Australian Government

Australian Law Reform Commission

THE FUTURE OF LAW REFORM:

A SUGGESTED PROGRAM OF WORK 2020-25

December 2019

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This Report reflects the law as at 1 November 2019.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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ISBN: 978-0-6482087-6-1

Citation: Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020-25* (2019).

Printed by Fineline Print & Copy Service, NSW

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Acknowledgements

The ALRC gratefully acknowledges that it has received significant and generous support in a voluntary capacity from a number of individuals and organisations in the course of this project, including:

- The experts involved in public seminars:
    - Professor George Williams AO, Professor Rosalind Dixon, Gemma McKinnon, and Dr Paul Kildea;
    - Professor Sally Wheeler OBE, Associate Professor Matthew Zagor, Dr Lesley Seebeck, Professor Peter Leonard, and Dr Imogen Saunders;
    - Professor Matthew Harding, Professor Cheryl Saunders AO, Professor Adrienne Stone, Professor Susan Kneebone, and Katie Robertson;
    - Professor Jonathan Fulcher, Dr Justine Bell-James, Dr Russell Reichelt, and Professor Karen Hussey.
- The organisations that co-hosted public seminars: the University of NSW (Gilbert + Tobin Centre of Public Law); the Australian National University (Law Reform and Social Justice); the University of Melbourne (Centre for Comparative Constitutional Studies); and the Law Society of Western Australia.
- Professor Simon Rice OAM, who spearheaded and coordinated the work of a significant number of student volunteers and their academic advisors (listed under 'Participants') at the University of Sydney, to prepare literature reviews on shortlisted law reform topics.
- Professor Jeffrey Giddings, who has coordinated Monash University Student Clinic placements for the ALRC for some years and who oversaw the students (listed under 'Participants') conducting preliminary research for this project.
- Professor Peter Billings, who conducted consultations and collated submissions from a number of practitioners and other experts.

Executive Summary

Overview

This report seeks to identify the most pressing areas for law reform in Australia that would be suitable for an inquiry by the Australian Law Reform Commission (ALRC). The suggestions in this report are made for the assistance, and consideration, of the Commonwealth Attorney-General, consistent with the *Australian Law Reform Commission Act 1996* (Cth). If accepted, the topics set out in this report could form a set program of work for the ALRC over the next five years. This is the first time the ALRC has undertaken this process.

The objectives of the Future of Law Reform project include efficiency, proactivity, and inclusiveness. An agreed program of work for a period of years in advance is likely to enhance the efficiency of the ALRC's work. In addition, a more proactive approach to the identification of law reform issues facilitates a more systematic review of Australia's laws. Finally, opening up conversations about future inquiry topics to the general public acknowledges the fact that, in the words of its inaugural Chairman the Hon Michael Kirby AC CMG, law reform is 'too important to be left to the experts'.

Process

Chapter 1 explains the process adopted by the ALRC, which reflects that of the Law Commission of England and Wales. It has included research, broad consultation, and the analysis of ideas against set criteria: importance; impact; suitability; effectiveness; and jurisdiction.

The ALRC released two preliminary research papers; held six public seminars and webinars; received over 400 responses to its online survey; involved law students from two universities in research; and held a number of consultations (including with government departments) in person, via telephone, and via correspondence. The ALRC gratefully acknowledges the many individuals who volunteered their time and expertise in this process.

The suggested inquiry topics contained in this report thus reflect a combination of public interest, expert opinion, governmental commitment, and ALRC capability.

Benefits of the project have included: an opportunity for the public to express views on the appropriate role of the ALRC; gaining a sense of the public's priorities and concerns regarding Australian law; reinvigorated debate about constitutional reform; a fresh approach to the ALRC's engagement with stakeholders; and the identification of future opportunities for collaboration.

Suggested program of work

Chapter 2 outlines the suggested program of work. It comprises five suggested references on topics relating to automated decision making, principle-based regulation of financial services, defamation, press freedom and public sector whistleblowers, and legal structures for social enterprises. These are the topics that the ALRC has assessed as the most suitable and pressing for future law reform inquiries.

Automated decision making and administrative law

A future law reform inquiry could consider whether reforms are necessary to ensure that automated decisions made by government agencies are fair, transparent, accountable, and timely. The ALRC suggests a 24 month timeframe.

Principle-based regulation of financial services

A future law reform inquiry could consider whether reforms to the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth), and any other Commonwealth law should be made in order to simplify and rationalise the regulation of financial services, consistent with recommendations 7.3 and 7.4 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The ALRC suggests a timeframe of 36 months, with potential for interim reports on discrete aspects.

Defamation

A future law reform inquiry could consider whether reforms to the Model Defamation Provisions and any other Commonwealth laws should be made in order to modernise, rationalise, and enhance the law of defamation and its practical application. The ALRC suggests a 24 month timeframe.

Press freedom and public sector whistleblowers

A future law reform inquiry could consider whether reforms to Commonwealth laws should be made in order to appropriately protect public interest journalistic activity, and to protect whistleblowers in the public service. The ALRC suggests a 24 month timeframe.

Legal structures for social enterprises

A future law reform inquiry could consider whether reforms should be made to the *Corporations Act 2001* (Cth), the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), and any other Commonwealth laws to provide for an appropriate corporate structure for social enterprises. The ALRC suggests a 12 month timeframe.

Other significant topics

Chapter 3 describes eight additional law reform topics that the ALRC considers to be of significance, but which are not included in the suggested program of work for a variety of reasons. The ALRC invites the Government to consider the topics in this chapter as potential alternative topics to those suggested above, subject to the considerations set out in the chapter.

The other significant topics are:

- the establishment of a standing body to oversee ongoing reform of the *Australian Constitution*;
- coherent, effective, aligned, streamlined, and clear laws for environmental protection;
- simplifying and enhancing the operation of migration legislation;
- drafting statutes to enhance the coherence, readability, and useability of the law, especially in light of the anticipated transition to digital legislation;
- the rights of creditors of an insolvent trustee, particularly when trust assets may be insufficient to meet creditors' claims;
- uniformity or complementarity between state and territory surrogacy laws;
- regulation of debt management services, 'buy now pay later' services, or services targeting people at risk of financial hardship; and
- human tissue laws that can accommodate emerging technologies, are nationally consistent, and do not operate as barriers to organ and tissue donation.

1. Introduction

Contents

Overview

1.1 What are the most pressing areas for law reform in Australia in 2019? Of those topics, which would be suitable for an inquiry by the Australian Law Reform Commission (ALRC)? This report seeks to answer these questions. The report follows broad public consultation and research over a period of eight months, and sets out a number of potential topics that may be suitable for future inquiry by the ALRC. The suggestions in this report are made for the assistance, and consideration, of the Commonwealth Attorney-General. If accepted, the topics set out in this report could form a set program of work for the ALRC over the next five years. It is the first time the ALRC has formally undertaken this kind of process.

1.2 This project is an initiative of the ALRC itself, and has not been produced in response to any request by the Attorney-General. Through this project, the ALRC has sought to take a more proactive approach to the identification of appropriate matters for inquiry. Having a proposed multi-year program of work in place is expected to enhance the efficiency and effectiveness of the ALRC's work.

1.3 The *Australian Law Reform Commission Act 1996* (Cth) provides for the ALRC to inquire into only those matters referred to it by the Attorney-General. However, s 20(1) of that Act also contemplates that those matters may be 'at the Commission's suggestion'. This report thus represents suggestions to the Attorney-General by the ALRC for potential future law reform inquiry topics.

1.4 The project has involved extensive public consultation on potential topics, reflecting the ALRC's longstanding commitment to broad public participation in law reform. The ideas and priorities of members of the public have enabled identification of a broader range of possible inquiry topics than would otherwise be possible.

What makes a good inquiry topic?

1.5 The ALRC is an independent, non-political Commonwealth agency. Its mandate is to make recommendations to government in order to inform the development, reform, and harmonisation of Australian laws and related processes through research, analysis, community consultation, and reports.

1.6 The ALRC is required by law to make recommendations for reform that:

- bring the law into line with current conditions and ensure it meets current needs;
- remove defects in the law;
- simplify the law;
- adopt new or more effective methods for administering the law and dispensing justice; and
- provide improved access to justice.[1]

1.7 The ALRC can make recommendations that government should make or consolidate particular Commonwealth laws, repeal unnecessary laws, work towards uniformity between state and territory laws, or facilitate complementary Commonwealth, state, and territory laws.[2]

1.8 The ALRC makes recommendations regarding policy development, but does not conduct inquiries into matters which are primarily matters for political judgement. In addition, the ALRC does not have investigative powers and does not conduct inquiries into alleged wrongdoing.

1.9 This description of the ALRC and its role is provided as context, as a good law reform inquiry topic is one that plays to the ALRC's strengths. A good law reform topic is one where independent research will make a meaningful contribution to the legal and policy debate.[3] The ALRC starts each inquiry with questions and not with answers. A topic in respect of which there are divergent views, but views amenable to persuasion on the evidence, is ideal. Inquiries where the answers are not self-evident, and as to which research and engagement will elicit potential new approaches, are well suited to the ALRC. In contrast, questions for which a number of alternative answers are known, but in respect of which the choice of approach is essentially to be determined as a matter of policy, are primarily political questions best left to the Parliament; not the ALRC.

1.10 The ALRC's process is defined by open and transparent consultation that is conducted at arm's length from government.[4] Speaking of the ALRC's consultation

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1 *Australian Law Reform Commission Act 1996* (Cth) s 21(1).

2 Ibid s 21(1)(b)–(d).

3 The Hon. Michael Kirby AC CMG, 'Changing fashions and enduring values in law reform' (Speech, Conference on Law Reform in Hong Kong: Does it Need Reform?, The University of Hong Kong, 17 September 2011).

4 The Hon Michael Kirby AC CMG, 'Are We There Yet?' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 433, 435–7.

process, the inaugural Chairman of the ALRC the Hon Michael Kirby AC CMG has noted that:

> Sometimes it added perspectives that the experts had missed or identified sensitivities that need to be addressed. Occasionally it repaired the imbalances between the well organised lobby groups and the interests of ordinary people. It provided a forum to test expert ideas in civil society and to question intelligent laymen about their views and experience.[5]

1.11 Accordingly, a good law reform topic is one where extensive consultation may elicit new perspectives and ideas and enable individuals with diverse views to contribute to the law reform process.

1.12 Law reform is more than a technical inquiry into defects in the law or a process aimed at simplifying statutes. Law and policy are intrinsically linked and law reform is but one policy tool available to policy makers. A good law reform topic will have a broader policy context, but at its heart will involve the identification of existing or potential legal problems that seek solutions from the ALRC. As the Hon Michael Kirby has explained, law reform is built on 'the technique of conceptualising the problem and bringing in social data and seeing the legal problem in its social context.'[6]

1.13 Equally important is a commitment to implementation by government. The ALRC is not a think tank but part of the government. Accordingly, the ALRC is committed to producing inquiry reports that are useful to government. Thus, good law reform inquiry topics are relevant to government, and a key consideration is whether government has committed to consider implementing the recommendations.

Objectives and outcomes

1.14 The objectives of the Future of Law Reform project include efficiency, proactivity, and inclusiveness.

1.15 To date, the ALRC has generally had little or no advance notice regarding its future inquiry work; terms of reference are routinely provided to the ALRC at approximately the same time as they are made public at the commencement of an inquiry. This presents difficulties for planning and structuring the ALRC's team and arrangements appropriately. In contrast, having an agreed program of work for a period of years in advance is likely to enhance the efficiency of the ALRC's work. In particular, being able to plan for the ALRC's future workload beyond its current inquiries is expected to be advantageous. For example, it may be of assistance to know in advance what particular legal expertise might be most relevant when recruiting new legal staff.

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5 Ibid 436.

6 The Hon Michael Kirby AC CMG, 'Forty Years on — Lessons of the ALRC' (Remarks at the ALRC 40th Anniversary Celebration, Federal Court of Australia, Sydney, 23 October 2015).

1.16 In addition, a more proactive approach to the identification of law reform issues is anticipated to enable more systematic review of Australia's laws. It can take greater consideration of recent, current, and imminent inquiries in other jurisdictions, both internationally and in the states and territories of Australia. Furthermore, this approach is expected to give rise to inquiries which prioritise more enduring and fundamental concerns with aspects of the law, rather than more reactionary topics addressing issues of concern at a particular point in time.

1.17 As noted above, inclusivity has long been a hallmark of the ALRC's approach to its inquiry work. The ALRC has consistently sought to assess the impact of the law on the general public, and to take into account the views and needs of the public, as well as legal stakeholders, in developing recommendations. However, the same approach has not consistently been taken to the identification of inquiry topics. Early reports of the ALRC noted the lack of any systematic mechanism for 'collecting and channelling worthwhile suggestions for law reform put forward by people from all walks of life'.[7] To the extent that discussions have occurred regarding potential future topics, they have principally been held between the Attorney-General's Office, the Attorney-General's Department (Cth), and the ALRC. By opening up these conversations to stakeholders and the general public, the ALRC seeks to apply the same philosophy as it has in other areas of its work: that law reform is 'too important to be left to the experts'.[8]

1.18 This report and its suggested inquiries are the most immediately apparent outcomes of this project. However, there have been a number of other less tangible benefits arising. The public has had an opportunity to reflect, and express views, on the appropriate role and focus of the ALRC. In turn, the ALRC has been able to gain a sense of the public's priorities and concerns regarding Australian law, which may be able to inform its approach to any future inquiry. By highlighting difficulties associated with reform of the *Australian Constitution*, the ALRC has reinvigorated debate about appropriate approaches and institutional structures which might best facilitate that process. Finally, the project has enabled a fresh approach to engagement with traditional stakeholders such as other law reform agencies, legal professional bodies and other statutory agencies, and the consideration of potential collaborative activity.

Project methodology

Models in other jurisdictions

1.19 This is not the first time that the ALRC has made suggestions to the Attorney-General about potential inquiry topics.[9] However, this formal project collecting law

7 Australian Law Reform Commission, *Annual Report 1978* (Report No 10) 33.

8 The Hon Michael Kirby AC CMG, 'The Forensic Sciences and Law Reform' (Speech, The Australian Seventh International Symposium of the Forensic Sciences, Sydney, 10 March 1981).

9 See, eg, Australian Law Reform Commission, *Annual Report 1976* (Parliamentary Paper No 340/1976) 47.

reform ideas from the public is the first of its kind for the ALRC. Other jurisdictions have provided methodological models for the ALRC to consider and adapt.

1.20 Notably, the Law Commissions of the United Kingdom have a statutory mandate to take and keep all the law under review with a view to its systematic development and reform and to prepare and submit to the Lord Chancellor programs for the examination of different branches of the law with a view to reform.[10] The Law Commission of England and Wales is currently implementing its 13th Programme of Work.

1.21 Before deciding what projects to take forward, the Law Commission takes views from judges, lawyers, government departments, the not-for-profit and business sectors, and the general public. It considers whether to review an area of law against published criteria. Before approving the inclusion of a law reform project in a Law Commission Programme, the Lord Chancellor will expect the Minister with relevant policy responsibility to give an undertaking that there is 'a serious intention to take forward law reform in this area'.[11] This enables the Law Commission to focus on projects with a real prospect of implementation.

1.22 The then Lord Chief Justice of England and Wales, Lord Thomas, observed in the Sixth Scarman Lecture in June 2017 that its approach to the law reform process is a core strength of the Law Commission.[12] The ALRC has paid close attention to the approach of the United Kingdom in designing this project.

1.23 Several states and territories in Australia similarly have processes in place for law reform agencies proactively to suggest law reform topics to government.

