor in Sydney.



STEPHEN BLANKS

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

Sections 189 and 196 of the *Migration Act 1958* (Cth), which permit the indefinite detention of refugees, asylum seekers and others and are in breach of basic common law and human rights standards.

Why does this section/regulation need to be changed?

The right to personal liberty is among the most fundamental of all common law rights and the universally recognised human rights.

In July 2013, the United Nations Human Rights Committee communicated its views that the detention of 46 refugees with ASIO adverse security assessments was arbitrary and in breach of Articles 7, 9(1) and 9(4) of the ICCPR.

But refugees are not the only ones being arbitrarily or indefinitely detained under the Migration Act. There are also thousands of asylum seekers subject to mandatory detention. And in the last 12 months

a new category of arbitrarily detained persons has emerged – permanent and temporary visa holders who have been living lawfully in the community for years, many of them married to Australian citizens, some of them with children, who have had their visas cancelled following an ASIO adverse security assessment.

The right to personal liberty is among the most fundamental of all common law rights and the universally recognised human rights.

Australians with ASIO adverse security assessments are managed in the community. Non-citizen visa holders and refugees should be managed in the same way.

Stephen Blanks is the President of the NSW Council for Civil Liberties

THOMAS LIU



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

The one law or regulation I would change is actually just a 'guideline', but one that is made in application of the *Legal Aid Commission Act 1979* (NSW). That guideline is cl 3.4 of the Legal Aid NSW guidelines on granting legal assistance in civil law matters.

Why does this section/regulation need to be changed?

Clause 3.4 sets out when a grant of legal aid will be available in visa cancellation cases under s 501 of the *Migration Act 1958* (Cth). Section 501 allows the minister to cancel the visa of an Australian permanent resident on 'character' grounds, i.e. if that person has a lengthy criminal record.

In some cases where a person has been living in Australia since childhood, it can be said that their offending is a product of other failures as well as their own.

Often those subject to visa cancellation have been resident in

Australia their entire lives. The effect of cancellation under s 501 is removal and permanent exclusion from re-entering Australia.

In some cases where a person has been living in Australia since childhood, it can be said that their offending is a product of other failures as well as their own. The failure of our schools to educate them. The failure of our justice system to rehabilitate them. Yet they are punished by deportation both for their own offence and society's failures.

Despite these public failures, the availability of public legal assistance in NSW is strictly limited by cl 3.4 to cases where the person facing deportation is a refugee, suffers from a severe disability or has minor children who will be gravely affected.

Another criterion should exist to cover cases where there are other overwhelming humanitarian considerations.

Thomas Liu is a solicitor and was previously the Human Rights Fellow in the civil law division of Legal Aid NSW.



KUNAL SHARMA

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

I would change the conditions of Bridging Visa E to allow asylum seekers in the community awaiting determination of their protection visa status the right to work.

Why does this section/regulation need to be changed?

Asylum seekers in immigration detention may be granted bridging visas while they're awaiting a decision on their protection visa application (*Migration Act 1958* (Cth) pt 2 div 3 sub-div AF). One of the conditions of a bridging visa is that the holder must not engage in work (see *Migration Regulations 1994* reg 2.24; sch 2 cl 0511.611; sch 8 condition 8101).

Many [asylum seekers] have no financial independence, little or no structure to their lives, and no ability to pay for advice that they may need.

This applies to asylum seekers who arrived in Australia after 13 August 2012. Over 20,000 people living in the

community face this restriction. As a result, they are often exposed to poverty and hardship. Many have no financial independence, little or no structure to their lives, and no ability to pay for advice that they may need.

There are certain schemes to assist asylum seekers experiencing severe hardship. These programs, however, come nowhere close to providing sufficient support and, in any case, perpetuate dependence on welfare assistance in cases where the individual could – and would prefer to – work.

