

Inclusive
Independent
Innovative

**Law reform
in action**



Victorian
Law Reform
Commission





Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

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Information in this booklet is correct as at April 2020.

ISBN: 978-0-9943725-7-4

CHAIR

The Hon. Anthony North QC

COMMISSIONERS

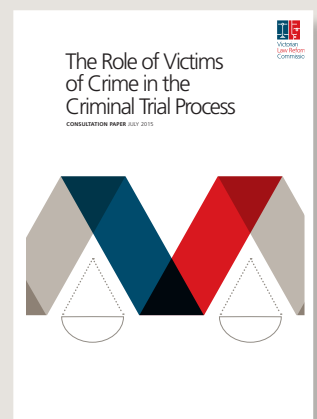
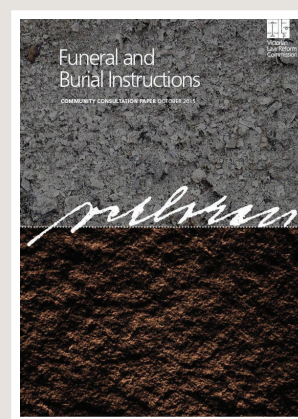
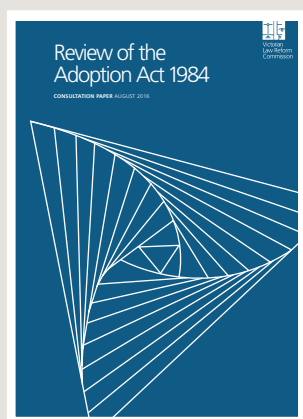
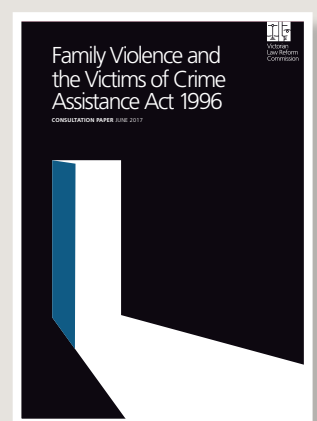
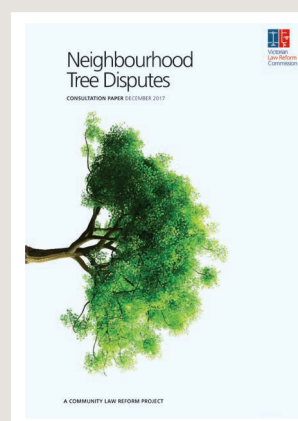
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Letterbox



The Victorian Law Reform Commission reviews Victorian laws and makes recommendations for change.

Sometimes laws are out of date, too complex, not working well, or out of step with community values. The Commission is an independent agency, and our job is to provide advice to the Government about how to reform the law.

Our recommendations are based on extensive consultations with the public, and anyone can make a submission to our projects. The Commission aims to improve the law for all Victorians.

When we complete a project, we report to the Attorney-General of Victoria with practical recommendations to make the law fairer, up to date, and more inclusive and accessible.

The Chair and the Commissioners

The Chair of the Commission is the Hon. Anthony North QC. Mr North was previously a judge of the Federal Court of Australia, and was appointed to lead the Commission in 2019. The Commissioners are appointed by the Attorney-General for a period of up to four years each. Commissioners are people with broad experience and knowledge of different areas of the law. The Commissioners' role is to decide on the contents of reports, including recommendations, published by

the Commission. For a current list of Commissioners, see lawreform.vic.gov.au/about-us/who-we-are/commissioners