1.24 The legislation underpinning the Queensland Law Reform Commission is the most similar to that in the United Kingdom. Namely, it requires the Commission to 'keep under review all the law applicable to the State with a view to its systematic development and reform' and to 'prepare and submit to the Minister … a program for the examination, in order of priority, of different branches of the law for the purposes of reform'.[13] A Protocol helpfully sets out in some detail the procedure adopted by the Commission in developing its programs, including targeted consultation, assessment against selection criteria, and liaison with the Minister and the Attorney-General's Department (Qld).[14]

1.25 Similarly, legislation requires the Law Reform Commission of Western Australia to 'prepare and submit to the Attorney General from time to time proposals for the review of any area of law with a view to reform, and for this purpose may consider any proposals for the reform of the law which may be made to it by any person'.[15] Members

10 *Law Commissions Act 1965* (UK) s 3(1).
11 Law Commission of England and Wales, *Protocol between the Lord Chancellor (on Behalf of the Government) and the Law Commission* (Law Com No 321, March 2010).
12 The Rt Hon Lord Thomas of Cwmgiedd, '"Law Reform Now" in 21st Century Britain: Brexit and Beyond' (Sixth Scarman Lecture, 26 June 2017) [45].
13 *Law Reform Commission Act 1968* (Qld) s 10.
14 Queensland Law Reform Commission, *Protocol for the Development of Proposed Programs* (2014).
15 *Law Reform Commission Act 1972* (WA) s 11.

of the public are encouraged to make suggestions for law reform to the Commission, and these suggestions may be submitted to the Attorney General.[16]

1.26 New South Wales legislation does not mandate the preparation of a program of work, however the NSW Law Reform Commission invites members of the public to make suggestions at any time about laws that need to be changed. The Commission then considers whether to suggest that the Attorney General refer the matter to the Commission for inquiry.[17]

This project

1.27 In summary, the methodology for this ALRC project has included research; consultation with stakeholders (including government departments); public submissions via an online survey; public seminars and webinars; and analysis of ideas against set criteria.

1.28 To begin with, the ALRC conducted preliminary research of: recent and publicly available suggestions for law reform in Australia; comments in Australian court judgments suggesting a potential need for law reform in particular areas; and common topics canvassed by law reform agencies in other jurisdictions. Students from Monash University (listed at the front of this report) assisted with this research. In May 2019, the ALRC produced a preliminary analysis paper, including seven example law reform topics to stimulate public discussion. This paper also set out the selection criteria to be used to prioritise the law reform topics submitted by the public. A copy of the paper is at Appendix A.

1.29 In addition, the ALRC's own experience of the limitations for law reform imposed by the *Australian Constitution* led the ALRC to prepare a paper specifically focusing on potential constitutional reform. That paper was also released in May 2019 and a copy is at Appendix B.

1.30 From 15 May until 30 June 2019, the ALRC invited public submissions by way of an online survey. A copy of the survey questions is at Appendix C.

1.31 The ALRC received just over 400 responses to its online survey. Approximately half of the respondents commented on the merit (or otherwise) of the seven example topics which had been proposed by the ALRC (see table below). In addition, approximately 200 new ideas were received regarding other potential topics. Some charts with information about those who made submissions, and the relative 'popularity' of the example law reform topic areas, are included at Appendix D.

16 Law Reform Commission of Western Australia, 'Contribute to Law Reform' <www.lrc.justice.wa.gov.au>.
17 NSW Department of Justice, 'How to Suggest Areas of the Law That May Need Reform' <www.lawreform.justice.nsw.gov.au>.

Survey responses – Strength of need for reform in example topic areas

	High	Medium	Low	No need	Total
Australian Constitution	76 (53%)	44 (31%)	19 (13%)	5 (3%)	144
Financial Services	50 (50%)	34 (34%)	12 (12%)	5 (5%)	101
Environmental Law	81 (70%)	27 (23%)	6 (5%)	2 (2%)	116
Anti-Corruption Law	58 (60%)	28 (29%)	8 (8%)	2 (2%)	96
Migration Law	53 (58%)	21 (23%)	12 (13%)	5 (5%)	91
Tax Law	34 (43%)	28 (35%)	13 (16%)	5 (6%)	80
Defamation	35 (41%)	25 (29%)	16 (19%)	10 (12%)	86

1.32 By way of comparison, the Law Commission of England and Wales received 250 proposals from 180 consultees for its 12th Programme of Work,[18] and 1,315 submissions to its most recent 13th Programme of Work.[19] The Scottish Law Commission received 57 formal responses to its most recent 10th Programme of Work published in early 2018.[20]

1.33 The ALRC held public seminars on particular focus topics in conjunction with partner organisations as follows:

- Sydney, 29 May 2019, The University of NSW, 'Public Law Reform'.
- Canberra, 12 June 2019, Australian National University, 'Technology and the Law'.
- Melbourne, 18 June 2019, The University of Melbourne, 'Constitutional and Immigration Issues' (live streaming was available, and the video recording is available via the ALRC website).
- Brisbane, 20 June 2019, 'Energy, Resources and Environmental Law'.

1.34 Summaries of each seminar are included at Appendix E.

1.35 Finally, the ALRC corresponded with state and territory law reform bodies inquiring as to any potential law reform issues relating to Commonwealth law which had been raised with them by the public, or which they had come across in recent inquiries. In particular, the ALRC acknowledges the prompt and detailed response from the Victorian Law Reform Commission outlining a number of law reform ideas raised by community

18 Law Commission, *12th Programme of Law Reform* (Law Com No 354, 2014) [1.7].
19 Law Commission, *13th Programme of Law Reform* (Law Com No 377, 2017) [1.8].
20 Scottish Law Commission, *10th Programme of Law Reform* (Scot Law Com No 250, 2018) [1.9].

members, as well as Commonwealth legal issues raised in recent Victorian law reform reports.

1.36 All submissions received were analysed as a whole for prominent themes using qualitative data analysis software, and each submission was also individually read and analysed.

High-level summary of law reform ideas

1.37 In light of the number of law reform ideas received through this process, it would not be possible to comprehensively outline them in this report. What follows is a high-level summary of some ideas relating to the example topics, as well as some other ideas raised independently by the public and stakeholders. A longer (but still high-level rather than comprehensive) list, is at Appendix F. For those topics which are included in this report as suggested future inquiries topics, more detail can be found in the relevant section of this report.

1.38 In relation to the *Australian Constitution*, substantive ideas for inquiry included wholesale constitutional review, recognition and rights for Aboriginal and Torres Strait Islander peoples, the electoral system, and federalism. Procedural ideas related to the process of reforming the *Constitution*, primarily to include greater involvement of the public in the development of reform proposals.

1.39 Ideas relating to the regulation of financial services focused on transparency and simplicity in the substance and process of regulation, effective remedies for consumers, and a number of suggestions relating to specific issues in litigation, some of which are summarised in Chapter 3.

1.40 Environmental laws elicited a range of passionate responses, many of which related primarily to political and policy issues, rather than necessarily legal problems. Ideas included strengthening the objects of environmental legislation, establishing more effective governance and enforcement mechanisms, consideration of interjurisdictional environmental effects, and compliance with international law.

1.41 Ideas for reform of laws addressing corruption included the establishment of an anti-corruption commission, a focus on honesty in political advertising and campaigns, clearer standards and stronger penalties for ministerial conduct, and national consistency of laws.

1.42 In relation to migration law, many submissions spoke strongly regarding offshore processing and detention of asylum seekers, the balance of ministerial discretion and review powers, and consistency of Australian immigration law with international standards. Fewer submissions sought a reduced, or differently constituted, migration intake. Again, a number of submissions addressed primarily political and policy issues.

1.43 Under taxation law, many submissions addressed various taxation rates, perceived loopholes, and inefficiencies.

1.44 In relation to defamation, submissions raised issues with appropriate balancing of rights, emerging technologies, media reporting rules, and access to justice.

1.45 A vast range of other ideas were raised. Some related to laws that are primarily a state responsibility, such as criminal laws and child protection. Others related to topics covered recently by the ALRC, including family law and elder abuse. Some related to the legal system, rather than substantive laws, such as: the adversarial nature of the system, necessary qualifications for judges, and the provision of legal aid. Ideas were raised in diverse contexts, including: administrative law; copyright; native title; consumer law; bankruptcy; corporations law; national security; and technology.

Application of selection criteria

1.46 The selection criteria used to prioritise the topics raised were:

- **Importance**

  To what extent is the existing law problematic? Consider, for example, whether it is unfair, unduly complex, inaccessible, or outdated.

- **Impact**

  What are the potential benefits of reform? Consider, for example, the nature and depth of the impact, the number of people and organisations affected, and the costs and benefits (financial or otherwise) of reform.

- **Suitability**

  Is the independent, non-political ALRC the most suitable body to conduct the project?

  Is there a commitment by government to reform the law in this area?

  Has the topic been covered by a recent inquiry (for example a Royal Commission, Parliamentary Committee, Expert Panel)?

- **Effectiveness**

  Does the nature, scale, and scope of the project make it an appropriate and efficient use of the ALRC's resources?

- **Jurisdiction**

  Does the project relate to an area of Commonwealth law?

  Does the project identify a need for uniform or complementary state and territory laws?

1.47 A shortlist of potential topics was developed for further investigation and testing with stakeholders. The shortlisted topics were posted on the ALRC website, and additional public events were held to discuss how the shortlisted topic areas might be further refined:

- Online webinar, 12 August 2019, CCH Wolters Kluwer; and

- Perth, 26 August 2019, Law Society of Western Australia (with live streaming available to remote participants).

1.48 Students from the University of Sydney (listed at the front of this report, with the assistance of academic advisors) produced literature reviews for the shortlisted topic areas to: assist in directing the ALRC's further research and consultations; further test the relative priority of the shortlisted topics against the selection criteria; and to help identify aspects of those topics which might be best suited to an ALRC inquiry.

1.49 The ALRC held consultations with several stakeholders throughout the process. A full list of those consulted is at Appendix G. Importantly, a number of government departments were consulted about shortlisted topics relevant to their work to gauge the level of governmental commitment to reform in those areas, and to help identify any potential barriers to implementation of any future inquiry report recommendations.

1.50 The suggested inquiry topics contained in this report thus reflect a combination of public interest, expert opinion, governmental commitment, and ALRC capability.

2. Suggested Program of Work

Contents

Summary

2.1 This chapter outlines a suggested program of work for the ALRC for the next five years. It comprises five suggested references on topics relating to automated decision making, principle-based regulation of financial services, defamation, press freedom and public sector whistleblowers, and legal structures for social enterprises. These are the topics that the ALRC has assessed as the most suitable and pressing for a future law reform inquiry, based on the ideas raised with us in submissions and consultations, complemented by further research, and assessed against the ALRC's selection criteria.

2.2 Each topic is described in more detail below, including the suggested parameters and duration of each reference, an outline of relevant submissions, a brief background on work to date in each area, and a cursory review of available commentary on the issues. The selection of commentary is not provided in order to pre-judge the merits of any particular views or opinions, but rather to illustrate the types of issues that have been the subject of academic commentary under each topic. Accordingly, this chapter may serve as a preliminary guide to some of the issues that could warrant further investigation.

2.3 The ALRC has not drafted suggested Terms of Reference for each topic. The ALRC notes that in the past, the Commonwealth Attorney-General has, on occasion, publicly released draft Terms of Reference for consultation before finalising the scope of a reference to the ALRC.[1] The Attorney-General could consider adopting a similar approach in relation to the inquiries suggested in this report.

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1 See, eg, Attorney-General's Department (Cth), 'Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' <www.ag.gov.au/Consultations/Pages/Australian-Law-Reform-Commission-inquiry-into-incarceration-rate-of-Indigenous-Australians.aspx>; Australian Law Reform Commission, 'Copyright Inquiry Draft Terms of Reference' <www.alrc.gov.au/news/copyright-inquiry-e-news-draft-terms-of-reference/>.

Automated decision making and administrative law

2.4 A future law reform inquiry could consider whether, and if so what, reforms are necessary to ensure that automated decisions by government agencies are fair, transparent, accountable, and timely. This suggested reference would investigate whether, and if so what, reforms to Commonwealth laws should be made, or what new legislation should be introduced, in order to facilitate and appropriately regulate automated decision making by Australian Government agencies, including consideration of:

- how the law should seek to categorise and respond to the varying degrees of automation and human involvement across a range of decision-making processes, including the degree of human involvement, if any, that should be required for particular types of decisions;
- whether, and if so in what circumstances, decisions incorporating automation should be considered 'decisions' for administrative law purposes, and how this might be articulated more clearly in the law;
- appropriate processes for correction, substitution, audit, and review of automated decisions;
- whether existing laws adequately require automated systems to be sufficiently capable of providing adequate reasons for decisions;
- how the law might ensure procedural fairness and other rule of law concepts are applied in automated decision-making processes, or how rule of law concepts may need to be differently interpreted or applied in relation to automated decisions;
- any aspects of existing regulatory guidance material which should be codified in legislation; and
- appropriate regulations for obtaining, sharing, storing, and using data for the purposes of automated decision making.

2.5 The reference would enable consideration of: appropriate regulations relating to the design, procurement, and outsourcing of automated systems; appropriate requirements for independent scrutiny of automated systems prior to implementation, for example by way of 'algorithmic impact assessment';[2] how concepts of human dignity might affect the use and regulation of automated systems; how the use of automated systems may affect freedom of information requests; the potential utilisation and impacts of digital legislation; and how regulatory bodies might be better enabled to apply existing laws to automated decisions.

2.6 The ALRC could potentially collaborate on such an inquiry with an organisation with relevant technological expertise to complement the ALRC's legal expertise. The ALRC has held preliminary discussions in this regard with the newly established Centre of Excellence for Automated Decision-Making and Society.

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2 See, eg, Dillon Reisman et al, *Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability* (AI Now, 2018).

2.7 The ALRC could likely complete this inquiry within 24 months.

Submissions

2.8 The Preliminary Analysis Paper for this project identified that several law reform bodies in other jurisdictions have examined issues relating to technology and the law. A number of submissions and consultations for this project raised issues relating to technology generally, including issues of accountability and safety, data rights, technological powers of national security and law enforcement agencies, and the potential for discrimination in the use of genetic information.

2.9 Others, such as Professor Lyria Bennett Moses, specifically highlighted issues relating to automated decision making and data-driven inferencing across a range of legal areas, including administrative law.

2.10 One of the priority topics submitted by Digital Rights Watch was the 'ethical use of algorithms by government', noting in particular the potential for harm of vulnerable groups, and that people subjected to automated decisions often have little knowledge about their rights. Digital Rights Watch suggested consideration of a 'presumption of invalidity for an automated decision, which could be tempered through the involvement of a human reviewer or a transparent reasoning process, subject to challenge', and the use by government of open source programs to enable scrutiny of data sources and decision-making criteria.[3]

2.11 Expert speakers at the public seminars for this project and other relevant events attended by the ALRC during the course of the project, also focused on the urgent and growing need to review the regulation of algorithm use by public agencies.

2.12 A number of submissions focused on issues relating to privacy and data protection. The ALRC notes that similar topics have been the subject of previous inquiries (including by the ALRC in 2008 and 2014),[4] and so does not suggest a further ALRC review targeted at privacy at this stage. However, data protection issues will be relevant to a consideration of appropriate regulation of public sector automated decision making.

2.13 The ALRC has accordingly focused on administrative law issues for this suggested inquiry into automated decision making. However, other legal aspects of automated decision making are likely to also be of significance, and some of these are outlined briefly at the end of this section.

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3 See also Danielle Keats Citron, 'Technological Due Process' (2008) 85(6) *Washington University Law Review* 1249.

4 See, eg, Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008); Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014); Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (2019); Senate Community Affairs References Committee, 'My Health Record System', 18 October 2018; Parliamentary Joint Committee on Intelligence and Security, 'Review of the Mandatory Data Retention Regime', (due to report by 13 April 2020).

Background

2.14 Advances in computing, artificial intelligence, and massive-scale data collection have enabled the proliferation and deployment of automated decision making for a wide range of purposes. Increasingly, such software is employed across a variety of government services, from the assessment and payment of social welfare to taxation. While software offers the potential to be more cost and time effective, as well as more accurate, than human decision makers, it is also capable of failure.

2.15 Even when automated systems are deployed carefully and effectively by government agencies, questions remain as to their compatibility with core administrative law principles and the rule of law. In particular, it is not yet clear whether (or how) such systems can ensure procedural fairness; the legality of actions and decisions by public bodies; and transparency and accountability of government decisions (in particular, whether automated decision-making software can provide adequate reasons that would in turn facilitate access to judicial and merits review where appropriate).