Pursuant to art 6 of the ICESCR, Australia has an obligation to take steps to confer on all people the right to work. Asylum seekers on bridging visas should be allowed to work, even if on a part time basis and with certain conditions attached.

Kunal Sharma is a Rhodes Scholar and a candidate for the Bachelor of Civil Law at Oxford University (2014 –15)

KATIE WRIGLEY



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

The removal and transfer powers in Part 2 Division 8 of the *Migration Act 1958* (Cth) which require asylum seekers who have come to Australia by boat to be removed offshore.

Why does this section/regulation need to be changed?

RACS strongly opposes processing asylum seekers at either Nauru or PNG because:

- Australia is responsible for violations of international law relating to the treatment of asylum seekers;
- organisations such as UNHCR, Amnesty International and the Human Rights Commission, that have visited Nauru and PNG, have been unequivocal in their conclusions that the conditions under which asylum seekers are detained do not meet basic human rights standards, do not provide safe or humane living conditions, and constitute arbitrary detention under international law;
- sending asylum seekers to Nauru and PNG is cruel and unnecessarily punitive. Asylum seekers are human beings who deserve to be treated

fairly and humanely;

- less harmful measures are available to save lives at sea and reduce people smuggling, such as increasing UNHCR's capacity to assess, support and resettle refugees around the world; and
- given the chance, refugees make great Australians. Refugees helped by RACS are vibrant and contributing members of Australian society, as mothers and fathers, nurses and engineers, students and volunteers, and more.

From our knowledge of the lived experience of RACS clients, and from our reading of the statistics on final acceptance rates, we know that those who come by boat are more commonly accepted to be refugees following a proper assessment than those who come by plane, and are likely to have had no other option in terms of real or permanent protection in any other country en route to Australia.

Katie Wrigley is the Principal Solicitor at the Refugee Advice and Casework Service (RACS). RACS is a specialised refugee legal centre and has been assisting asylum seekers on a not-for-profit basis since 1988.



DARREN JENKINS

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

I would amend the *Australian Security Intelligence Organisation Act 1979* (Cth) to require all ASIO warrants to be approved by a court and not just the Commonwealth Attorney General.

Why does this section/regulation need to be changed?

ASIO's warrant process should come into line with our traditional warrants framework to safeguard public confidence in ASIO's vital work...

Unlike police warrants, ASIO warrants do not require approval from a judge or a magistrate. Instead, the Commonwealth Attorney General decides whether or not to authorise a warrant. ASIO's warrant process should come into line with our traditional warrants framework to safeguard public confidence in ASIO's vital work and also to remove the prospect of the Attorney General's political imperative - to never be the Attorney who refused a warrant that

could have stopped a terrorist attack – unnecessarily impinging on all of our civil liberties.

There is no compelling reason why ASIO warrants should not be subject to scrutiny by our courts. Conversely, the rationale for court authorisation can be quickly illustrated. Imagine for a moment a State Police Minister signing off on Police warrants, or the State Attorney General deciding bail applications. It is unthinkable.

ASIO's indispensable work would benefit from increased transparency by giving the community greater confidence that not only is ASIO doing the right thing, but that it can also clearly be seen to be doing the right thing.

Darren Jenkins is a practising barrister and the Vice President of the NSW Society of Labor Lawyers.

SENATOR

THE HON JOSEPH LUDWIG



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

I would amend section 11C of the *Freedom of Information Act 1982* [Cth].

Why does this section/regulation need to be changed?

Whilst I've significantly changed this Act before – legislating Labor's 2009 reforms – there's one small tweak I'd like to see made: inserting a requirement in s 11C for government departments and agencies to publish the exact wording of each FOI request made and a statement of reasons from the decision maker.

requests had been made and why documents were or weren't released. It would mean applicants seeking similar documents could build on each other's requests, which would also reduce any duplication of requests. Publishing the reasons for a decision would allow for scrutiny of departmental decisions and open the door to further reform to allow review of requests by parties other than the initial applicant.