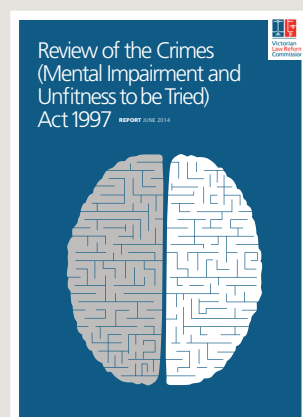
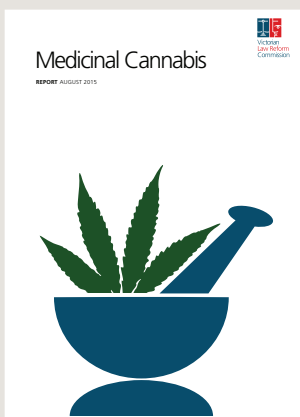
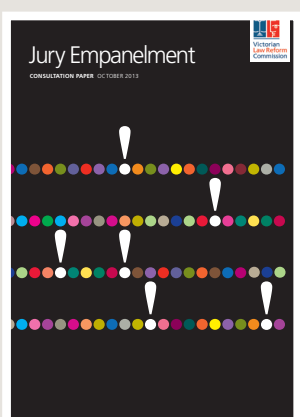
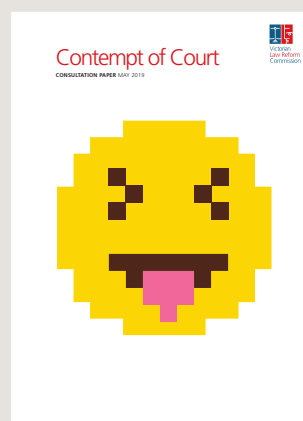
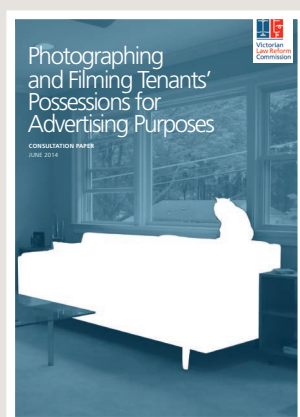
Staff

The Commission has a small staff that supports the Commissioners. Research and policy staff are allocated specific projects to work on. They carry out consultations, conduct research, draft and publish papers and reports, and generally advise the Commissioners.

Some staff are permanent, while others are hired to work for the length of specific projects. Staff members who work on projects almost always have law degrees. Many have practised as lawyers with government, in private practice, or the community sector.

Internships and work experience

As a small organisation the Commission does not have wide scope to accept interns. However we have partnered with a number of educational and community organisations on internship programs. Visit our website for further details. Unfortunately we are unable to accept work experience students outside our partnerships.



A selection of inquiries by the Commission. For a complete list see page 12.

Functions of the Commission

The functions of the Commission are set out in the *Victorian Law Reform Commission Act 2000* section 5.

- (1) The functions of the Commission are –
 - (a) to examine, report and make recommendations to the Attorney-General on any proposal or matter relating to law reform in Victoria that is referred to the Commission by the Attorney-General;
 - (b) to examine, report and make recommendations to the Attorney-General on any matter that the Commission considers raises relatively minor legal issues that are of general community concern if the Commission is satisfied that the examination of that matter will not require a significant deployment of the resources available to the Commission;
 - (c) to suggest to the Attorney-General that a proposal or matter relating to law reform in Victoria be referred to the Commission by the Attorney-General;
 - (d) to monitor and co-ordinate law reform activity in Victoria;
 - (e) to undertake educational programs on any area of the law relevant to a reference, whether past or current.

Why have a law reform commission?

The Victorian Law Reform Commission (VLRC) exists to provide independent advice to the Victorian Government on reforms to the law.

The VLRC is not the only body that provides advice on law reform, but it is the central law reform agency in Victoria. As a permanent law reform agency, the Commission is able to build skills and expertise in research and community consultation.

There are differences between the VLRC and other law reform bodies, such as royal commissions or parliamentary committees.

How is the VLRC different?

- > **Royal commissions** focus on one important issue and work for a specific period of time until their inquiry is finished. They have special powers including the power to subpoena witnesses and hear sworn evidence. In contrast, **the VLRC** is a permanent body that can review any area of law. It does not have the power to subpoena witnesses and hear sworn evidence.
- > **Parliamentary committees** are composed of members of parliament. In contrast, Commissioners of the VLRC are not politically aligned, and the VLRC is independent of government. Like royal commissions, parliamentary committees can subpoena witnesses and take evidence on oath.
- > **The VLRC** must report to the Attorney-General, a royal commission to the Governor, and a parliamentary committee to Parliament.

Why might laws need to change?