2.16 For several years, a number of Australian laws have permitted government decisions to be made using 'computer programs'.[5] Justice Melissa Perry has noted that such provisions generally reflect 'highly artificial constructs of decision-making processes' and that '[m]ore sophisticated approaches may need to be developed'.[6]

2.17 In addition, not all of those laws expressly permit an authorised person to substitute their own decision for an automated decision.[7] The laws that do provide for substitution provide for different circumstances in which the person authorising the use of the computer program may substitute their own decision. Inconsistent approaches raise issues of fairness. Consequently, it has been argued that Australia needs 'greater statutory clarity regarding the ambit of responsibility and consequence of automated decision making'.[8]

2.18 In 2004, the Australian Government's Administrative Review Council reported on government agency use of automated decisions, and assessed advantages and disadvantages of automation in relation to different types of administrative decisions using technologies available at that time.[9] In 2007, a Working Group produced a Better Practice Guide to assist government agencies in complying with the principles

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5 See, eg, *Australian Citizenship Act 2007* (Cth); *Designs Act 2003* (Cth); *Patents Act 1990* (Cth); *Trade Marks Act 1995* (Cth); *Business Names Registration Act 2011* (Cth).

6 The Hon Justice Melissa Perry and Alexander Smith, 'iDecide: The Legal Implications of Automated Decision-Making' (Conference Paper, Cambridge Centre for Public Law Conference, University of Cambridge, 15 September 2014). See also Jake Goldenfein, 'Algorithmic Transparency and Decision-Making Accountability' in *Closer to the Machine: Technical, Social, and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019).

7 See, eg, *Business Names Registration Act 2011* (n 5).

8 Angus Murray, 'Computer Says No ... But Then What?' [2019] *Proctor* 48.

9 Administrative Review Council, *Automated Assistance in Administrative Decision Making: Report to the Attorney-General* (Report No 46, 2004).

previously identified by the Administrative Review Council.[10] These documents have been described as 'antiquated policy'; arguably there is 'no explicit legal algorithmic accountability regime' in Australia.[11] The ALRC understands that the Better Practice Guide is currently under review.

2.19 More recently, the Australian Government has sought to clarify ethical standards and implications of artificial intelligence.[12] The Australian Human Rights Commission has also examined the human rights implications of a range of emerging technologies, including artificial intelligence.[13]

2.20 The Online Compliance Intervention of the Department of Human Services (Cth), which incorporates use of automated systems, has been the subject of two Senate inquiries and a Commonwealth Ombudsman inquiry.

2.21 The Australian Government is currently consulting on potential legislation relating to data sharing and release.[14] It is also exploring possibilities of 'digital legislation', as are other jurisdictions.[15]

Commentary

2.22 The Full Court of the Federal Court of Australia has suggested that the use of automated processes means that no 'decision' may in fact be made for administrative law purposes.[16] A dissenting judgment in that case focused squarely on this issue, commenting that the 'legal conception of what constitutes a decision cannot be static; it must comprehend that technology has altered how decisions are in fact made'.[17] Commentators have noted consequent uncertainty about the legal status and effect of automated decisions, and about the availability of administrative review and other processes in such circumstances.[18] An ALRC inquiry could investigate how the law could provide for greater certainty in this regard.

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10 Australian Government, *Automated Assistance in Administrative Decision-Making: Better Practice Guide* (2007).

11 Goldenfein (n 6) 47.

12 Data61, *Artificial Intelligence - Australia's Ethics Framework: A Discussion Paper* (Australian Government Department of Industry, Innovation and Science, 2019).

13 Australian Human Rights Commission, *Human Rights and Technology Issues Paper* (2018); Australian Human Rights Commission and World Economic Forum, *Artificial Intelligence: Governance and Leadership* (White Paper, 2019).

14 Australian Government Department of the Prime Minister and Cabinet, *Data Sharing and Release: Legislative Reforms Discussion Paper* (2019).

15 Digital Transformation Agency, 'Exploring Opportunities for Digital Legislation, Policy and Rules' (12 August 2019) <www.dta.gov.au/blogs/exploring-opportunities-digital-legislation-policy-and-rules>; New Zealand Government, *Better Rules for Government: Discovery Report* (2018); NSW Government, 'Rules as Code – NSW Joins the Worldwide Movement to Make Better Rules' (25 January 2019) <www.digital.nsw.gov.au/article/rules-code-nsw-joins-worldwide-movement-make-better-rules>.

16 *Pintarich v Deputy Commissioner for Taxation* [2018] FCAFC 79.

17 Kerr J at [49].

18 Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation – When Is a Decision a Decision?' (2019) 26 *Australian Journal of Administrative Law* 21, 21, 33. The authors argue that there is a 'pressing need' for 'development of the substantive principles of merits and judicial review in light of automation'.

2.23 Others have noted complex relationships between automation and rule of law concepts. For example, it has been suggested that appropriate design choices are crucial for automated systems to achieve consistency with concepts such as transparency and accountability; predictability and consistency; and equality before the law.[19] It has similarly been suggested that stricter rules may be required regarding auditing and certification of decision systems.[20] It has been predicted that tensions between automation and foundational values of public law are likely to escalate, such that 'it is paramount that the complex intersections between the two are urgently investigated', and that technological developments are effectively regulated.[21]

2.24 Some further speculate whether ongoing technological developments could and should change the interpretation and application of traditional rule of law concepts.[22] Accordingly, an ALRC inquiry could examine how the law could facilitate or regulate appropriate design choices for automated systems, as well as the extent to which rule of law concepts should potentially evolve to accommodate technological developments.

2.25 Commentators have noted that administrative law principles may apply differently to 'technology-assisted decision-making' and fully automated decisions. Issues to consider include: the identification and disclosure of authorised decision makers; the precise tasks being undertaken by the automated system; appropriate review mechanisms for decisions; and, how freedom of information obligations should apply.[23]

2.26 Australian and overseas commentators have queried whether automation should be permissible for decisions which require discretionary judgement, or for laws which set standards rather than prescribing rules.[24] The European General Data Protection Regulation (commonly known as GDPR) includes a general rule that decisions producing legal or 'similarly significant' effects should not be 'based solely on automated processing', subject to limited exceptions.[25]

2.27 Others have emphasised the role of 'structural deficiencies and oversights in the design of accountability and remedial avenues' in relation to the Online Compliance Intervention.[26]

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19 Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) *The Modern Law Review* 425, 429–31.

20 Goldenfein (n 6).

21 Monika Zalnieriute et al, 'From Rule of Law to Statute Drafting: Legal Issues for Algorithms in Government Decision-Making' in Woodrow Barfield (ed), *Cambridge Handbook on the Law of Algorithms* (Forthcoming, Cambridge University Press) 'Concluding Remarks'.

22 Zalnieriute, Moses and Williams (n 19) 426.

23 Katie Miller, *The Application of Administrative Law Principles to Technology-Assisted Decision-Making* (Paper, Australian Institute of Administrative Law National Conference, Brisbane, 2016).

24 Justice Melissa Perry and Smith (n 6); Citron (n 3).

25 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) art 22.

26 Terry Carney, 'Robo-Debt Illegality: The Seven Veils of Failed Guarantees of the Rule of Law?' (2019) 44(1) *Alternative Law Journal* 4.

2.28 The Australian Council of Learned Academies recently released a report on effective and ethical development of artificial intelligence.[27] It identifies key regulatory issues, including: algorithmic transparency and the 'explainability' of automated decisions; human rights impacts; and the capacity of regulatory institutions to respond to the disruptive potential of artificial intelligence.

2.29 These issues have also been examined in other jurisdictions and at the inter-governmental level.

2.30 The United Nations Special Rapporteur on Extreme Poverty and Human Rights has recently reported on the increasing use by governments of technology in the administration of social security regimes in particular. He warned that regulation, transparency and accountability are crucial to ensuring that such regimes protect human rights and promote the wellbeing of everyone in society.[28]

2.31 The United Nations Human Rights Council is also preparing a report more generally on the human rights impacts of emerging digital technologies. The Resolution calling for the report recognises that 'digital technologies have the potential to facilitate efforts to accelerate human progress, to promote and protect human rights and fundamental freedoms' but also that 'the impacts, opportunities and challenges of rapid technological change … are not fully understood', and accordingly need to be further analysed.[29]

2.32 Recently, an American author has suggested that increasing use of automated systems such as data mining, policy algorithms, and predictive risk models have disproportionate impacts on poor and disadvantaged communities.[30]

2.33 The Council of Europe Commissioner for Human Rights has recently recommended a number of measures for effective regulation of artificial intelligence use, including by government agencies, such as: legislatively required impact assessments, updated and AI-specific open procurement standards, requirements for transparency in decision making, and legislatively established oversight bodies.[31]

2.34 In 2018 the New Zealand Government reviewed its use of algorithms, emphasising the importance of human oversight and clear explanations of how algorithms affect decisions.[32] In October 2019 the Government released a Draft Algorithm Charter for consultation.

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27 The Australian Council of Learned Academies, *The Effective and Ethical Development of Artificial Intelligence: An Opportunity to Improve Our Wellbeing* (2019).

28 United Nations Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights* (A/74/48037, 2019).

29 United Nations Human Rights Council, *New and Emerging Digital Technologies and Human Rights* (Resolution 41/11, UN Doc A/HRC/41/L.14, 2019).

30 Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (St Martin's Press, 2018).

31 Council of Europe Commissioner for Human Rights, *Unboxing Artificial Intelligence: 10 Steps to Protect Human Rights* (Council of Europe, 2019).

32 'Algorithm Assessment Report - Data.Govt.Nz' <https://data.govt.nz/use-data/analyse-data/government-

2.35 A recent National Standard of Canada on the responsible use of automated decision systems recommends procedures in relation to the design, deployment and monitoring of artificial intelligence technology, and for appeals and escalation of automated decisions by affected persons.[33] Another recent Canadian report suggests that a number of regulatory reforms regarding data governance could improve national economic competitiveness by spurring innovation while respecting privacy, security, and ethical considerations.[34]

Other issues relating to automated decision making

2.36 Beyond administrative law, a wide range of other legal issues relating to automated decision making could be the subject of alternative (or additional) references to the ALRC. For example, Professor Lyria Bennett Moses and Professor Peter Leonard each raised issues relating to consumer law and anti-discrimination laws. How well do digital transactions fit with existing consumer legislation concepts of 'goods and services'? How should the use of genetic information be regulated to avoid discrimination?

2.37 A commonly raised question is how to attribute, or apportion, liability for harm caused by automated systems, including surgical robots and smart cars. Emeritus Professor Margaret Jackson has argued that laws are 'remarkably flexible and can often apply to new technology without the need for significant amendment' while conceding that with artificial intelligence 'there may be difficulty … in identifying which part of the supply chain … was the cause of the problem'.[35] The Australian Council of Learned Academies has recently reported that liability for defective automated vehicles is 'a legal grey area. Until legislative changes are made it is unclear the extent to which provision of cloud or other remote AI systems might be treated as services'.[36] The House of Lords has similarly noted uncertainty regarding existing English laws, recommending that the Law Commission consider the question 'as soon as possible'.[37]

2.38 In addition, the Australian Council of Learned Academies has queried whether Australian regulatory bodies are capable of responding to improper use of artificial intelligence, for example to distort financial markets.[38] The report also notes emerging regulatory responses, such as a statutory code of practice for the use of personal information in political campaigns recently recommended in the United Kingdom.[39]

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algorithm-transparency-and-accountability/algorithm-assessment-report/>.

33 CIO Strategy Council, *Ethical Design and Use of Automated Decision Systems* (National Standard of Canada CAN/CIOSC 101:2019, 2019).

34 Michel Girard, *Standards for the Digital Economy: Creating an Architecture for Data Collection, Access and Analytics* (2019).

35 Margaret Jackson, 'Regulating AI' in *Closer to the Machine: Technical, Social, and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019) 122.

36 The Australian Council of Learned Academies (n 27) 146.

37 House of Lords Select Committee on Artificial Intelligence, *AI in the UK: Ready, Willing and Able?* (House of Lords, Report of Session 2017-19, 2018) 98.

38 The Australian Council of Learned Academies (n 27) 138. See also Australian Competition and Consumer Commission (n 4).

39 The Australian Council of Learned Academies (n 27) ch 5.

Principle-based regulation of financial services

2.39 A future law reform inquiry could consider whether, and if so what, reforms to the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth), and any other Commonwealth law should be made in order to simplify and rationalise the regulation of financial services, consistent with recommendations 7.3 and 7.4 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('the Royal Commission').

2.40 This suggested inquiry could consider: the appropriate use and construction of definitions in financial services legislation; the intersection of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth); how Chapter 7 of the *Corporations Act 2001* (Cth) could be redrafted to ensure that the intent of the law is met, and to identify and give effect to the fundamental norms of behaviour being pursued; any desirable changes to the licensing framework and disclosure requirements in Chapter 7 of the *Corporations Act 2001* (Cth); whether existing powers for regulators to make class orders, standards and rules are appropriate; and how a coherent hierarchy of laws might be constructed for effective principle-based regulation.

2.41 The ALRC could likely complete this inquiry within 36 months, with the publication of interim reports throughout that period on particular aspects.

Submissions

2.42 The ALRC identified the Royal Commission recommendations as a potential future law reform topic in its Preliminary Analysis Paper at the commencement of this project. 84% of those answering the relevant survey question felt there is a 'high' or 'medium' need for reform of financial services regulation.

2.43 A number of individuals submitted that financial services legislation is too long, complex, and inaccessible. They called for legislation to use 'plain English'. They felt that the complexity of the law detracted from principles of transparency, and facilitated 'abuse' of the law by institutions.

2.44 Lawyer Mark Aberdeen submitted that the ALRC should inquire into implementation of the Royal Commission recommendations generally, to address negative impacts on the economy, individuals, and small business, as well as lack of confidence in government and the rule of law. In addition, law firm Maurice Blackburn submitted that the ALRC 'has an important role to play in ensuring that all law reform recommended by the Royal Commission is acted upon in an appropriate and timely manner'. In contrast, one submission opposed an ALRC inquiry on these topics, arguing that the Royal Commission highlighted the need for existing laws to be enforced, rather than changed.

2.45 The Consumer Action Law Centre submitted that the implementation of Royal Commission recs 7.3 and 7.4 particularly should be the subject of an ALRC inquiry. The

submission asserted that more principle-based legislation may assist to more effectively regulate ever-evolving business practices which seek to exploit gaps in the details of complex and prescriptive legislation.

Background

2.46 Commissioner Hayne stated that the voluminous regulation of financial services can be summarised by six simple requirements: obey the law; do not mislead or deceive; act fairly; provide services that are fit for purpose; deliver services with reasonable care and skill; and when acting for another, act in the other's best interests.[40]

2.47 However, Commissioner Hayne expressed concern that these principles are reflected in a piecemeal and sometimes contradictory fashion in Australian legislation. This makes the legislation difficult to navigate, potentially enables wrongdoers to strategically draw out litigation, and potentially deters regulators from investigating and prosecuting wrongdoing.[41] Royal Commission recs 7.3 and 7.4 related to simplification of the law. For example, rec 7.4 was that:

> As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.

2.48 Importantly, Commissioner Hayne observed that these recommendations were made as examples of steps that need to be taken in the context of a much wider 'overall task' of simplification of the law. He noted that such a task

> will require examination of how the existing laws fit together and identification of the various policies given effect by the law's various provisions. Only once this detailed work is done can decisions be made about how those policies can be given better and simpler legislative effect.[42]

2.49 In its response to the Royal Commission, the Australian Government agreed to identify the norms of behaviour and principles that underpin legislation as part of the legislative simplification process:

> The Royal Commission has noted that over-prescription and excessive detail can shift responsibility for behaviour away from regulated entities and encourage them to undertake a 'box-ticking' approach to compliance, rather than ensuring they comply with the fundamental norms of behaviour that should guide their conduct. A clearer focus

40 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) 8–9.

41 See Hui Xian Chia and Ian Ramsay, 'Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)' (2015) 33(6) *Company and Securities Law Journal* 389, 393–4; Elise Bant and Jeannie Marie Paterson, 'Understanding Hayne. Why Less Is More' [2019] *The Conversation* <http://theconversation.com/understanding-hayne-why-less-is-more-110509>.

42 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 40) 495.

> on those fundamental norms in the primary legislation and subordinate instruments will improve the regulatory architecture and ensure that the law's intent is met.[43]

2.50 Government has tasked the Department of Treasury (Cth) 'to begin the longer term task of considering how to simplify the law, consistent with recommendations 7.3 and 7.4 of the Royal Commission.'[44] The ALRC considers that this suggested ALRC inquiry could contribute helpfully to the overall simplification of the law, and the incorporation of more principle-based regulation.