Senator Ludwig is a Senator for Queensland and a Barrister (Bar Association of Queensland).

This measure is designed to make government more transparent. It would allow the public to see what requests had been made and why documents were or weren't released.

This measure is designed to make government more transparent. It would allow the public to see what



HANNAH RYAN

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

Remove s 8(1)(e) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW), which allows a court to make a suppression order if it is necessary in the public interest and that public interest significantly outweighs the interest in open justice.

Why does this section/regulation need to be changed?

Open justice is at risk in Australia. WikiLeaks' revelation that the Victorian Supreme Court has issued a suppression order which forbids publication of the order itself is but the latest development in a trend of secrecy.

Section 8(1)(e) should be removed because it is unnecessary, and because it allows courts to indulge their increasing propensity to make suppression orders.

The Act provides a statutory basis to make such orders in NSW. Section 8(1) provides the grounds on which an order can be made. While paragraphs (a)-(d) enumerate specific grounds, such as that an order is necessary

to protect the administration of justice or to protect a person's safety, paragraph (e) acts as something of a catch-all.

The suggestion that a judge should undertake a balancing exercise between the identified public interest and open justice risks distorting the principled common law position – that open justice is paramount and should only be derogated from when truly necessary.

Although the subsection still requires an order to be 'necessary', it gives judges significant wriggle-room to determine what necessity means. While much of the discussion about courts' eagerness to suppress information has centred on Victoria, the Victorian statute wisely lacks an equivalent of paragraph (e).

The importance of open justice does not need repeating. Derogations should be rare and principled. While s 8(1)(e) remains, they may not be.

Hannah Ryan is a recent graduate of Sydney Law School.

CAMERON MURPHY



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

I would create a specialised Privacy Court with the power to issue certificates of identity and make a series of orders including the removal of information from the internet, and requiring organisations to produce copies of private information held and to correct any errors.

Why does this section/regulation need to be changed?

Privacy protection and identity crime are growing issues in Australia. As more people share private information on social media, the need for specialist competent courts to deal with privacy breaches and identity crime will grow. A specialist Privacy Court could help safeguard a person's identity and protect privacy in three ways:

First, more than 1.2 million Australians have been victims of identity crime. We need a mechanism that allows victims to re-establish their identity. A specialist Privacy Court could assist by issuing a certificate verifying the individual's identity, which can then be used

to prove identity with financial institutions.

Second, there is currently no effective recourse to prevent an imminent privacy breach or to stop a lesser breach becoming a larger one. We need a court that is able to conduct hearings on less than an hour's notice and make interim orders which can prevent privacy breaches. For example, 'revenge porn' is a growing problem. A woman came to me for assistance when her ex-boyfriend threatened to publish compromising photos of her on the Internet. We were unable to prevent their publication. While she has since received monetary compensation, the photos are still available online.

Third, a Privacy Court can act where people need to access and correct errors in information held about them by agencies and companies.

Cameron Murphy is the Labor candidate for East Hills in the 2015 State Election. He has previously served as the President of the NSW Council for Civil Liberties, a Board Member of the Anti-Discrimination Board of NSW and a Member of the Consumer, Trader and Tenancy Tribunal.



CHRISTOPHER PARKIN

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

I would insert a provision into the *Privacy Act 1988* (Cth) requiring parties to bear their own costs in applications for injunctions enforcing rights under the Act.

Why does this section/regulation need to be changed?

Although the potential sanctions for breach of the Australian Privacy Principles are significant, an individual's ability to insist on compliance is limited.

Complaints to the Office of the Australian Information Commissioner are free. Complaints will be investigated, conciliated and appropriate enforcement action may be taken. Unfortunately the Office is under-resourced and slow (with things likely to get worse when the Federal Government disbands it in December).

The spectre of an unfavourable costs order is likely to be a significant deterrent.