Laws may need to change for many reasons, including:

- > Changes in the attitudes and values of society (for example, it is now illegal to discriminate on the basis of sex, race or sexual preference; greater awareness of the needs of the victims of crime has led to victims gaining more rights).
- > Changes in technology (for example, the increase in digital photography and the use of smartphones affects the privacy of individuals).
- > Laws are out-of-date or too complex (for example, the laws about the directions that judges were required to give to juries had become too confusing, which made court cases go on too long and led to many appeals).

Where do our projects come from?

Law reform projects begin in one of two ways:

- > A reference from the Attorney-General
- > The Commission decides to begin a community law reform project.

References from the Attorney-General of Victoria

References from the Attorney-General constitute about 80 per cent of the work of the VLRC. The Attorney-General can ask the Commission to review any area of Victorian law in accordance with section 5(1)(a) of the Victorian Law Reform Commission Act.

The Attorney-General gives the Commission 'terms of reference' that state what issues the Commission is to consider, and a date by which the report must be ready. References may be large or small in scope. See page 12 for a complete list of all the VLRC's inquiries. At any one time, the VLRC is typically working on two references from the Attorney-General.

Community law reform projects

Community law reform projects usually begin with a suggestion from the community (in accordance with section 5(1)(b) of the Victorian Law Reform Commission Act.) Unlike references, the Commission chooses the community law reform projects it takes on. These projects constitute about 20 per cent of the work of the VLRC.

Anyone can suggest a community law reform project. Suggestions are often received from individual members of the public and community organisations. The Commission considers all ideas and takes on one new community law reform project approximately every two years.

Community law reform projects must meet the selection criteria of section 5(1)(b) of the Act. These projects must be 'relatively minor legal issues of general community concern' and 'not require a significant deployment of the resources available to the Commission', meaning the projects are limited in size and scope. These projects are smaller than references. They will be of benefit to the general community and/or to disadvantaged members of the community.

Examples of community law reform projects include:

- > *Birth registration and birth certificates.*
We recommended changes to make it easier for people to register the birth of a baby or get a birth certificate.
- > *Funeral and burial instructions.*
We recommended changes to reduce family disputes by making a person's instructions for their own funeral and burial legally binding.

For comprehensive information about all our references and community law reform projects, see our website lawreform.vic.gov.au.

How do we work?

For a flowchart illustrating this process, see pages 4–5.

When the Commission begins a project, the Chair appoints a number of Commissioners to oversee the project.

Research and expert input

The staff assigned to the project carry out research into relevant legislation and cases, consider similar laws throughout Australia and overseas, talk to people affected and identify the issues. A panel of experts may be appointed to provide assistance—for example, the Commission appointed an expert panel including psychologists, psychiatrists and other mental health professionals to a project involving mental impairment.

Consultations and submissions

The Commission publishes a consultation paper (or issues paper) for each project. This paper describes the current law and the problems with it, asks questions and invites the public to respond. Anyone can make a submission through our website, via email, or in documents sent to the Commission. Submissions are generally made public unless the person making the submission asks for it to be confidential.

The Commission consults with community members affected by the law, taking care to include disadvantaged groups. Commission staff travel to many parts of Victoria to consult as widely as possible. Online consultations are also an option. The purpose of consultations is to help the VLRC know and understand people's views about and experiences of the law. We also seek information through online surveys and written submissions.

The format of each consultation depends on who is present, and on the subject matter. Consultations can range from informal private conversations to large-scale public community meetings.

The Commission uses the information gathered via research, consultations, the advice of the expert panel and submissions as the basis for its recommendations. The recommendations are included in a report and delivered to the Attorney-General by the required date.

How the law changes

As required by law, the Attorney-General tables the Commission's reports in Parliament within 14 parliamentary sitting days of receiving them. After the tabling, the Commission publishes the report. Anyone can request a hard copy or read the report online at the VLRC website.

The Government decides whether to proceed with changes to the law based on the Commission's recommendations. The law only changes if and when Parliament passes new legislation. This may happen within a few months, or may take several years. The VLRC has no control over this part of the process.

The law reform process

EARLY STAGES

A PROBLEM WITH THE LAW IS IDENTIFIED

1

THE PROJECT STARTS: RESEARCH AND SCOPING

The Commission receives a reference (from the Attorney-General) or begins a community law reform project (based on a proposal from the community). A 'Division' of Commissioners (the whole Commission or a part of it) begins work on the project. Staff members are allocated to the project – usually a team leader, and up to three policy and research officers.