Academic commentary

2.51 The financial services industry is the largest contributor to the Australian economy.[45] The need for particular regulation of the industry, over and above other types of businesses, has been justified by reference to the potential for 'significant harm to consumers' as well as the unique ability of the sector to 'create or amplify economic shocks'.[46] It has been argued that ineffective regulation can exacerbate the fragility of the Australian financial system, potentially leading to 'personal and nationwide economic damage'.[47]

2.52 Principle-based regulation can take many forms, and different models have been adopted in different jurisdictions. Caution is required in 'translating' models from one jurisdiction to another.[48] The Expert Panel on Securities Regulation in Canada has noted that principle-based regulation

> is not about replacing rules with principles or leaving businesses to their own devices … No regulatory system is entirely based on either the rules-based or principles-based approach; there is a continuum between the two extremes and regulatory systems fall somewhere in the middle.[49]

2.53 The question is how Australian financial services regulation might take a *more* principle-based approach.

2.54 It has also been suggested that a 'standard based' approach such as that found in the European Union's *Directive on Unfair Commercial Practices* could be a helpful

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43 Australian Government, *Government Response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019) 38.

44 Australian Government, *Restoring Trust in Australia's Financial System: Financial Services Royal Commission Implementation Roadmap* (2019) 5.

45 Australian Trade and Investment Commission, *Why Australia: Benchmark Report 2019* (Australian Government, 2019) 8.

46 John Farrar and Pamela Hanrahan, *Corporate Governance* (LexisNexis Butterworths, 2017) 508 [30.4], citing the Department of Treasury (Cth), *Financial System Inquiry Final Report* (November 2014).

47 David G Millhouse, 'From Campbell to Hayne: W[h]Ither Australia? Australian Financial Regulation and Supervision at a Cross-Roads' (2019) 13(2–3) *Law and Financial Markets Review* 81, 87.

48 Julia Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3(4) *Capital Markets Law Journal* 425, 428–9.

49 Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets: Final Report* (Department of Finance, Canada, 2009) 17.

model for Australia in particular circumstances, such as regulation of predatory business models.[50]

2.55 International research has considered a number of relevant legal issues relating to the effective implementation of principle-based regulation, such as:

- the appropriate balance and interaction of principle-based rules and more specific rules in light of arguable earlier failures of principle-based regulation;[51]
- how legislation might be structured to incorporate more principles, including examination of approaches in different jurisdictions;[52]
- consideration of 'organisational, cognitive and functional dimensions of regulation' which can cause principle-based (and other) regulatory models to fail, create paradoxical effects, or otherwise not perform as intended;[53] and
- on what basis particular aspects of regulation might be more appropriately contained in 'soft law' statements issued by regulatory bodies from time to time, rather than incorporated into legislation.[54]

2.56 Relevant issues have also been the subject of commentary in Australia. For example, instances of potentially inappropriate delegation of parliamentary powers in legislation have been remarked upon by various parliamentary bodies and commentators.[55]

2.57 The Hon Chief Justice Allsop AO has observed that the common law and equity often achieved fundamental regulatory goals in a simpler way than statutes. Legislation has on occasion, and could again in future, seek to reflect the simplicity of concepts such as 'unjust' conduct, which cannot be exhaustively defined.[56]

2.58 In addition, the complexity and incomprehensibility of Chapter 7 of the *Corporations Act 2001* (Cth) has been described by Buchanan J in the Federal Court of Australia thus:

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50 Jeannie Marie Paterson and Gerard Brody, '"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 38(3) *Journal of Consumer Policy* 331, 347–50.

51 RG Walker, 'Reporting Entity Concept: A Case Study of the Failure of Principles-Based Regulation' (2007) 43(1) *Abacus* 49.

52 Christie Ford, *Principles-Based Securities Regulation: A Research Study Prepared for the Expert Panel on Securities Regulation* (Canada, 2009).

53 Julia Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75(6) *Modern Law Review* 1037.

54 Anita Anand, 'Rules v Regulations as Approaches to Financial Market Regulation' (2009) 49 *Harvard International Law Journal Online* 111.

55 See, eg, Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 41st Parliament November 2004 – October 2007* (2008); The Hon David Hamer, *Can Responsible Government Survive in Australia?* (2004); Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No. 35, 1992). Several prudential standards issued by the Australian Prudential Regulation Authority are noted in Farrar and Hanrahan (n 46) 505–6 [30.2].

56 Hon Chief Justice JLB Allsop AO, 'The Judicialisation of Values' (Speech, Law Council of Australia and Federal Court of Australia Joint Competition Law Conference, 30 August 2018) [11]–[15]. See also *Australian Securities and Investments Commission v Kobelt* (2019) 93 ALJR 743, [2019] HCA 18.

> The standards of conduct which are set out in the Corporations Act in general and in Chapter 7 in particular should operate as a reliable guide to conduct, readily ascertainable and capable of equally ready understanding. They should be accessible and comprehensible by those whose conduct is governed and by those whose interests might be affected – ie consumers and clients, small as well as big. The provisions with which I am dealing in this judgment fall short of that objective by a large margin, even for trained lawyers. That is unfortunate. The result is that the provisions of Chapter 7 do not, in my view, act as an effective guide to conduct at all. They represent a complicated catalogue from which to select instruments of retribution well after loss or damage has been suffered. The applicants in the present case have persevered, but justice for them and others (and for licensees) should not depend upon such complexities as Chapter 7 presents, and should not be endangered by the real possibility of misunderstanding or misapplication of its provisions.[57]

2.59 Professor Elise Bant and Professor Jeannie Paterson have highlighted that legislative complexity can undermine the effectiveness of regulatory responses and increase litigation costs. They have argued that law reform should aim for coherence within and across statutory regimes. Identifying core principles underlying a statutory regime can also provide a framework for thinking about enforcement priorities and reporting outcomes.[58]

2.60 Commissioner Hayne observed as an example of the piecemeal approach to financial services regulation that the definitions of 'financial product' and 'financial service' in Chapter 7 of the *Corporations Act 2001* (Cth) differ from those in the unconscionable conduct and consumer protection provisions of the *Australian Securities and Investment Commission Act 2001* (Cth).[59]

2.61 The 'broader task' of legislative simplification envisaged by Commissioner Hayne necessarily entails consideration of appropriate regulatory institutions. It has been suggested that principle-based regulation can 'slide into bare self-regulation' without appropriate regulatory oversight.[60] Accordingly, the capacity and structure of regulatory bodies is a key ingredient in effective principle-based regulation. Principle-based regulation has been described as

> more than a statutory drafting choice. Promulgating principles-based legislation alone, without also paying attention to implementation and regulatory approach, will not foster better regulation.[61]

2.62 The Australian Government Competition Policy Review recommended changes to the competition regulatory institutions.[62] The Government accepted those

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57 *Casaclang v WealthSure Pty Ltd* (2015) 238 FCR 55, [2015] FCA 761 [236].

58 Jeannie Paterson, 'Regulators, Enforcement and Lessons from the Banking Royal Commission' (Speech, ACCC & AER Regulatory Conference, Brisbane, 2 August 2019).

59 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 40) 10.

60 Cristie Ford, 'Principles-Based Securities Regulation in the Wake of the Global Financial Crisis' (2010) 55(2) *McGill Law Journal* 257, 261. See also Walker (n 51).

61 Ford (n 52).

62 Ian Harper et al, *Competition Policy Review: Final Report* (Australian Government, 2015).

recommendations in part and committed to work with states and territories on a new national framework 'including the most appropriate institutional architecture'.[63]

2.63 The Royal Commission affirmed the existing 'Twin Peaks' regulatory model, while making a number of recommendations regarding appropriate institutional roles.[64] The Government acknowledged in its response the importance of 'strong and effective financial system regulators' that have the necessary powers and are able to cooperate with each other and share information.[65]

2.64 Academics have argued for institutional changes to address more effectively objectives such as consumer protection[66] and 'systemic financial stability'.[67]

2.65 The ALRC anticipates that this suggested inquiry would assist to inform the Government's decisions regarding appropriate regulatory institutions.

Defamation

2.66 A future law reform inquiry could consider whether, and if so what, reforms to the Model Defamation Provisions and any Commonwealth laws should be made in order to modernise, rationalise, and enhance the law of defamation and its practical application, including consideration of whether:

- defamation legislation should be introduced at the Commonwealth level;
- existing law appropriately balances rights to free expression and rights to protect reputation;
- the law could better address the prevalence and evolving nature of digital publication;
- additional or alternative remedies should be provided for, and how they might be enforced; and
- the law could be simplified, and dispute resolution mechanisms made more accessible and proportionate to the issues in dispute.

2.67 The reference would permit consideration of, for example: whether criminal defamation should be abolished across all jurisdictions; whether existing restrictions on the ability of corporations to sue for defamation are appropriate; whether existing defences to defamation are appropriate; any desirable reforms to applicable general law

63 Australian Government, *Government Response to the Competition Policy Review* (2015) 38.

64 Under this model, the Australian Prudential Regulation Authority is responsible for prudential regulation and the Australian Securities and Investments Commission is responsible for regulation of conduct and disclosure. Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 40) recs 6.1–6.10.

65 Australian Government (n 43) 6.

66 Pamela Hanrahan, 'Twin Peaks after Hayne: Tensions and Trade-Offs in Regulatory Architecture' (2019) 13(2–3) *Law and Financial Markets Review* 124.

67 Steve Kourabas, 'Improving Australia's Regulatory Framework for Systemic Financial Stability' (2018) 29 *Journal of Banking and Finance Law and Practice* 183.

rules; ways in which media reporting of defamation proceedings should be regulated; and whether and in what manner general law principles of defamation should continue to apply simultaneously alongside statutory provisions.

2.68 The ALRC could likely complete this inquiry within 24 months.

Submissions

2.69 Defamation law was one of the seven example law reform topics raised by the ALRC at the commencement of this project. Freedom of expression was a popular topic with respondents to our online survey, and attendees at our public seminars. 70% of those answering the relevant question in our online survey stated that defamation law was in 'high' or 'medium' need of reform.

2.70 The ALRC received a number of submissions about potential reforms to defamation law, including:

- consistency in operation between states;
- reducing complexity of the law;
- appropriately balancing rights to freedom of expression and rights to maintain reputation;
- modernisation of the law taking into account the proliferation of digital technologies;
- efficient and effective procedures for dispute resolution and litigation;
- reducing the cost of disputes and litigation; and
- alternative and additional remedies that could be introduced.

2.71 Associate Professor Jason Bosland submitted that defamation law needs 'complete revision' due to its complexity, and due to the impact of digital communication technologies. He observed that the law is not easily understood by those whose interests it is intended to protect, and that 'individual (non-media) publishers' are increasingly affected due to the prevalence of social media. He suggested review of both the substance of the law, as well as the procedures and costs of litigation, to re-examine the appropriate balance between competing rights to reputation and freedom of expression. He argued that the differing approaches taken by jurisdictions (particularly relating to defences) undermine the existing uniform legislation. He also noted the internationally high rate of defamation litigation in New South Wales in particular. In advocating for an ALRC inquiry, Bosland commended the comprehensive approach of the Law Commission of Ontario, which commenced its defamation inquiry in 2015 and is due to release an interim report soon.[68]

2.72 One submission argued against prioritisation of defamation law as an inquiry topic, arguing that only a small number of people are affected by such laws. Others

68 Law Commission of Ontario, 'Defamation Law in the Internet Age' <www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/>.

argued that fundamental principles of free expression affect society at large, and that review at the federal level would be appropriate.

Background

2.73 Defamation has traditionally been the domain of the states and territories, with limited involvement at the federal level. However, federal involvement has increased in recent years for two principal reasons.

2.74 First, in 2005 the Standing Committee of Attorneys-General (now known as the Council of Attorneys-General) approved Model Defamation Provisions in an effort to enable a uniform approach to defamation across Australia. All states and territories enacted substantially uniform legislation by the end of 2006. An intergovernmental agreement provides that if a jurisdiction considers that a clause of the Model Defamation Provisions requires amendment, it must refer the clause to the Council of Attorneys-General for consideration.

2.75 Secondly, in 2012 the Full Court of the Federal Court of Australia confirmed that the Federal Court has jurisdiction to hear and determine defamation matters arising under Australian Capital Territory or Northern Territory laws.[69] This has led to a significant increase in the number of defamation matters heard in federal courts, particularly given that statements made or transmitted digitally may be accessed by people in any state or territory of Australia. For example, defamatory matter which is principally published in Victoria, but which is accessible in the Australian Capital Territory in an electronic format (such as on a web site), might give rise to an action under the law of the Australian Capital Territory, such that proceedings could be brought in a federal court, rather than in a Victorian court.[70]

2.76 The increasing prevalence of defamation litigation in federal courts may also give rise to concerns about 'forum shopping' between federal and state courts. For example, different rules may apply in federal and state courts about whether a matter is to be tried by a judge or by jury.[71] This arguably justifies consideration of the possibility of federal defamation legislation.

2.77 In 2010, the NSW Department of Justice commenced a statutory review of the *Defamation Act 2005* (NSW) on behalf of the NSW Attorney-General, to assess whether the policy objectives of the legislation remain valid, and whether the provisions remain appropriate to achieve those objectives. It invited submissions from the NSW public and received 18 submissions in 2011. The report was then delayed for some years, 'principally due to competing Government priorities' and other factors, and was not completed

69 *Crosby v Kelly* (2012) 203 FCR 451, [2012] FCAFC 96.

70 In another example, the High Court of Australia confirmed that material published by a company in the United States of America, accessible online in Victoria, could be the subject of litigation under Victorian defamation laws: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [2002] HCA 56.

71 *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61, [2017] FCAFC 191.

until 2018.[72] The report includes 16 recommendations, each of which is expressed as a recommendation that the Council of Attorneys-General consider particular amendments (in accordance with the intergovernmental agreement).

2.78 In the same month as that report was released, the Council of Attorneys-General tasked its Defamation Working Party (led by the NSW Department of Justice) in very similar terms to the NSW statutory review. A Discussion Paper was released in February 2019,[73] and 34 submissions are publicly available.[74]

2.79 The Discussion Paper is structured almost identically to the NSW statutory review, analysing: general principles; dispute resolution without litigation; the roles of judicial officers and juries; defences; and remedies. The Discussion Paper asks 18 Questions which closely reflect the recommendations of the NSW statutory review. The final Question asks about 'any other issues relating to defamation law that should be considered'. In June 2019 a supplementary document was issued summarising and seeking comment within approximately two weeks on additional issues raised by stakeholders. Three supplementary submissions are publicly available.[75]

2.80 Consultees noted that it is difficult to predict the value of, and government appetite for, a future ALRC inquiry at this stage, given the ongoing Defamation Working Party process. The ALRC notes the valuable work which has been undertaken in this area to date and looks forward to the final report of the Defamation Working Party. In addition, the ALRC expects that a further inquiry conducted by the ALRC in relation to defamation laws, informed by and building on the work of previous inquiries, would be of significant value for a number of reasons.

2.81 First, given the clear and unanimous interest in maintaining a national approach to defamation, the escalating involvement of federal courts in defamation matters, and the potential for 'forum shopping' identified above, it may be appropriate for a national body such as the ALRC to conduct an inquiry.

2.82 Secondly, a key strength of the ALRC is its independence from government. The reviews to date have been conducted by government itself. There is likely to be value in an independently conducted inquiry, which can consider the legal issues of principle and substance independently of the pragmatism and compromise that is necessary to achieve consensus within an intergovernmental body.

2.83 Thirdly, a review by the ALRC would enable simultaneous consideration of other relevant federal laws, such as the *Broadcasting Services Act 1992* (Cth), as well as the possibility of introducing new federal legislation (if considered necessary).

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72 NSW Department of Justice, *Statutory Review: Defamation Act 2005* (State of NSW, 2018) [1.9].

73 Council of Attorneys-General, *Review of Model Defamation Provisions: Discussion Paper* (2019).

74 NSW Department of Justice, 'Review of Model Defamation Provisions' <www.justice.nsw.gov.au/defamationreview>.

75 Ibid.

2.84 Fourthly, an ALRC review could conduct extensive research and consultations to consider more broadly relevant issues not already raised in the NSW statutory review. The Law Council of Australia has emphasised that 'truly radical reform (rather than 'tinkering around the edges' of the existing laws) should be given serious consideration as part of the reform process'.[76] Judge Gibson has made similar remarks.[77]

Commentary

2.85 Freedom of speech has been described as 'the freedom *par excellence*; for without it, no other freedom could survive'.[78] International law also recognises that freedom of expression is not absolute, and that its exercise 'carries with it special duties and responsibilities'.[79] In particular, free expression must be balanced with the enjoyment of other human rights and the protection of reputation.