Alternatively, an injunction may be sought under s 98. Applicants taking this path risk paying the other party's costs if unsuccessful. The spectre of an unfavourable costs order is likely to be a significant deterrent.

Section 98 already recognises the problem by directing that applicants cannot be required to give undertakings as to damages for interim injunctions. The fact that the provision is so rarely invoked suggests the need for reform. Requiring parties to bear their own costs (eg. a provision like s 570 of the *Fair Work Act 2009* (Cth)) would go some way to giving the privacy principles some teeth without placing an undue burden on business.

Christopher Parkin is a freelance legal writer, researcher and lecturer with an interest in information law.

JAMES MACK



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

I would amend s 3 of the *Acts Publication Act 1905* (Cth) to require Acts to be published in a standardised machine readable format.

Why does this section/regulation need to be changed?

The reason why Facebook seems so clever is because it has a data format which identifies that there is a person, living in Sydney, who is lawyer and is friends with Julia. A machine is able to 'read' this data and tell that person they have a mutual friend in Bob, infer they went to university in Sydney and that they are likely to enjoy mango pickle.

Currently, the data format of published legislation only allows a machine to identify that there is a bunch of text with paragraph breaks. This stifles advancements in legal education, access to justice and productivity. If legislation were published in a machine readable data format, a line of text in the Racial Discrimination Act could be identified as a subsection relating to discrimination that declares

something as unlawful. At a click, a computer would then be able to match this line of text with other lines of text that share like qualities.

Success in this area is dependent on defining standards for a format. This is a difficult task and care is required, however it is not impossible and is assisted by the highly structured and logical nature of legislation. If the Commonwealth were to implement, hopefully other jurisdictions would follow [see for e.g. s 45C of the *Interpretation Act 1987* (NSW)].

Perhaps one day Facebook will be able to: suggest you like s 18C of the Racial Discrimination Act... reason you would oppose knee jerk changes to the Bail Act... infer you believe that years spent in immigration detention are a waste of humanity... recommend a republic to you... calculate that you support constitutional recognition of Indigenous Australians and then suggest you become a member of the NSW Society of Labor Lawyers.

James Mack is the Secretary of NSW Labor Lawyers and a Barrister at Level 22 Chambers.



TIM QUADRIO

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

Establish a Commonwealth Independent Commission Against Corruption, with the powers of a standing royal commission.

Why does this section/regulation need to be changed?

Currently the only dedicated anti-corruption body at the Commonwealth level is the Australian Commission for Law Enforcement Integrity (ACLEI). The Gillard Labor Government extended the jurisdictional coverage of ACLEI, however its focus remains limited to agencies engaged in law enforcement functions.

It is naive to think that corruption is only a problem in state and local governments.

We need a Commonwealth Independent Commission Against Corruption to cover all Commonwealth departments and

agencies. The commission should be established by legislation and be independent. It should be appropriately empowered to scrutinise the actions of public servants, ministers, ministerial advisers and members of parliament.

It is naive to think that corruption is only a problem in state and local governments. Earlier this year the ABC obtained a copy of an internal government document that reportedly identified almost 2,000 cases of corruption in Commonwealth government agencies between 2008 and 2011. The work of a permanent commission dedicated to exposing corruption in Canberra would not be pretty, but it is an important task that needs to be done.

Tim Quadrio is a commercial solicitor at William James. He previously served as a ministerial advisor to the Rudd/Gillard Labor government.

ELIOT OLIVER



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

I would amend s 304 of the *Commonwealth Electoral Act 1918* (Cth) to require public disclosure of political donations of \$1000 or more in amount or value.

Why does this section/regulation need to be changed?

Large, secret donations raise concerns about corruption and undue influence exerted by donors. The first step towards dealing with these concerns is making political donations more transparent.

Under the *Commonwealth Electoral Act 1918*, political donations do not have to be disclosed until they exceed \$12,800 (indexed to CPI). Large, secret donations raise concerns about corruption and undue influence exerted by donors. The first step towards dealing with these concerns is making political donations more transparent.