COMMUNITY INPUT

4

CONSULTATION PAPER AND CALL FOR SUBMISSIONS

The consultation paper provides relevant background, asks questions, and invites people to submit their opinions about whether the law should change and how.

RECOMMENDATIONS FOR CHANGE

7

REPORT

The report includes recommendations for reform agreed by all the Commissioners, along with evidence and reasons. The Commission completes its report and delivers it to the Attorney-General by the due date.

IMPLEMENTATION – CHANGING THE LAW

9

GOVERNMENT RESPONSE

The government decides whether to implement the VLRC's recommendations in full, in part, or not at all. It does not have to provide a formal response to the report and there is no set timeline for action.

2 INITIAL RESEARCH AND CONSULTATIONS

Staff members research the law in Australia and overseas, find relevant cases, talk to people affected by the law, and identify the problems and issues.

3 EXPERT PANEL

The Commission may appoint a panel of people with expert knowledge of the topic to provide advice.

5 CONSULTATIONS

The Commission meets with people and organisations who have experience and knowledge of the issues, including disadvantaged groups.

6 SUBMISSIONS

Anyone can make a submission, which is a statement of a person or organisation's views about the law and how to improve it. Submissions can be made via an online form or in documents sent to the VLRC.

8 TABLING

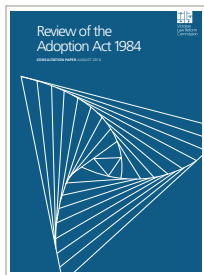
The report is tabled in Parliament by the Attorney-General within 14 Parliamentary sitting days, then published by the Commission on its website and in hard copy. The Commission's work on the project is now complete.

10 CHANGES TO THE LAW

If the Government decides to introduce new legislation, Parliament debates changes to the law, which may be accepted, amended or rejected. When new (or amended) legislation is passed by Parliament, and receives royal assent, the process is complete. The law changes on the date specified in the legislation.

Review of the *Adoption Act 1984* — a reference from the Attorney-General

The *Adoption Act* is more than 30 years old and needs to be modernised.



18 December 2015

The Attorney-General provided the Commission with the terms of reference.

10 August 2016

The Commission released a consultation paper outlining the current law in Victoria and presenting several options for reform.

16 September 2016

The Commission finished its consultation period and received 61 submissions by the due date.

28 February 2017

The Commission delivered its report to the Attorney-General by the due date.

7 June 2017

The report was tabled in the Victorian Parliament and published.

What was this project about?

This project concerned adoption laws in Victoria. The Commission was asked whether or not the *Adoption Act 1984* sufficiently prioritised the best interests of the child, was in harmony with community values, and upheld the principles of other laws and conventions including the United Nations *Convention on the Rights of the Child*.

Why did the law need to change?

When it was first introduced, the *Adoption Act 1984* made significant changes to the laws of adoption in Victoria. The 1984 Act replaced 'closed adoption' with 'open adoption'. 'Closed adoption' involved secrecy at every stage. 'Open adoption' means that information and contact can be shared between the birth parents and adoptive parents of a child.

However, more than 30 years have passed since the Act's introduction. Society's values have changed and in some ways the law is now out of step with community expectations on the needs of children and families. The technical language of the Act is not easy for most people to understand, and Parliament has amended it many times, making it even more complex.

What was the Commission's task?

The Attorney-General gave the Commission these terms of reference:

'At the time of its introduction, the *Adoption Act 1984* represented a significant change in Victorian adoption policy.

The government recognises that adoption is complex, and past adoption practices have resulted in significant trauma for people affected by those practices. The government also acknowledges the positive experience of adoption for many Victorian children, adult adopted people and their families.

To ensure that the *Adoption Act*, now over 30 years old, meets the needs of the children and families it affects, it is time to review the Act to ensure:

- > The best interests of the child are paramount
- > It is consistent with contemporary law in relation to family and community
- > It operates harmoniously with other relevant areas of law that have developed since the introduction of the *Adoption Act*
- > It is structurally sound and in accordance with contemporary drafting practice.