2.86 Professor David Rolph has argued that the process undertaken at the time of introducing uniform defamation laws was more focused on uniformity than substantive revision, and consequently the law remains in need of substantive reform in a number of areas.[80]

2.87 Professor Robyn Carroll and Catherine Graville have provided a helpful overview and analysis of a number of potential alternative remedies which could be made available under defamation law.[81]

2.88 Writing shortly before the release of the NSW statutory review, Judge Gibson expressed concern about the process of that review, and urged a thorough national review of defamation law by the ALRC, including proper consideration of 'legislation capable of responding to internet generally', and methods of addressing abuse of process.[82]

2.89 Indeed, the continual evolution of technology has played an important role in driving the need for review of defamation laws, and for consistency in national approaches. In its 2018 report, the NSW Department of Justice noted that since the Model Defamation Provisions were approved,

> the manner in which information is published and transmitted has changed significantly, particularly with the exponential growth in reliance on digital publications and

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76 Law Council of Australia, Submission to the Council of Attorneys-General Defamation Working Party, *Review of Model Defamation Provisions* (14 May 2019).

77 Judge JC Gibson, 'Adapting Defamation Law Reform to Online Publication' (Paper, University of NSW, 21 March 2018).

78 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

79 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 19.

80 David Rolph, *Defamation Law* (Thomson Reuters, 2016). See also his submission to the Review of Model Defamation Provisions, 2019.

81 Robyn Carroll and Catherine Graville, 'Meeting the Potential of Alternative Remedies in Australian Defamation Law' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 311.

82 Judge JC Gibson (n 77).

> communications, interactive online forums and blogs. Information flows are even less bound by territorial borders…[83]

2.90 Kim Gould has noted that a majority of defamation cases involving digital publications are disputes between 'ordinary people' rather than between celebrities and media outlets. She has argued for the need to develop a proportionate means for resolving small defamation claims.[84] Pro bono legal service LawRight has reported that 26% of clients at its Self Representation Service are involved in defamation disputes.[85]

2.91 Daniel Joyce has observed that digital forms of publication may result not from an individual author's activity online but rather from algorithmic associations, and queries who, if anyone, should bear the responsibility for such material. He has suggested that deeper reconsideration is required of the interrelationship between defamation, privacy, speech and data protection, as well as of changing conceptions of reputation in the context of data associations.[86]

2.92 The High Court of Australia has recently held that online search engine results could be capable of conveying defamatory imputations.[87] Some commentators such as Professor Anthony Gray have suggested that online search engines should ordinarily not be liable for defamatory material posted by others.[88] Professor Nicolas Suzor and Dr Kylie Pappalardo have argued that the concept of 'publication' is a 'relatively poor mechanism to delineate responsibility' for online intermediaries, and that the legal distinction between 'active' publishing and 'merely passive facilitation' is not well developed.[89]

2.93 The Australian Competition and Consumer Commission has assessed that, notwithstanding the complexities of defamation law, digital platforms 'are regulated by Australian defamation law in a broadly similar way to media businesses which perform comparable functions'.[90]

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83 NSW Department of Justice (n 72) 3.

84 Kim Gould, 'Small Defamation Claims in Small Claims Jurisdictions: Worth Considering for the Sake of Proportionality' (2018) 41(4) *University of NSW Law Journal* 1222.

85 LawRight, Submission to Council of Attorneys-General Defamation Working Party (30 April 2019).

86 Daniel Joyce, 'Data Associations and the Protection of Reputation Online in Australia' (2017) 4(1) *Big Data & Society* 1.

87 See, eg, *Trkulja v Google LLC* [2018] HCA 25; *Google Inc v Duffy* (2017) 129 SASR 304, [2017] SASCFC 130.

88 Anthony Gray, 'The Liability of Search Engines and Tech Companies in Defamation Law' (2019) 27 *Tort Law Review* 18.

89 Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469, 481.

90 Australian Competition and Consumer Commission (n 4) 188.

Press freedom and public sector whistleblowers

2.94 A future law reform inquiry could consider whether, and if so what, reforms to Commonwealth laws should be made in order to appropriately protect public interest journalistic activity, and to protect whistleblowers in the public service, including consideration of whether:

- Commonwealth laws unjustifiably limit press freedom;
- Commonwealth laws place undue burdens or restrictions on public service whistleblowers;
- the law could better reflect changing understandings of 'journalists', 'the press', and related concepts;
- there exist appropriate accountability mechanisms for law enforcement and national security agencies regarding their use of technological powers for surveillance of journalists;
- there exist appropriate protections and limitations regarding the confidentiality of journalists' data;
- the *Public Interest Disclosure Act 2013* (Cth) might be simplified and might more effectively facilitate and regulate whistleblowing;
- the *Evidence Act 1995* (Cth) adequately and appropriately provides for anonymity of journalistic sources;
- current laws and processes regarding warrants to be executed on journalists and media organisations are appropriate; and
- reforms to federal legislation are necessary to appropriately protect freedom of the press subject to proper limitations, and to protect whistleblowers in the public sector.

2.95 In the event that the Attorney-General does not refer to the ALRC a standalone inquiry into defamation law as suggested earlier in this chapter, relevant aspects of defamation law could be examined additionally as part of this suggested inquiry into press freedom.

2.96 The ALRC could likely complete this inquiry within 24 months.

Submissions

2.97 Freedom of the press was a popular topic with respondents to our online survey, and attendees at our public seminars. For example, freedom of expression was the second most popular topic (by a narrow margin) at the public seminar in which these issues were raised. In that seminar, Professor Adrienne Stone argued that reviewing legislative protections for journalists and whistleblowers may be a more urgent and necessary task than constitutional review relating to freedom of speech more generally.

2.98 Several online survey responses emphasised that press freedom and protection for whistleblowers should be constitutionally protected because of their centrality to

democracy. One submission raised concerns that the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) may inadvertently affect whistleblowers releasing graphic content of human rights abuses.[91] One submission advocated for better reporting by law enforcement and national security agencies on how they use their technological powers and for what purposes, to increase their accountability for surveillance of classes of people like journalists.

2.99 The need for 'stronger' freedom of information laws was also raised by several submissions and consultees, for example to help prevent corruption. One submission suggested consideration of New Zealand's approach in this area.

2.100 One submission urged that laws prohibiting incitement of hatred not be weakened in the pursuit of media freedom. One submission stated that media outlets should be held more accountable, rather than less, particularly for 'malicious reporting'.

2.101 A significant number of other submissions raised related issues, including freedom of speech and protection of human rights more generally.

Background

2.102 In 2009, the ALRC inquired into secrecy laws and recommended a number of changes to Commonwealth criminal laws, public service regulations, and other laws including freedom of information provisions.[92]

2.103 In 2015, the ALRC reported on a number of Commonwealth laws affecting freedom of expression and the rights of media organisations, and concluded that several laws should be further reviewed to assess whether they unjustifiably limit freedom of expression, including the *Crimes Act 1901* (Cth), the *Criminal Code Act 1995* (Cth) and the *Australian Security Intelligence Organisation Act 1979* (Cth).[93]

2.104 In 2015, the Australian Government commissioned an independent review of the *Public Interest Disclosure Act 2013* (Cth). The report was completed in 2016 and contained 33 recommendations, including that the Act be reviewed every three to five years.[94]

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91 See also Law Council of Australia, 'Livestream Laws Could Have Serious Unintended Consequences, Chilling Effect on Business' <www.lawcouncil.asn.au/media/media-releases/livestream-laws-could-have-serious-unintended-consequences-chilling-effect-on-business>. This legislation is also the subject of brief comment in Australian Law Reform Commission, *Corporate Criminal Responsibility*: *Discussion Paper* (DP 87, 2019) 270.

92 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

93 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) esp 120–7.

94 Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (Department of the Prime Minister and Cabinet, 2016) rec 1.

2.105 In May 2018, the Australian Government commissioned a review of the legal framework governing the national intelligence community, due to report by the end of 2019.[95]

2.106 In November 2018, the Council of Attorneys-General noted that the Attorney-General's Department (Cth) had undertaken a review of the suppression order regimes operating at the federal, state, and territory levels, highlighting that implementation of model legislation varies across jurisdictions.[96]

2.107 In April 2019, the Australian Government announced its intention to reform the *Public Interest Disclosure Act 2013* (Cth) and other laws to implement certain recommendations by a Parliamentary Committee in 2017 and the independent review in 2016.[97]

2.108 In June 2019, the Australian Federal Police conducted raids on a journalist's home and, then, the offices of the Australian Broadcasting Corporation, during the course of two investigations. These events in particular, and ensuing litigation, have sparked broad-ranging public debate on the potential for legal reform.[98]

2.109 The Parliamentary Joint Committee on Intelligence and Security is currently conducting an 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press'. The inquiry commenced on 4 July 2019. Submissions were requested by 26 July 2019, and the report is due by 28 November 2019.[99]

2.110 In addition, the Senate Environment and Communications References Committee is conducting an inquiry into 'Press Freedom'. That inquiry commenced on 23 July 2019. Submissions closed on 30 August 2019, and the report is due by 16 March 2020 (extended from the original due date of 4 December 2019).[100]

2.111 The ALRC acknowledges the work of these two parliamentary inquiries and expects that a further inquiry by the ALRC, independent of government and the Parliament, is likely to be of value in assessing the state of the law and the need for any

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95 Attorney-General's Department (Cth), 'Comprehensive Review of the Legal Framework Governing the National Intelligence Community' <https://www.ag.gov.au/NationalSecurity/Pages/Comprehensive-review-of-the-legal-framework-governing-the-national-intelligence-community.aspx>.

96 Council of Attorneys-General, *Communique November 2018* (Attorney-General's Department (Cth)).

97 Australian Government, *Australian Government Response to the Parliamentary Joint Committee on Corporations and Financial Services Report into Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors* (2019).

98 Patricia Drum, 'Raids, Outrage and Reform: What Now for Press Freedom?' (2019) 59 *Law Society of NSW Journal* 36.

99 Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Commonwealth Parliament, 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress>.

100 Senate Environment and Communications References Committee, 'Press Freedom' <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom>.

reforms. In addition, an ALRC inquiry could be broader than the issues currently being examined by the two parliamentary committees.

2.112 Related issues are also the subject of current legislative reform in overseas jurisdictions. For example, in October 2019 the European Union adopted a new legal framework to protect whistleblowers.[101]

2.113 In relation to the private sector in Australia, legislation was passed earlier in 2019 amending whistleblower protections.[102] The Australian Securities and Investments Commission is currently considering appropriate regulatory guidance in this area.[103] The ALRC is considering whether, and if so what, further reforms may be desirable in the context of its current inquiry into corporate criminal responsibility. The ALRC therefore does not suggest further review of private sector whistleblower protection in the context of this suggested press freedom inquiry.

2.114 The NSW Law Reform Commission is currently conducting a review of the operation of suppression and non-publication orders, and access to information, in NSW courts and tribunals.[104] The Victorian Law Reform Commission is conducting a review of the law relating to contempt of court, including contempt by publication.[105]

Commentary

2.115 Freedom of the press is an important right in a democratic society, and is protected under international law, principally in the form of the right to freedom of expression. In 2018, a number of intergovernmental expert bodies issued a joint declaration on media independence, expressing concern at 'contemporary legal threats to freedom of expression and the media, including broadening and often ambiguous notions of national security'.[106]

2.116 A number of campaigns are on foot in Australia relating to perceived threats to press freedom, despite Australia's history of strong and independent media. Commonly identified threats include: increasing concentration of media ownership; the impact of national security laws; decreasing protection of journalists' confidential data; inadequate protections for whistleblowers; inadequate 'shield laws' to maintain anonymity of journalists' sources; defamation laws; court suppression orders; and freedom of information laws.[107] Advocated reforms include public interest defences, limiting access

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101 'Better Protection of Whistle-Blowers: New EU-Wide Rules to Kick in in 2021' <http://www.consilium.europa.eu/en/press/press-releases/2019/10/07/better-protection-of-whistle-blowers-new-eu-wide-rules-to-kick-in-in-2021/>.

102 *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth).

103 Australian Securities & Investments Commission, *Whistleblower Policies* (Consultation Paper 321, 2019).

104 NSW Department of Justice, 'Open Justice Review' <www.lawreform.justice.nsw.gov.au>.

105 Victorian Law Reform Commission, 'Contempt of Court, Judicial Proceedings Reports Act 1958 and Enforcement Processes' <www.lawreform.vic.gov.au>.

106 United Nations Special Rapporteur on Freedom of Opinion and Expression et al, *Joint Declaration on Media Independence and Diversity in the Digital Age* (2018).

107 See, eg, Alliance for Journalists' Freedom, *Press Freedom in Australia* (White Paper, 2019); Reporters Without Borders, 'Australia: Investigative Journalism in Danger' <rsf.org/en/australia>; Media

to journalists' metadata, judicial oversight of warrant applications, and protections for public interest disclosures.[108]

2.117 The current Attorney-General has recently argued against introducing 'blanket rules' for journalists, such as contestable warrants and exemptions from national security laws, and has identified freedom of information laws and court suppression orders as potential areas for reform.[109]

2.118 Professor A J Brown has recently argued that Australia's whistleblowing laws 'currently amount to a well-motivated but largely dysfunctional mess'.[110] His 'plan for restoring public confidence in Commonwealth whistleblower protection' includes: comprehensive overhaul or replacement of the *Public Interest Disclosure Act 2013* (Cth); reforming the criteria for protection of whistleblowing outside official channels; revising key statutory definitions; strengthening shield laws; amending 'anti-detriment protections' to match international best practice; updating statutory requirements for whistleblowing policies; establishing a whistleblower protection authority;[111] introducing a reward scheme for public interest whistleblowers;[112] and introducing a general public interest defence.

2.119 A Federal Court judge recently described the *Public Interest Disclosure Act 2013* (Cth) as 'technical, obtuse and intractable', and ultimately 'largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public or a person employed in the Commonwealth bureaucracy'.[113]

2.120 Dr Keiran Hardy and Professor George Williams have found a number of inconsistencies, ambiguities, and anomalies in federal legislation relating to disclosure of national security information, and have made associated recommendations for reform. They note that whistleblower protections are 'severely limited' in this context.[114]

Entertainment and Arts Alliance, *The Public's Right to Know: The MEAA Report into the State of Press Freedom in Australia in 2019* (2019); Your Right to Know Coalition, 'Media Freedom' <yourrighttoknow.com.au/media-freedom/>.

108 Drum (n 98).

109 Joe Kelly, 'Attorney-General Christian Porter Hits out at Right-to-Know Campaign', *The Australian* (online at 25 October 2019) <www.theaustralian.com.au/nation/politics/attorneygeneral-christian-porter-hits-out-at-righttoknow-campaign/news-story/860bc86fed79954fd09614822164e010>.

110 AJ Brown, 'Safeguarding Our Democracy: Whistleblower Protection after the Australian Federal Police Raids' (130th Henry Parkes Oration, Tenterfield, 26 October 2019).

111 It has been suggested that such an agency could helpfully take on a 'stronger, interventionist protection role', rather than the current 'monitoring' role: AJ Brown et al, 'Whistleblower Support in Practice: Towards an Integrated Research Model' in AJ Brown et al (eds), *International Handbook on Whistleblowing Research* (Edward Elgar Publishing, 2014) 457, 475.

112 See also Inez Dussuyer and Russell Smith, *Understanding and Responding to Victimisation of Whistleblowers* (No 549, Australian Institute of Criminology, May 2018); OECD, *Committing to Effective Whistleblower Protection* (2016).

113 *Applicant ACD13/2019 v Stefanic* [2019] FCA 548 [17]-[18].

114 Keiran Hardy and George Williams, 'Terrorist, Trader, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information' (2014) 37(2) *University of NSW Law Journal* 784, 819.