If we have learned anything from the rot uncovered by the ICAC

investigations over the past two years, it is that the Australian public should be better informed about money in politics. Transparency keeps governments accountable to the people they represent and political parties focused on the public interest, not special interests.

The Commonwealth Electoral Act should be brought in line with NSW electoral law so that political donations of over \$1,000 must be disclosed by both the donor and recipient. Donations to multiple branches of a political party should also be aggregated to ensure the law cannot be circumvented via several smaller donations. Harmonising State and Commonwealth thresholds will prevent donations being funnelled through the federal branches of a political party to avoid State disclosure regulations. And the \$1,000 threshold avoids placing an undue administrative burden on parties to disclose small, low-risk donations.

Eliot Oliver is currently on sabbatical completing postgraduate studies at University College London.



JOHN WHELAN

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

We should tilt the democratic balance of influence in favour of individuals over corporations by banning corporate donations to political parties.

Why does this section/regulation need to be changed?

The power of an individual's vote should not be diluted by the financial power of a corporation.

Individuals should have more influence than corporations. The power of an individual's vote should not be diluted by the financial power of a corporation.

To survive a Constitutional challenge the nuance of law reform required would make the very unfairly characterised 'Noodle Nation' seem as simple as a Tony Abbott grab for A

Current Affair. It needs to observe the two-part test outlined in *Lange* and refined in *Coleman v Power*:

- does the law burden freedom of communication about government; and
- if so, is the law adapted to serve a legitimate purpose compatible with responsible government?

As Attorney-General for a day I would insert a ban on corporate donations into Division 3 of the Commonwealth *Electoral Act 1918* (Cth).

I would welcome a challenge from the Big End of Town and am prepared to go down swinging in the High Court!

John Whelan is a soon-to-be barrister and an experienced professional in dispute resolution, including mediation, conflict coaching and group training. He is a former Senior Adviser to the Prime Minister and Chief of Staff to both the Minister for Justice and the Attorney-General.

PROFESSOR

GEORGE WILLIAMS AO



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

Section 53 of the Australian Constitution should be amended to prevent the events of 11 November 1975 happening again. The Senate should be prevented from again blocking a government's supply bills.

Why does this section/regulation need to be changed?

The Senate's failure to pass the supply bills in 1975 provoked a constitutional crisis that led Governor-General Sir John Kerr to dismiss Prime Minister Gough Whitlam.

It is naive to suggest that the Senate will never again fail to pass a government's supply bills. The only thing stopping this occurring is restraint and good sense on the part of Australia's major parties. Nothing has been done to remedy the flaw in the Constitution that enables a hostile Senate to hold a government to ransom.

This problem has been dealt with

elsewhere. The NSW Constitution has been amended to remove the power of its upper house to block a bill appropriating moneys for the ordinary annual services of the government.

It is naive to suggest that the Senate will never again fail to pass a government's supply bills. The only thing stopping this occurring is restraint and good sense on the part of Australia's major parties.

A similar change is needed to the national constitution. Section 53 should be amended to provide that the Senate may not reject or otherwise block the supply bills.

Professor George Williams AO is a Professor of Constitutional Law, Anthony Mason Professor, Scientia Professor and the Foundation Director of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales.



PROFESSOR
ELISABETH PEDEN

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

I would amend s 229 of the *Strata Schemes Management Act 1996* (NSW).

Why does this section/regulation need to be changed?

An Owners Corporation can sue and be sued. It “owns” the common parts of the property of a strata scheme, and is controlled by the owners of the various lots within the scheme. Section 229 of the *Strata Schemes Management Act* provides that when a Court makes a costs order against an Owners Corporation or requires payment of a sum by the Owners Corporation (for example, an order in favour of lot owners who have sued the Owners Corporation for failure to take care of the common property), the Court may order that the Owners Corporation levies particular lot owners in particular ways (usually excluding the successful lot owners).

costs in the absence of an order for costs or payment by the Owners Corporation, which could result in levies being struck that are not equitable...