Accordingly, the Victorian Law Reform Commission ('the Commission') is requested to provide recommendations to government on the modernisation of the *Adoption Act 1984* and the *Adoption Regulations 2008*.'

For the complete terms of reference, see lawreform.vic.gov.au.

The Commission was not asked to consider intercountry adoption programs or commercial surrogacy (which are national, not state matters) nor adoption by same-sex couples (which has already been legislated in Victoria).

What were the issues?

Lifelong effects of adoption

Adoption has lifelong emotional and legal effects for the child and their natural and adopted families. It is important for decision makers to consider the effects of adoption into the adulthood of the child, not just in the present.

Trauma

Past forced adoption practices have had traumatic effects on the people involved. Adopted people have often struggled with psychological and emotional trauma, even when their adoptive families were loving and supportive.

Openness

Despite the introduction of 'open adoption', adoption processes still involve secrecy:

- > Records (such as those relating to adoption orders) are often closed and information restricted, and court orders are needed to access these.
- > Natural parents and adoptive parents are not told each other's full names.
- > Proposed adoptive parents are not allowed to see the adoptive child's birth certificate and are not told the child's surname.
- > Adoptive parents are not required to tell a child that they are adopted.
- > Court proceedings about adoptions are not open to the public.

Participation of the child

The child should be at the centre of any adoption process, and the law should allow children to make their views known.

Support

Ongoing support is needed even after an adoption process is formally complete. Support should be made available for everyone involved in an adoption process, including families, siblings and subsequent generations.

Transparency and clarity

The law on adoption should be made easier to understand, and the process of making decisions about adoptions should be more

open. If the law is clear, this will help everyone — adoption agencies, adoption information services and applicants for adoptions — to make better decisions about adoptions.

What did the community say?

The Commission undertook 38 consultations across Victoria with individuals and organisations who had personal experience with adoption laws or specialist knowledge about adoptions. Consultations were held with people who had been adopted and their parents, groups representing adopted people, adoption agencies, lawyers with expertise in adoption matters and Aboriginal and Torres Strait Islander organisations.

The Commission received 61 written submissions, including from adopted people and their families, academics, medical practitioners, community organisations and religious groups. Most of these submissions are available on the Commission's website.

What was recommended?

The report, *Review of the Adoption Act 1984*, makes recommendations to modernise the law of adoption in Victoria and ensure that it is consistent with other laws. The central recommendation is that the current Act should be repealed and replaced with a completely new Adoption Act.

The Commission recommended that the new Act should provide for the following:

- > Adopted people should be able to obtain integrated birth certificates that show the names of their natural parents and adoptive parents—not just adoptive parents.
- > The same criteria should apply to single people applying to adopt as to couples.
- > An independent children's lawyer should be appointed for every child in the adoption process.
- > Every adoption should have a court-approved adoption plan with details about contact arrangements, information exchange and other aspects of the adoption.

- > It should be easier for children and relatives to obtain information under a new 'access to information' scheme.
- > There should be more consistency across Victoria and between agencies in the treatment of applicants for adoption.
- > Religious exemptions under the *Equal Opportunity Act 2010* (Vic) should not apply to publicly-funded adoption agencies. It should not be possible for religious bodies to refuse to provide services to LGBTI applicants.
- > There should be a state-wide register of approved applicants to adopt a child.

People involved in adoptions should have access to more support through their lives, such as counselling, mediation and financial grants.

The report was tabled in the Parliament of Victoria on 7 June 2017.

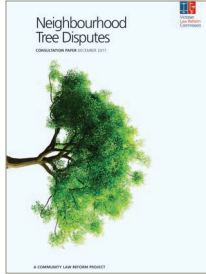
More information

More information about this project, including the report, the consultation paper and many of the submissions, can be viewed on the Completed Projects page of the Commission's website.

Neighbourhood Tree Disputes

— a community law reform project

The law around tree disputes is complex, confusing and they are hard to resolve.



8 June 2017

The VLRC commenced a review of the law regarding neighbourhood tree disputes.

December 2017

The Commission published a consultation paper explaining the current law, asking questions about how the law should change, and inviting the public to make submissions by 28 February.