2.121 Professor Kim Rubenstein and Andrew Henderson have identified inconsistencies in laws regulating access to federal court records, and have argued for reform.[115]

2.122 Professor Rick Sarre has argued that the shield laws introduced around Australia in recent years are inadequate, and have not substantially altered the protection that journalists enjoyed under the common law in any event. He suggests adopting more broadly an approach akin to s 66 of the *Privacy Act 1988* (Cth), which excuses journalists from providing information if it would tend to reveal the identity of a confidential source.[116]

2.123 Bradley Dean has examined the history of search warrants and judicial oversight, and has questioned whether journalists should be subject to a special category of warrants.[117]

Legal structures for social enterprises

2.124 A future law reform inquiry could consider whether, and if so what, reforms should be made to the *Corporations Act 2001* (Cth), the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), and any other Commonwealth laws to provide for an appropriate corporate structure for social enterprises, including consideration of whether:

- existing corporate structures should be adapted or amended to take into account the needs and purposes of social enterprises; and/or
- one or more new corporate structures should be introduced for social enterprises, and what the elements of any such new corporate structure should be.

2.125 The reference could permit consideration of, and recommendations regarding: appropriate methods for social enterprises to be able to raise capital; appropriate regulatory bodies for social enterprises; any desirable amendments to existing legal structures for charities and not-for-profit entities; and the interaction of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) with related state and territory legislation.

2.126 The ALRC could likely complete this inquiry within 12 months.

What is a social enterprise?

2.127 A commonly cited Australian report defines social enterprises as entities that:

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115 Andrew Henderson and Kim Rubenstein, 'Court Records as Archives: The Need for Law Reform to Ensure Access' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press, 2017) 419.

116 Rick Sarre, 'Why Shield Laws Can Be Ineffective in Protecting Journalists' Sources', *The Conversation* (13 August 2018) <theconversation.com/why-shield-laws-can-be-ineffective-in-protecting-journalists-sources-101106>.

117 Bradley Dean, 'The Journalist, the Warrant and the Gatekeeper: Is It Time for More Oversight?' (2019) 59 *Law Society of NSW Journal* 74.

- are led by an economic, social, cultural, or environmental mission consistent with a public or community benefit;
- trade to fulfil their mission;
- derive a substantial portion of their income from trade; and
- reinvest the majority of their profit/surplus in the fulfilment of their mission.[118]

2.128 In the sample of social enterprises analysed in that 2016 report, the most common mission was the creation of meaningful employment opportunities for particular groups of people. Social enterprises reportedly operate in every industry of the economy, and are involved in all forms of economic production – including retail, wholesale, and manufacturing – but operate primarily within the service economy. The majority are small entities and predominantly trade in local and regional markets, although some are large and some operate in international markets.[119]

Submissions

3.129 A number of submissions called for law reform to recognise more strongly corporate responsibilities beyond shareholder profits. For example, some submissions called for explicit environmental duties for corporate directors, tax benefits for any organisation undertaking environmentally protective activities, and ways of legislating for corporate social responsibility more generally. Some submissions focused on appropriate regulation of particular types of entities, such as small and medium enterprises, employee share schemes, and co-operatives.

3.130 Three submissions specifically discussed the need for a dedicated legal model for social enterprises in Australia, arguing that social enterprises have the potential to make a significant contribution to a wide range of societal issues.

3.131 The Social Enterprise Legal Models Working Group submitted that the number of social enterprises in Australia is growing, but that the lack of a dedicated corporate structure at law is a particular obstacle. Social entrepreneurs are sometimes required to spend a disproportionate amount (for example $20,000) to set up a trust ensuring that the entity's assets are protected and used only for the intended purpose, and to design a bespoke constitution to suit the organisation's particular purpose. In contrast, the United Kingdom legislated for 'community interest companies' in 2004.[120] The government provides a range of model company constitutions, and online registration costs £27.[121] There are now over 14,000 registered community interest companies in the United Kingdom, with a total of around 30,000 anticipated to be registered by 2025.[122]

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118 Jo Barraket, Chris Mason and Blake Blain, *Finding Australia's Social Enterprise Sector 2016: Final Report* (Centre for Social Impact, Swinburne University of Technology, and Social Traders, 2016).

119 Ibid.

120 *Companies (Audit, Investigations and Community Enterprise) Act 2004* (UK) s 26.

121 UK Government, 'Setting up a Social Enterprise' <www.gov.uk/set-up-a-social-enterprise>.

122 Regulator of Community Interest Companies, *Annual Report 2017-2018* (UK Government, 2018).

2.132 Employee Ownership Australia (also associated with the Social Enterprise Legal Models Working Group) submitted that a dedicated legal model would enable government, businesses, and the community to readily identify social enterprises. An easier and more cost-effective set-up process would improve the ability of communities to work towards solving societal problems, complementing government expenditure on these issues.

2.133 Professor Bronwen Morgan submitted that a dedicated legal structure to facilitate the incorporation of social enterprises would assist to address 'the root cause of much environmental harm'. Namely, it would encourage the establishment of more entities that do not feel the need to prioritise 'the maximisation of profit to the detriment of environmental "externalities"'. She argued that it is much more efficient for an entity to incorporate at the federal level, rather than utilise a state-based model such as a co-operative.[123] Australian law and related systems currently distinguish between 'for-profit' and 'not-for-profit' entities, and the law is 'unclear as to the risks involved in creating a hybrid entity'. Different legislative models exist in many jurisdictions within the US, Canada, and Europe.[124]

Background

2.134 In 2014, the Financial System Inquiry recommended that Government explore ways 'to facilitate development of the impact investment market and encourage innovation in funding social service delivery'.[125] The Government Response stated:

> The Government agrees that impact investing has the potential to benefit government and taxpayers. … We will prepare a discussion paper to explore ways to facilitate development of the impact investment market in Australia, and introduce legislative amendments if necessary.[126]

2.135 In February 2015, a report commissioned by the Minister for Social Services recommended that the Australian Government develop a long term strategy for social enterprise development, including increased investment in social enterprises and an improved enabling environment for social enterprises:

> Stakeholders agreed with the potential for social enterprises to play a part in the new social support system and the need for support of their development. … The UK developed strategies in both 2002 and 2011 and now social enterprises contribute over £55 billion to the economy and employ over two million people. … Australia would benefit from a long term strategy to support social enterprise development. Such a strategy could consider how to increase demand for investment by enterprise, increase

123 One other submission suggested the ALRC should inquire into whether the regulation of co-operatives should be federal, rather than state-based.

124 See, eg, Bronwen Morgan, Joanne McNeill and Isobel Blomfield, 'The Legal Roots of a Sustainable and Resilient Economy: New Kinds of Legal Entities, New Kinds of Lawyers?' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 495, 501.

125 *Financial System Inquiry: Final Report* (Australian Government, 2014) rec 32.

126 Australian Government, *Improving Australia's Financial System: Government Response to the Financial System Inquiry* (2015).

> supply of investment to enterprise and improve the enabling environment. … Social enterprises offer clear benefits to communities and the disadvantaged individuals within them. More can be done to promote the development of social enterprises and growth in the market for them. The stronger social enterprises are and the more demand grows for them, the less they will be reliant on government grants and interventions.[127]

2.136 Also in 2015, the Social Enterprise Legal Models Working Group produced a report proposing four key elements of a new legal structure for social enterprises, noting those goals could be achieved either by adapting existing legal forms or by creating a new legal form. The report recommended further work be undertaken to develop legal models for social enterprises, including further study in respect of overseas legal models.[128]

2.137 In March 2016, the Department of Social Services, on behalf of the Prime Minister's Community Business Partnership, reviewed the evidence of the benefits of social impact investing, and highlighted the potential for social impact investments in key government areas. The report considered the development of a dedicated legal form could contribute to removing barriers to social investment in Australia. The report noted specific amendments to the *Corporations Act 2001* (Cth) suggested by the Social Enterprise Legal Models Working Group, and noted that the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) may also need to be reviewed.

2.138 In January 2017, the Australian Government released a Discussion Paper noting the potential benefits to government of social impact investing, and questioning whether introducing a legal structure for social enterprises could remove regulatory barriers to social impact investing, or whether existing structures could be appropriately utilised. It raised questions including:

- whether dedicated legal structures are effective in promoting investment in the absence of tax incentives;
- whether one dedicated legal structure would be suitable for a majority of social enterprises;
- whether introducing a new legal structure is likely to add to complexity;
- whether the benefits offered in overseas models are already available in existing legal structures in Australia;
- whether model constitutions for social enterprises could be developed based on existing legal structures; and
- whether directors are already sufficiently obliged to pursue any social objectives listed in the corporation's constitution.[129]

2.139 The Law Council of Australia, for example, submitted in support of a dedicated legal structure for social enterprise. It submitted that the boundaries between 'charities',

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127 Reference Group on Welfare Reform, *A New System for Better Employment and Social Outcomes: Final Report* (Report to the Minister for Social Services, 2015) 173–5.

128 Social Enterprise Legal Models Working Group, *The Legal Models Working Group Final Report* (2015).

129 Australian Government, *Social Impact Investing Discussion Paper* (2017).

'not-for-profits' and 'social enterprises' can be blurred, and recommended greater clarity. It further recommended consideration of legislative change to facilitate social impact investing using superannuation monies.[130]

2.140 In late 2017, the Prime Minister's Community Business Partnership held roundtable meetings noting 'ongoing debate about whether the NFP sector needs a dedicated legal structure', and concluding that it

> would be desirable for the Australian Law Reform Commission (ALRC) to have a thorough look at the legal issues for Australian social enterprises and NFPs on a first principles basis rather than the sector adopting a compromise model. This should build on some current work being done by two leading legal firms — Ashurst and Minter Ellison — in analysing the legal issues in relevant submissions made to the Treasury Inquiry on Social Impact Investing.[131]

2.141 The Australian Government continues to express its intention to

> consider ways to reduce regulatory barriers inhibiting the growth of the SII [social impact investing] market. … SII provides governments with an alternative and innovative mechanism to address social and environmental issues while also leveraging government and private sector capital, building a stronger culture of robust evaluation and evidenced-based decision making, and creating a heightened focus on outcomes. A key objective for the Government is to create an enabling environment for SII.[132]

Commentary

2.142 Some argue that while corporate legal entities have considerable merits, focusing disproportionately on shareholder value can inhibit businesses from becoming environmentally sustainable and socially responsible.[133] Social enterprises have been identified as a potential 'driver of sustainability' and a 'vehicle for low carbon transition'.[134]

2.143 One of the main constraints identified for the social enterprise sector is a lack of access to appropriate capital. 'Impact investment', which seeks to deliver both positive societal impact and financial returns, is an emerging phenomenon seen as strongly aligned with social entrepreneurship. However, a lack of investment in newly established social

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130 Law Council of Australia, Submission to the Department of Treasury (Cth), *Social Impact Investing Discussion Paper* (27 February 2017).

131 Prime Minister's Community Business Partnership, *Summary of Main Issues and Outcomes from Achieving Scale for Social Impact Roundtables* (2018) <www.communitybusinesspartnership.gov.au>.

132 Australian Government, 'Australian Government Principles for Social Impact Investing', *The Treasury* <treasury.gov.au/programs-initiatives-consumers-community/social-impact-investing/australian-government-principles-for-social-impact-investing>.

133 Eleanor O'Higgins and László Zsolnai, 'What Is Progressive Business?' in Eleanor O'Higgins and László Zsolnai (eds), *Progressive Business Models: Creating Sustainable and Pro-Social Enterprise* (Springer International Publishing, 2018) 3.

134 Joanne Hillman, Stephen Axon and John Morrissey, 'Social Enterprise as a Potential Niche Innovation Breakout for Low Carbon Transition' (2018) 117 *Energy Policy* 445, 446.

enterprises in Australia may be partly because many social enterprises are incorporated in legal structures that do not allow for equity finance.[135]

2.144 Professor Morgan has described a 'paucity of academic literature on hybrid legal forms'.[136] Nevertheless, a helpful overview of the history and development of social enterprise models in Australia is available.[137] Resources including rationales for, and examples of, social enterprise legal models have been collated by Employee Ownership Australia.[138]

2.145 Morgan has observed that 'Australia stands out in the Anglophone and European world as almost unique in lacking a recently enacted legal structure that is distinctively useful for social enterprise'.[139] Arguments in favour of legislating for a new corporate structure include anticipated 'advantageous second-order effects' such as 'signalling, legitimation and the formation of professional networks'.[140]

2.146 Dr Marina Nehme and Professor Fiona Martin have recently analysed the legal structures currently available for social entrepreneurs in Australia and conclude that 'the law seems to fall short on providing these organisations with a structure that would balance the competing purposes of the organisation'.[141]

2.147 Some American commentators have argued that legislated hybrid corporate forms in the United States of America have helped social enterprises to gain acceptance, but have done little to enhance their access to capital. They suggest further legislative measures to 'provide affirmative protection for mission in order to build trust between entrepreneurs and investors'.[142] Others have noted a range of opinions about American 'hybrid' legal structures, including the potential implications for organisations operating within existing 'not-for-profit' structures.[143]

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135 Erin I Ping Castellas, Jarrod Ormiston and Suzanne Findlay, 'Financing Social Entrepreneurship' (2018) 14(2) *Social Enterprise Journal* 130.

136 Bronwen Morgan, 'Telling Stories Beautifully: Hybrid Legal Forms in the New Economy' (2018) 45(1) *Journal of Law and Society* 64, 65.

137 Jo Barraket et al, 'Classifying Social Enterprise Models in Australia' (2017) 13(4) *Social Enterprise Journal* 345.

138 'Social Enterprise Legal Models', *Employee Ownership Australia* <https://employeeownership.com.au/resources-2/social-enterprise-legal-models/>.

139 Bronwen Morgan, 'Legal Models beyond the Corporation in Australia: Plugging a Gap or Weaving a Tapestry?' (2018) 14(2) *Social Enterprise Journal* 180, 181.

140 Ibid 191.

141 Marina Nehme and Fiona Martin, 'Social Entrepreneurs: An Evaluation of the Pty Ltd Company from a Corporations Law and Taxation Law Perspective' (2019) 93 *Australian Law Journal* 126, 127.

142 Dana Brakman Reiser and Steven A Dean, *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (Oxford University Press, 2017) 4.

143 Hans Rawhouser, Michael Cummings and Andrew Crane, 'Benefit Corporation Legislation and the Emergence of a Social Hybrid Category' (2015) 57(3) *California Management Review* 13.

3. Other Significant Topics

Contents

Summary

3.1 This chapter describes eight additional law reform topics that the ALRC considers to be of significance, but which are not included in the suggested program of work for a variety of reasons. Each is put forward as a potential future ALRC inquiry topic in some form, although with less specificity than the topics suggested in Chapter 2. The ALRC invites the Government to consider the topics in this chapter as potential alternative topics to those in the suggested program of work. However, the ALRC considers that some of these topics are not yet ready for a reference to the ALRC. For example, the ALRC suggests the Government consider establishing a dedicated constitutional reform body, which could in due course identify appropriate ALRC inquiry topics relating to particular constitutional reform proposals. In addition, the ALRC suggests awaiting the outcome of the current statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) before deciding on an appropriate environmental law inquiry topic for the ALRC. Each of the eight topics is considered in more detail below. The order in which they are presented is not intended to reflect the relative importance of the topics.

The Australian Constitution

3.2 The ALRC does not suggest that the Government refer to the ALRC an inquiry on reform of the *Australian Constitution* at this stage. Instead, the ALRC suggests that the

Government consider the establishment of a standing constitutional reform body. In due course, that new body could identify appropriate constitutional reform topics for inquiry by the ALRC.

3.3 At the outset of this project, the ALRC identified the *Australian Constitution* as a potential priority topic for law reform. The ALRC prepared a paper outlining the dearth of recent referendums, public debate on a number of constitutional reform issues, and constitutional obstacles encountered by the ALRC in its work (see Appendix B). The ALRC asked what role it could helpfully play in facilitating constitutional reform, given the process of amending the *Constitution* is much more involved than ordinary legislative amendment.

3.4 Two public seminars held by ALRC included the *Australian Constitution* as a focus topic. Several experts raised a number of potential options for substantive constitutional reform. However, they expressed a view that the ALRC would not be the appropriate body to keep the *Constitution* under ongoing review, as this could be an all-consuming task which could detract from the ALRC's other functions. It was noted that a number of overseas jurisdictions have adopted 'deliberative democratic' models (for example, involving citizens' assemblies), which would represent a significantly more involved approach than the ALRC has traditionally taken in law reform inquiries. The experts instead advocated for the establishment of a dedicated constitutional reform body.