The section does not provide for the making of orders for the payment of the Owners Corporations’ own costs in the absence of an order for costs or payment by the Owners Corporation, which could result in levies being struck that are not equitable in the circumstances. For example, if there is no order as to costs there is no express provision. Courts have indicated that the section ought to be amended: see eg *Xabregas v The Owners Strata Plan 79205* [2014] NSWSC 1027.

Dr Elisabeth Peden is a barrister, mediator and a Professor of Law at the University of Sydney.

The section does not provide for the making of orders for the payment of the Owners Corporations’ own

KIM RICHARDSON



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

Section 4 of the *Inclosed Lands Protection Act 1901* (NSW), which enables shopping centres to ban people from entering. This has a significant impact on people in remote, rural and regional areas.

Why does this section/regulation need to be changed?

The Act makes it an offence to enter 'inclosed lands' without the consent of the owner and without lawful excuse. The original intention of the Act was to limit entry to farms and other private property. However this definition has been expanded over time and is now very broad and includes public / private spaces such as shopping centres (*Director of Public Prosecutions (NSW) v Strang* [2011] NSWSC 259).

This has a disproportionate effect on vulnerable and disadvantaged people living in remote, rural and regional areas, who once banned will be prevented from accessing vital services...

A shopping centre may issue a banning notice to a person, thereby revoking its consent to that person entering the shopping centre. This has a disproportionate effect on vulnerable and disadvantaged people living in remote, rural and regional areas, who once banned will be prevented from accessing vital services located in the shopping centre, such as a chemist or a grocery store, even though the shopping centre may be the only place where these services can be accessed within the town.

There is no ability to appeal a banning notice once it has been issued.

The Act should be amended to either limit the definition of "inclosed lands" or to allow a person issued with a banning notice to appeal the notice.

Kim Richardson is a Senior Solicitor at the Hunter Community Legal Centre and the Convenor of the Community Legal Centres NSW Regional Rural Remote Issues Committee.



JANE NEEDHAM SC

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

Section 11 of the *Forfeiture Act 1995* (NSW), which allows the forfeiture rule to apply to persons found not guilty of crimes due to mental impairment, should be removed.

Why does this section/regulation need to be changed?

Section 11 seeks to punish a person financially where the criminal law may not punish them...

The forfeiture rule – whereby a person who unlawfully kills another may not benefit from the deceased’s estate – has been an unwritten rule of the common law for centuries. Prior to 2005, when s 11 was enacted, a person who was found not guilty due to mental impairment could still inherit from the deceased, consistently with that person’s lack of culpability for the death. Section 11 seeks to punish a person financially where the criminal law may not punish them; for example, where a mentally ill wife kills her husband, s 11 would enable the

husband’s children to seek to remove her from the line of succession in his estate. The section operates to treat a person who is not guilty of a crime as if they were – the rule applies “as if the offender had been found guilty of murder”. The second reading speech made it clear that the amendment was sought to “prevent mentally ill murderers from profiting from their crime”.

Leaving aside the comment that a person who is relevantly mentally ill is not a “murderer”, a more just approach, and one more in keeping with modern understandings of mental illness, would be to return to the exception to the forfeiture rule under common law. The law should recognise that a person who is found not guilty by reason of mental illness should not be treated as guilty of that crime and suffer punishment in a non-criminal context. The protections in s 11 (which are questions of “justice”) do not subtract from this fundamental proposition.

Jane Needham is the President of the NSW Bar Association and a barrister who specialises in Equity and Succession Law.



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and legacy of the 21st
Prime Minister of Australia,
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unity. Equality and quality of opportunity, equality
of life and more quality in life, go together."

- Gough Whitlam

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