January 2018

The Commission published a video on its website about neighbourhood tree disputes.

February 2018

38 submissions were received which were published on the VLRC website. Submissions came from members of the public, arborists, councils, courts and lawyers, among others.

February–March 2018

The Commission consulted with stakeholders including community members, arborists, councils, courts and Aboriginal Victoria.

April 2017

127 responses were received to an online survey about neighbourhood tree disputes.

July 2019

The Commission delivered its report including 63 recommendations to the Attorney-General.

What was this project about?

The project was about disputes which arise between neighbours because of trees growing on private land.

Trees are a valuable part of our urban and suburban environment. However, trees sometimes disturb neighbours' use and enjoyment of their own land. Tree disputes are surprisingly common and can be a source of ongoing disagreement and tension between neighbours.

Neighbours sometimes argue about overhanging branches, roots that cause damage to foundations and drains, unsafe trees that create hazards and the loss of vegetation.

Why did the law need to change?

The law in relation to tree disputes in Victoria is difficult to find and use. There is no single Act of Parliament relating to tree disputes. Instead, there are various state and local laws that relate to vegetation, heritage, the environment, planning and fences. The law on tree disputes is also found in the common law (established by court cases) but common law principles don't neatly apply to tree disputes. It is not always clear what people are required to do by law about their trees or their neighbours' trees.

The processes to resolve tree disputes are confusing and expensive. Many people are not sure of their rights and responsibilities regarding trees on private land, and information is hard to find. Often disputes remain unresolved. Court cases are expensive and time-consuming, the result is uncertain, and they are not a realistic option for most people.

The law needs to be clearer and there should be a better process to resolve disputes.

Origin of the project

Under the *Victorian Law Reform Commission Act 2000*, section 5(1)(b), the Commission has the power to initiate some of its own projects without a reference from the Attorney-General. These projects must be "relatively minor legal issues of general community concern" and are known as community law reform projects.

The Neighbourhood Tree Disputes project arose from community enquiries and suggestions that the law should be improved. The Dispute Settlement Centre of Victoria (DSCV) also advised the Commission that community members often ask for help mediating tree disputes with their neighbours. The Commission considered the matter and decided this would be a suitable community law reform project.

The Commission's task

The Commission reviewed the legal framework for resolving disputes between neighbours about trees on private neighbouring land that cause damage and/or harm. It considered whether the law should be reformed to provide more just, effective and timely ways to resolve these disputes.

All relevant documents and publications are available on the Commission's website at lawreform.vic.gov.au

What did the community say?

Community members told the Commission that they found it hard to resolve neighbourhood tree disputes because the law is confusing, and they do not know who can assist them. Other submissions said that the law was unclear because there are too many planning laws and local laws that overlap. Many responses stated there is no clear process for resolving disputes, and there is a lack of clear remedies. Very few people take legal action, because it is too expensive and time-consuming to go to court, but there is no easier, cheaper, reliable method.

There was overwhelming support for the introduction of a new dedicated Act to better help people resolve their disputes.

Report and Recommendations

The Commission's key recommendation was to introduce a new Neighbourhood Tree Disputes Act in Victoria to provide clarity to the law and guidance to the community on how to resolve tree disputes. A new Act would be the best way to ensure the fast, cheap and effective resolution of these disputes. Some other states have already enacted legislation to govern the resolution of tree disputes.

The new Act should assist the community to resolve their own disputes informally. The Commission recommended more community education to help people understand the new Act, how to prevent disputes arising, how to resolve a dispute, and what assistance is available. This means that fewer disputes would need to be resolved through a formal process.

When disputes can't be settled informally, the Commission recommended that the Victorian Civil and Administrative Tribunal (VCAT) should make decisions about tree disputes, with the assistance of tree experts (such as arborists). VCAT is much cheaper and easier to navigate than a court. The Act should provide clear principles to assist VCAT to make its decision. VCAT should be able to make orders to provide remedies when a tree causes damage to property or harm to anyone on the neighbour's land or is likely to do so, such as tree works and the payment of compensation for property damage.

The Act should also define which trees and land the Act applies to; what processes should be followed in a formal dispute; the roles of experts; and matters that VCAT must consider (including the location of the tree and its health, its environmental and aesthetic value and the cultural importance of particular trees).