3.5 Attendees at the ALRC seminars were asked to 'vote' for the law reform issues they felt should be prioritised. The establishment of a standing constitutional reform body, and the establishment of citizens' assemblies to develop constitutional reform proposals, were the most popular reform topics with participants at the relevant seminars.

3.6 A high proportion of survey respondents agreed with the need for constitutional reform. Approximately 84% of those answering the relevant question indicated either a 'high' or 'medium' need for reform in this area. Two respondents argued against the need for constitutional reform. Many respondents provided further comments on substantive aspects of the *Constitution* they saw as being in need of reform. Others, such as lawyer Mark Aberdeen, also proposed an 'ongoing review process' for the *Constitution*, so that the 'Australian population regards it as a regular and normal part of civil society discourse and discussion'.

Substantive constitutional reform issues

3.7 Many wrote passionately about the need for constitutional recognition of Aboriginal and Torres Strait Islander peoples, their rights and a 'voice to parliament'. These topics were also broached at the ALRC's public seminars, although with a caution that any future inquiry should not delay constitutional reform, given the number of processes which have already occurred.[1] The ALRC notes that the Government has

1 For example, the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution reported in 2012; the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples reported in 2015, and again in 2018; the Referendum Council reported in

made various commitments regarding progress of Aboriginal and Torres Strait Islander recognition in the near future, including implementation of the recommendations of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples.[2] Accordingly, the ALRC anticipates that suggesting an ALRC inquiry at this stage would likely cause undue delay in the achievement of those goals.

3.8 Other substantive constitutional issues raised in submissions to this project include:[3]

- wholesale constitutional reform, including becoming a republic;[4]
- section 44 of the *Constitution* and eligibility for parliament;
- the electoral system, including fixed parliamentary terms;
- the separation of powers, particularly the appropriate roles and powers of the judiciary and the executive;
- protection for human rights; and
- federalism — responsibilities, accountability, and funding.

3.9 Some submissions focused on the process of constitutional reform, such as:

- the importance of public education on referendum topics;
- the accessibility of the referendum process for the public;
- how referendum campaigns are financed;[5] and
- involving members of the public in the development of reform proposals.

Constitutional reform body models

3.10 A significant amount of research has already been conducted on potential models for a constitutional reform body, a selection of which is referred to here. The ALRC encourages the Government to review that research and consider adopting an appropriate model that effectively engages and informs the public, while also involving the

2017.

2 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2018; Dan Conifer, 'Indigenous Constitutional Recognition to be Put to Referendum in next Three Years, Minister Promises', *ABC News* (online at 7 October 2019) <https://amp.abc.net.au/article/11294478>; Liberal Party of Australia, 'Our Plan to Support Indigenous Australians', *Liberal Party of Australia* (15 May 2019) <https://www.liberal.org.au/our-plan-support-indigenous-australians>; 'Dutton against "separate Voice" as Government Backtracks on Indigenous Constitutional Change', *SBS News* <https://www.sbs.com.au/news/dutton-against-separate-voice-as-government-backtracks-on-indigenous-constitutional-change>; 'Federal Government Commits to Referendum on Indigenous Constitutional Recognition in the next Three Years', *NITV* <https://www.sbs.com.au/nitv/article/2019/07/10/federal-government-commits-referendum-indigenous-constitutional-recognition-next>.

3 Interestingly, a number of these topics reflect issues which were considered a decade ago in: House of Representatives Standing Committee on Legal and Constitutional Affairs, *Reforming Our Constitution: A Roundtable Discussion* (Commonwealth Parliament, 2008).

4 See also Klaas Woldring, *YES, We Can ... Rewrite the Australian Constitution* (BookPOD, 2018).

5 Karin Gilland Lutz and Simon Hug (eds), *Financing Referendum Campaigns* (Palgrave Macmillan UK, 2010); Paul Kildea, 'Achieving Fairness in the Allocation of Public Funding in Referendum Campaigns' [2016] (1) *Adelaide Law Review* 13.2010

Government in planning and oversight. Regard could be had to models of deliberative democracy which are being applied increasingly in constitutional reform efforts around the world.

3.11 At a public seminar held for this project, Professor George Williams advocated for a standing body to review the *Australian Constitution*, noting that this body could additionally be responsible for public education about the *Constitution*. Dr Paul Kildea suggested: the establishment of citizen assemblies to examine specific constitutional issues (similar to the model adopted in Ireland); reform of referendum financing provisions to ensure that wealth does not inappropriately influence public debate; and more explanatory material available to inform the public about constitutional reform issues.[6] Professor Cheryl Saunders and Professor Adrienne Stone similarly advocated for the general public to be more involved earlier in the constitutional reform process,[7] for example in the form of citizen assemblies.

3.12 Professor Anne Twomey has argued that the way in which constitutional review is conducted, and the composition of the body that undertakes the review, are 'crucial factors in achieving the support of the Commonwealth Parliament, Commonwealth and State governments and, most importantly, the people'.[8] She notes that the constitutional convention is the oldest but least used form of constitutional reform mechanism in Australia. She has identified a significant list of merits, disadvantages, and issues requiring attention in the design of constitutional conventions. She further notes strengths and weaknesses of expert constitutional commissions, which are able to efficiently and expertly undertake comprehensive reviews, as well as parliamentary committees, which are better suited to reviewing specific aspects of the *Constitution*. She notes that deliberative polls and citizen assemblies are 'relative newcomers' as reform mechanisms.[9]

3.13 Similarly, Professor George Williams and David Hume have published a helpful overview of various bodies which have previously been established to generate or examine ideas for constitutional reform in Australia, including popular conventions, intergovernmental conventions, commissions of experts, and parliamentary committees.[10] On reviewing the history of constitutional referendums in Australia, they assert that five elements are necessary to achieve constitutional reform: bipartisanship; popular

6 See also Paul Kildea and George Williams, 'Reworking Australia's Referendum Machinery' (2010) 35(1) *Alternative Law Journal* 22.

7 Professor Saunders reflected on similar themes in her earlier paper: Cheryl Saunders, *The Parliament as Partner: A Century of Constitutional Review* (Research Paper No 3, Parliamentary Library, Parliament of Australia, August 2000).

8 Anne Twomey, 'Constitutional Conventions, Commissions and Other Constitutional Reform Mechanisms' (2008) 19(4) *Public Law Review* 308, 327.

9 Ibid.

10 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of NSW Press, 2010) 25–36.

ownership; popular education; sound and sensible proposals; and a modern referendum process.[11]

3.14 Kildea affirms these as 'useful as a rough guide to factors that may help a referendum to succeed' but cautions against applying them as 'fixed "pre-conditions" that must be met before a reform proposal can proceed to a vote'. He advocates that the objective should not be to 'win' referendums, but to improve referendum processes so that they are participatory, deliberative, inclusive, and fair:

> In practice, this may involve the creation of a standing constitutional review commission, the use of citizens' assemblies (as in Ireland), and better regulation to ensure a level playing field for campaigners and the inclusion of diverse voices.[12]

3.15 Williams and Hume have recommended the establishment of a

> small, ongoing Constitutional Review Commission charged with reviewing the Constitution, generating proposals for constitutional reform, consulting with the public on draft proposals and, after consultation, recommending them to Parliament.[13]

3.16 They recommend 'broad and inclusive' membership, including former parliamentarians, local government representatives, constitutional experts, and members of the broader community.[14] They further recommend that a Constitutional Convention be held every ten years to consider, debate and recommend reform proposals to the federal Parliament.[15] Finally, they suggest a Referendum Panel to manage the way in which reform proposals are put to the people and oversee public education initiatives leading up to a referendum.[16]

3.17 A parliamentary inquiry made similar recommendations in particular regarding a Referendum Panel, including some detail on the proposed role and constitution of the Panel.[17]

3.18 Research has noted the increasing use in overseas jurisdictions (including in Canada and in Europe) of small-group citizen deliberation and other participatory mechanisms to inform constitutional review, as part of a growing move towards 'deliberative democracy'.[18] It is argued that more deliberative processes can make referendums

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11 Ibid 239.

12 Paul Kildea, 'Getting to "Yes": Why Our Approach to Winning Referendums Needs a Rethink', *AUSPUBLAW* (12 December 2018) <https://auspublaw.org/2018/12/getting-to-yes-why-our-approach-to-winning-referendums-needs-a-rethink/>.

13 Williams and Hume (n 12) 240.

14 Ibid 241.

15 Ibid 242.

16 Ibid 243.

17 House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (Commonwealth of Australia, 2009) recs 7–15. However, three dissenting members disagreed with an unelected expert panel and argued that politicians were best placed to take the roles suggested for the Panel.

18 See, eg, Andre Baechtiger et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018); Paul Kildea, 'Expert Panels, Public Engagement and Constitutional Reform' (2014) 25(1)

more democratic,[19] although there are a range of views on effective models.[20] Dr Scott Stephenson has observed that most reflections on the Irish Constitutional Convention have been positive, and that most problems identified relate to the way the Convention was set up, rather than to the concept of citizen-led constitutional reform.[21]

3.19 Professor Bede Harris has suggested that providing education for the public to make informed decisions about constitutional reform proposals is likely to reveal a greater appetite for change than has previously been assumed in Australia.[22] Specific topics canvassed in that research included the electoral system, protection of rights, parliamentary processes, federalism, and the question of becoming a republic.

3.20 A number of Bills have been introduced in Australia's state and federal parliaments for 'citizen initiated referenda', but none have passed. It has been suggested that these efforts represent 'an unrealised desire for increased popular participation in the political process'.[23]

Environmental law

3.21 A future law reform inquiry could consider whether, and if so what, reforms are necessary to provide for a set of coherent, effective, aligned, streamlined, and clear laws for environmental protection. The ALRC does not suggest an inquiry on a specific environmental law topic at this stage, primarily due to the recent commencement of the statutory review of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'), which is the central piece of national legislation on environmental protection.[24] The ALRC understands that the *National Environment Protection Council Act 1994* (Cth) is also currently under review. Additionally, the Productivity Commission recently commenced a review of inefficiencies in resource sector regulation, and the Australian National Audit Office is currently inquiring into departmental processes relating to 'controlled actions' under the *EPBC Act*.

Public Law Review 33; Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012); Terrill Bouricius and David Schecter, *Citizen-Led Constitutional Change* (newDemocracy, Research and Development Note, 2018).

19 Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2018); Stephen Tierney, 'Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox' (2013) 12(4) *Election Law Journal* 508.

20 John Gastil and Peter Levine (eds), *The Deliberative Democracy Handbook: Strategies for Effective Civic Engagement in the Twenty-First Century* (Jossey-Bass, 2005); Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation* (Cambridge University Press, 2009).

21 Scott Stephenson, 'Reforming Constitutional Reform' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press, 2017) 375.

22 Bede Harris, *Exploring the Frozen Continent: What Australians Think of Constitutional Reform* (Vivid Publishing, 2014).

23 George Williams and Geraldine Chin, 'The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?' (2000) 35(1) *Australian Journal of Political Science* 27, 27.

24 Department of the Environment and Energy, 'Independent Review of the EPBC Act' <epbcactreview.environment.gov.au/about-review>.

3.22 Consultees agreed that the potential breadth of the independent and consultative review of the *EPBC Act* in particular makes it difficult to predict at this stage which areas of law might benefit most from an ALRC inquiry. However, in the 12 months available for the *EPBC Act* review process, the reviewers will not be able to review comprehensively all relevant aspects of the law, and may identify areas that require further investigation. Accordingly, the ALRC suggests that once the report of the *EPBC Act* review is available, the Government examine it to identify issues and areas of law which may benefit from further inquiry by the ALRC. The issues canvassed in the course of this project, summarised below, should provide some guidance as to potential appropriate topics.

3.23 The ALRC raised environmental law as an example topic at the beginning of this project, noting concerns that the *EPBC Act* is out of date, and that its enforcement mechanisms are ineffective. 93% of survey respondents answering the relevant question indicated a 'high' or 'medium' need for reform — the strongest support for reform out of all of the example topics. In addition, a large number of submissions and contributions at our public seminars commented forcefully on the need for environmental law reform across a wide range of areas.

3.24 Depending on the outcome of the current *EPBC Act* review, topics that were raised with the ALRC by stakeholders during this project that may be suitable for an ALRC inquiry include:

- whether, and if so how, the *EPBC Act* should be amended to more effectively facilitate appropriate decisional outcomes, rather than focusing on compliance with processes;
- whether, and if so how, federal environment-related laws, and associated institutional bodies, should be consolidated or more tightly aligned;
- whether the environmental responsibilities currently exercised by federal, state, territory, and local governments accord with existing intergovernmental agreements, and how federal, state, territory, and local environmental laws might best complement each other; and
- whether tensions exist between corporate duties, economic governance laws, and environmental regulation, which could be better managed by way of law reform.

3.25 Each of these topics is explored briefly below.

3.26 The Wilderness Society and others submitted that the *EPBC Act* is not sufficiently focused on outcomes. Instead, they assert that the *EPBC Act* 'ends up cataloguing environmental decline rather than achieving substantive changes'. Consultees considered that clear statutory processes theoretically provide more certainty, while outcome-focused legislation may require greater flexibility, potentially leading to uncertainty and increased litigation. The ALRC could potentially examine how to achieve an appropriate legislative balance between certainty in process and effectiveness in outcomes.

3.27 The Australian Panel of Experts on Environmental Law has identified over 70 Commonwealth Acts that relate to aspects of environmental management, and hundreds of environment-related institutions established by the Commonwealth. It describes the overall situation as exhibiting 'great complexity and diversity' and makes recommendations regarding new institutional arrangements.[25] Some submissions argued generally that the overall system of laws and regulations needs review. The ALRC could potentially investigate an appropriate overall federal legislative and institutional structure for environmental regulation.

3.28 A large number of submissions spoke strongly of the need to review and clarify the appropriate environmental responsibilities of federal, state, and territory governments. They spoke of difficulties in navigating decision-making responsibilities, and a lack of leadership at the federal level.[26] Associate Professor Nicole Graham submitted that environmental laws are often not aligned with natural resource laws, and that federalism is challenging as many environmental issues 'are impervious to jurisdictional boundaries'. Experts at the ALRC's public seminar also raised the importance of coordinated approaches to water management — both offshore and inland.

3.29 It has been observed that although the *EPBC Act* theoretically provides an overarching national legislative framework, the number of projects assessed under the *EPBC Act* is 'miniscule' in comparison to the number assessed under state and territory laws.[27] The Australian Panel of Experts on Environmental Law has recommended significant changes to federal arrangements.[28] The Minerals Council of Australia and the Business Council of Australia have also advocated for a reduction in overlapping federal and state processes.[29] A Parliamentary Committee has suggested that there are 'areas of regulatory duplication which, if addressed, can further enhance economic prosperity without sacrificing protection of the environment'.[30] Others have cautioned that, in the process of seeking to reduce duplication, there may be danger in imposing artificial divisions within a complex policy domain, and removing failsafe mechanisms.[31]

3.30 Principles for the interaction between levels of government on environmental matters are set out in the Intergovernmental Agreement on the Environment (1992) and the Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment (1997). The ALRC could inquire into whether current practices accord with

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25 Australian Panel of Experts on Environmental Law, *Environmental Governance* (Technical Paper 2, 2017).

26 See also Richie Merzian et al, *Climate of the Nation 2019* (The Australia Institute, 2019).

27 Chris McGrath, 'One Stop Shop for Environmental Approvals a Messy Backward Step for Australia' (2014) 31 *Environmental and Planning Law Journal* 164.

28 Australian Panel of Experts on Environmental Law (n 27).

29 Minerals Council of Australia, *The Next Frontier: Australian Mining Policy Priorities* (2019) 12; Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum* (2012) 5–6.

30 House of Representatives Standing Committee on the Environment, *Streamlining Environmental Legislation: Inquiry into Streamlining Environmental Regulation, 'Green Tape', and One Stop Shops* (Commonwealth Parliament, 2014) vii.

31 See, eg, Robyn Hollander, 'Rethinking Overlap and Duplication: Federalism and Environmental Assessment in Australia' (2010) 40(1) *Publius: The Journal of Federalism* 136.

those principles, and make recommendations regarding any changes to the interaction between federal and other legislation. Potentially, the ALRC could partner with a state law reform agency in any such inquiry.

3.31 Some submissions focused on the potential for corporate laws, such as directors' duties, to conflict with or undermine environmental objectives. Commentators have also discussed opportunities to reform corporate law and economic governance to align more closely with environmental protection.[32] The ALRC could examine more closely the extent and nature of any such tensions, and how they might appropriately be resolved in law.