The Commission recommended that the new Act should be reviewed after five years to check that it is working well.

To view all 63 recommendations, visit the VLRC's website.

What happened next?

The Attorney-General launched the report at the Victorian Parliament in November 2019 and stated that the government intended to implement the Commission's recommendations.

More information

Visit lawreform.vic.gov.au and look under All Projects for more about Neighbourhood Tree Disputes.

Community education and school visits

Staff members from the Commission visit schools, TAFEs, universities, and professional and community groups across Victoria to explain the work of the Commission. This is a free service.



Resources

We produce free educational resources for students and the community, including posters.

Free copies of posters and class sets of this booklet can be requested by phone or email or downloaded from the 'Students and teachers' section of our website, where you can also find videos explaining aspects of the legal system and law reform.

We produce a podcast, 'Old Law, New Law' which you can find at <https://vlrc.podbean.com/>

Request a speaker

If you would like someone from the VLRC to present to your class or group, please complete the 'Request a speaker' online form in the 'Teachers and students' section of our website. If we cannot visit you in person, we may be able to organise an online presentation.

Have your say

The Commission welcomes community input.

Tell us your idea for changing the law. Do you have an idea for a Victorian law that you think needs to change? Contact our community law reform team or complete the online form on our website (look for 'About community law reform' under the Projects menu). Please first make sure the law you want to change is a Victorian law (not a Commonwealth law).

Tell us what you think

If you want to contribute to a project, you can participate in consultations or make a submission. We often gather the views of the community through online surveys. Check our website to find out which projects are currently open for submissions.

If you want to make a submission you can complete an online form on our website, send us an email or letter, speak to us in person or over the phone. We want to hear your opinions and experiences about the laws we are looking at.

Keep up to date with law reform

To stay in touch with the Commission's work, follow us on Facebook or Twitter (@VicLawReform), listen to our podcasts at vlrc.podbean.com, and subscribe to our e-newsletter for a quarterly round up, via lawreform.vic.gov.au/contact-us

Do you have a question for the Victorian Law Reform Commission? Email us at law.reform@lawreform.vic.gov.au

Our work so far

This is a list of projects the Commission has worked on.
The date in brackets refers to the reporting date.
For more information visit lawreform.vic.gov.au.

Red denotes community law reform project

Criminal Liability for Workplace Death and Serious Injury in the Public Sector (2002)

Disputes between Co-owners (2002)

Failure to Appear in Court in Response to Bail (2002)

Workplace Privacy (2005)

People with Intellectual Disabilities at Risk: a Legal Framework for Compulsory Care (2003)

Sexual Offences (2004)

Defences to Homicide (2004)

Workplace Privacy (2005)

Uniform Evidence Law (2006)

Review of Family Violence Laws (2006)

Residential Tenancy Databases (2006)

Assisted Reproductive Technology and Adoption (2007)

Review of the Bail Act 1997 (2007)

Civil Justice Review (2008)

Abortion (2008)

Assistance Animals (2009)

Jury Directions (2009)

Surveillance in Public Places (2010)

Protection Applications in the Children's Court (2010)

Review of the Property Law Act 1958 (2010)

Easements and Covenants (2010)

Supporting Young People in Police Interviews (2010)

Sex Offenders Registration (2011)

Guardianship (2012)

Birth Registration and Birth Certificates (2013)

Succession Laws (2013)

Jury Empanelment (2014)

Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (2014)

The Forfeiture Rule (2014)

Trading Trusts—Oppression Remedies (2015)

Photographing and Filming Tenants' Possessions for Advertising Purposes (2015)

Medicinal Cannabis (2015)

Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries (2016)

The Role of Victims of Crime in the Criminal Trial Process (2016)

Funeral and Burial Instructions (2016)

Adoption (2017)

Review of the Victims of Crime Assistance Act 1996 (2018)

Access to Justice: Litigation Funding and Group Proceedings (2018)

Neighbourhood Tree Disputes (2019)

Contempt of Court (2019)

Committals (2020)

Improving the Response of the Justice System to Sexual Offences (2021)

Jurors with Hearing or Visual Impairments (2021)

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