3.32 Other reform topics suggested by the public and stakeholders included:

- consideration of how better to account for climate change in law, including as a potential additional 'matter of national significance' under the *EPBC Act* (this was raised by expert speakers at our public seminar, was voted as the most popular suggestion amongst participants at the seminar, and was the subject of the highest number of submissions);
- comprehensive reform of the *EPBC Act* to make it 'fit for purpose', or replacement with a new statutory regime for environmental protection;
- the appropriate balance of ministerial discretion and statutory standards for development application approvals;
- how the law could provide for better informed and more participatory decision making;
- how the law should take into account the cumulative impacts of development, rather than assessing individual applications in isolation;
- how laws can promote the quality and integrity of environmental impact assessments;
- the availability of merits review for decisions, and appropriate provisions for standing in such litigation;
- whether there exist legislative barriers to the generation and storage of renewable energy;
- how the law might improve its responsiveness to changing environmental circumstances, including concepts of 'resilience';[33]

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32 See, eg, Australian Panel of Experts on Environmental Law, *The Private Sector, Business Law and Environmental Performance* (Technical Paper 7, 2017); Jacqueline Peel et al, 'Governing the Energy Transition: The Role of Corporate Law Tools' (2019) 36(5) *Environmental and Planning Law Journal* 459; Andrew Belyea-Tate, 'Company Disclosure of Climate-Related Reputation Risks' (2019) 37 *Company and Securities Law Journal* 82.

33 See, eg, Jan McDonald, 'Reforming Environmental Law for Responsiveness to Change' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press, 2017); Stephanie Niall and Anne Kallies, 'Electricity Systems between Climate Mitigation and Climate Adaptation Pressures: Can Legal Frameworks for "Resilience" Provide Answers?' (2017) 34(6) *Environmental and Planning Law Journal* 488.

- how enforcement mechanisms might be made more effective; and
- how the law might better facilitate the 'circular economy', including review of definitions of concepts such as 'waste'.

Migration law

3.33 A future law reform inquiry could examine whether, and if so what, reforms are desirable to the *Migration Act 1958* (Cth), its subordinate instruments, and any other Commonwealth laws in order to simplify and enhance the operation of migration legislation. Particular attention could be given to: visa eligibility criteria; protection visas; visa cancellation provisions; family violence provisions; and merits review processes.

3.34 Migration law was one of the example topics raised by the ALRC at the outset of this project. The ALRC noted that the Act itself is one of the largest pieces of Commonwealth legislation, has been frequently amended, and operates in conjunction with a complex array of related regulatory instruments. 81% of survey respondents answering the relevant question considered there to be a 'high' or 'medium' level of need for migration law reform.

3.35 A significant number of submissions were received by the ALRC indicating concern with aspects of Australian migration law. Many of these submissions concerned issues which are primarily matters of policy, rather than law, and which are properly determined through parliamentary or other processes. For example, many submissions called for a review of offshore processing and detention of asylum seekers, processing times and visa costs, or of the number and categories of migrants entering Australia. The ALRC notes the Government has recently established within the Department of Treasury (Cth) a Centre for Population to examine issues relevant to migration patterns,[34] and the Department of Home Affairs is seeking to simplify existing visa categories.[35] Other submissions focused on the complex nature of the legislation, and on the availability of processes to review decisions.

3.36 Professor Susan Kneebone, speaking at our public seminar on these issues, highlighted the influence of the 'aliens' head of power in the *Australian Constitution* in fostering a culture of exclusion and control, and contemplated whether a new 'citizenship' head of power may facilitate greater inclusiveness (among other benefits). Katie Robertson from the Human Rights Law Centre described migration legislation as 'unmanageable' and 'a nightmare' to navigate, understand, and apply in practice.

3.37 A detailed submission collated by Professor Peter Billings argued for comprehensive review of the Act, describing it as 'elaborate, intersecting, often opaque

34 The Hon Alan Tudge, 'Launch of the Australian Government's Centre for Population: Media Release', *Ministers for the Department of Infrastructure, Transport, Cities and Regional Development* (4 October 2019) <minister.infrastructure.gov.au>.

35 Department of Home Affairs, 'Immigration Reform - Overview' <immi.homeaffairs.gov.au/what-we-do/immigration-reform>.

and sometimes disjointed'.[36] The submission includes case studies highlighting issues with the application of existing laws, and identifies specific areas of the legislative framework which could benefit from review, including:

- eligibility criteria for visa sub-classes, and whether they could be more clearly defined;
- protection visa criteria that use different terms, definitions, and obligations than those provided in international law;[37]
- opportunities for temporary protection visa holders to transition to permanent protection visas;[38]
- visa cancellation powers, including mandatory visa cancellation provisions on certain grounds;[39]
- the availability of family violence exceptions across visa sub-classes and for all partner visa applicants;[40] and
- merits review processes, including:
    - the procedural codes governing appeals to the Administrative Appeals Tribunal;[41]
    - the 'fast track review process' in Part 7AA of the *Migration Act 1958* (Cth);[42]
    - access to merits review under Part 5 of the *Migration Act 1958* (Cth) for applicants offshore at the time of decision; and
    - judicial review under Part 8 of the *Migration Act 1958* (Cth).

3.38 In relation to Part 8 of the *Migration Act 1958* (Cth), the submission noted: judicial comments that relevant key provisions of the Act 'have become impenetrably dense'

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36 The submission indicates that it incorporates views from Professor Susan Kneebone, Dr Louise Boon-Kuo, Matt Black, Khanh Hoang, and the Refugee and Immigration Legal Service in Brisbane.

37 See, eg, *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211, [2012] FCAFC 147; *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, [2017] HCA 34. In the latter case, for example, Edelman J found at [79] that the use of different definitions in some instances 'left a "hole" in the *Migration Act* scheme'.

38 At our public seminar, Katie Robertson commented that this is particularly an issue for children.

39 See, eg, *Cheryala v Minister for Immigration and Border Protection* [2018] FCAFC 43; Joint Standing Committee on Migration, *The Report of the Inquiry into Review Processes Associated with Visa Cancellations Made on Criminal Grounds* (Commonwealth Parliament, 2019). Related issues were also raised by participants at our public seminar on migration issues.

40 Related issues were also raised in a submission by Emeritus Professor Patricia Easteal and another submission from a member of the public. See also Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, Report No 117 (2012) [20.16]–[20.61]. In particular, issues can arise in relation to individuals who were 'offshore' at the time of applying for a partner visa, and in relation to family reunification visas.

41 See, eg, the Hon IDF Callinan AC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015 (Cth)* (2018). That review recommended repealing these codes (Measure 22), noting that members of the Tribunal supported their repeal, while the Department of Home Affairs (Cth) favoured their retention.

42 See, eg, *DVO16 v Minister for Immigration & Border Protection* [2019] FCAFC 157; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; Mary Crock and Hannah Martin, 'Refugee Rights and the Merits of Appeals' (2013) 32(1) *University of Queensland Law Journal* 137.

and some core concepts 'defy the understanding of any ordinary reader';[43] continuing high rates of judicial review applications; and the complexity of 'jurisdictional error' applications seeking constitutional writs compared with the processes available for applications made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Statutory drafting practices

3.39 A future law reform inquiry could consider whether current Commonwealth statutory drafting policies and practices are adversely affecting the coherence, readability, and useability of the law. Are reforms necessary or desirable to simplify, rationalise, and clarify legislation?

3.40 This inquiry could undertake a higher-level and broader analysis of principles and practices than is contemplated in the 'principle-based regulation of financial services' inquiry topic suggested in Chapter 2. This inquiry could also incorporate consideration of the implications of the anticipated transition to digital legislation, touched upon in the 'automated decision making and administrative law' topic also suggested in Chapter 2. Finally, this inquiry could examine the extent to which, and the circumstances in which, it may be beneficial to codify aspects of the law, or alternatively to allow courts to develop and apply general law principles.

3.41 A submission from barrister Quintin Rares compared older federal Acts with more recent legislation, and described the problem as follows:

> The new system of drafting involves the drafters making sections longer, splitting near identical sections within Acts and between disparate Acts and not providing adequate explanations of what they are doing. The sections each being longer is an attempt to account for every possibility. This is not possible and should not be attempted. The splitting of sections between disparate Acts is an attempt to say that misleading and deceptive conduct is somehow different if it is for a financial product (ASIC Act) as opposed to a product (ACL Part 2-1) or as opposed to misleading conduct relating to goods (also ACL Part 3-1).

3.42 Rares further submitted that Explanatory Memoranda and Second Reading Speeches, traditionally helpful sources in understanding the intent of new legislation, are no longer of great assistance. Consequently, Rares submitted that newer legislation is much more difficult for lawyers and courts to use and apply. Pleadings are necessarily more complex and expensive. Legislative drafting uses a disproportionate amount of public resources, and time-consuming amendments are frequently required.

3.43 Professor Elise Bant and Professor Jeannie Paterson have examined in detail the extensive variety of legislative provisions prohibiting misleading and deceptive conduct. They have found that the prohibition in s 18 of the *Australian Consumer Law*[44]

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43 *Minister for Immigration and Border Protection v ARJ17* (2017) 250 FCR 474, [2017] FCAFC 125 [177] (Kerr J).

44 *Competition and Consumer Act 2010* (Cth) sch 2.

is 'repeated in slightly different forms and with varying coverage in dozens of other legislative instruments at state, territory and commonwealth levels'.[45] They describe the resulting interaction of statute and general law as 'almost unmanageably complex – a labyrinth that defies navigation, let alone rational analysis'.[46] They argue that complexity undermines coherence in the law, and note the emphasis placed by the High Court of Australia on coherence as an overriding aim and requirement both of general law and statutory development. The same authors have previously argued that consumer law 'effectively needs to be self-executing' as its beneficiaries are unlikely to pursue their rights in court; the density and complexity of consumer law impedes this goal and access to justice more generally.[47] They recommend three steps to rationalise the law: map the current law; return to first principles of statutory design; and declutter legislation.

3.44 These issues arguably extend across many areas of the law. For example, Hui Xian Chia and Professor Ian Ramsay have written on the many consequences of complexity in corporate law, and have cited a number of judicial expressions of frustration.[48]

3.45 The Hon Chief Justice JLB Allsop AO has commented on

> the tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence. Often, if not always, this is in the name of certainty and completeness; but it is false certainty. … Deconstruction and particularism plague our statutes, especially Commonwealth drafting. Corporations legislation, competition legislation and taxation legislation are living examples.[49]

3.46 On another occasion, Allsop CJ has observed that Commonwealth legislation is:

> sometimes arranged more like a computer program than a narrative in language to be read from beginning to end ... If legislation is to be built on complex and interlocking definitions, or if doctrine is to be ordered minutely in the attempt to express exhaustively the minute reach and particular application of the underlying norm, there comes a point where the human character of the narrative fails, where its moral purpose is lost in a thicket of definitions, exceptions and inclusions. The vice is not just lack of clarity; that is bad enough. Worse, it is a loss of human context, a loss of the expression of the human purpose of the law.[50]

3.47 The Hon Justice Patrick Keane AC has also criticised the volume and complexity of federal laws, which he said hinders the resolution of litigated matters. He noted that

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45 Elise Bant and Jeannie Paterson, 'Developing a Rational Law of Misleading and Deceptive Conduct' in M Douglas et al (eds), *Economic Torts in Context* (Hart Publishing, forthcoming).

46 Ibid, citing *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1, [2012] FCA 1028, [947]–[948].

47 Elise Bant and Jeannie Paterson, 'Statutory Interpretation and the Critical Role of Soft Law Guidelines in Developing a Coherent Law of Remedies in Australia' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 301.

48 Hui Xian Chia and Ian Ramsay, 'Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)' (2015) 33(6) *Company and Securities Law Journal* 389.

49 The Hon Chief Justice JLB Allsop AO, 'The Judicialisation of Values' (Speech, Law Council of Australia and Federal Court of Australia Joint Competition Law Conference, 30 August 2018) [17].

50 The Hon Chief Justice JLB Allsop AO, 'The Law as an Expression of the Whole Personality' (Sir Maurice Byers Lecture, 1 November 2017) [56]–[57].

federal tax legislation contains almost 16,000 pages and quipped that 'opening the Tax Act is like entering the door to a parallel universe'.[51]

3.48 Consultees agreed that a general examination of legislative simplification and consolidation is likely to be of value, and that the potential benefits of digital legislation are significant. It may therefore be timely for the ALRC to inquire into appropriate drafting practices, particularly given that the Australian Government anticipates that legislation may be written in computer code within the next decade.[52]

Creditors and trusts

3.49 A future law reform inquiry could consider whether, and if so what, reforms to the *Corporations Act 2001* (Cth), superannuation legislation, and any other laws are desirable in relation to the rights of creditors of an insolvent trustee, particularly when trust assets may be insufficient to meet creditors' claims. Although trust law is primarily the domain of states and territories, the significant intersection with federal corporations law, and the desirability of national consistency in the law, suggest that a federal legal review could be appropriate. The ALRC could potentially partner with a state law reform agency in conducting such a review.

3.50 The Hon Joseph Campbell QC submitted that aspects of this area of Australian law are in need of review because of questionable legal foundations, and potential unexpected outcomes. He outlined that a century-old decision of the Privy Council in *Hardoon v Belilios*[53] expressed a rule of equity requiring (at least in some circumstances) a beneficiary of a trust to personally indemnify the trustee 'against the whole of the burdens incident to his legal ownership' when trust assets are insufficient to satisfy the trustee's right to indemnity. This has become known as 'the rule in *Hardoon v Belilios*'. The rule has been accepted in judgments of the High Court of Australia, as well as state appellate courts.[54] However, the Hon Joseph Campbell submitted that the rule

> was accepted by the High Court in days before the Court took a critical attitude to English authority. The decision of Lord Lindley is not justified by the cases on which he bases it. The 'rule' creates problems concerning the potential liability of investors in investment vehicles that use a trust as the vehicle, like unit trusts. This potential liability is one that the vast majority of investors, used to investing in companies, would not expect to have. As well it can deter investment in such vehicles by those who are aware of the rule.

3.51 The NSW Law Reform Commission reported on this issue in 2018. It accepted submissions by the Hon Joseph Campbell that the rule in *Hardoon v Belilios* was 'a

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51 James Eyers, 'Top Judge Hits out at Federal Laws', *Australian Financial Review* (21 January 2011).

52 Prime Minister of Australia, 'Question and Answer Session, Institute of Public Administration' (19 August 2019) <www.pm.gov.au/media/qa-institute-public-administration>.

53 *Hardoon v Belilios* [1901] AC 118.

54 See, eg, *Trautwein v Richardson* [1946] ALR 129; *Marginson v Ian Potter and Co* (1976) 136 CLR 161 (Jacobs J). Further citations available in NSW Law Reform Commission, *Laws Relating to Beneficiaries of Trusts* (Report 144, 2018) 5.

novelty'.[55] It noted uncertainty regarding the scope of the rule, subsequent Privy Council decisions that took a different approach, debate regarding the effectiveness of trust documents purporting to limit beneficiary liability, and the potential for creditors to seek to rely on a right of subrogation to stand in the trustee's shoes and recover from a beneficiary.[56] In the context of public trusts, the report noted previous recommendations, including by the ALRC, that investor liability should be limited to the unpaid amount, if any, of their investment.[57]

3.52 The NSW Law Reform Commission noted that submissions to it were divided on the issue, but ultimately recommended that the rule in *Hardoon v Belilios* effectively be abolished by statute.[58] It cited the main problems with the rule as being uncertainty about its application, and the potential exposure of beneficiaries to unanticipated liabilities.[59]

3.53 The NSW Law Reform Commission observed that, at least in relation to managed investment schemes, ideally reform should be made by way of amendment to the *Corporations Act 2001* (Cth). However, given that previous recommendations regarding federal law reform had not been implemented, it concluded that NSW legislation should instead be amended. The NSW Commission said it would 'welcome a reference on the wider issues such as creditors' rights and insolvency of trusts, perhaps jointly with a Commonwealth agency'.[60]

3.54 The Hon Joseph Campbell's submission agreed that federal legal reform would be preferable:

> As most of the investment in unit trusts is done through a trustee that is a corporation, it would be possible for the Commonwealth to alter the law concerning such trusts with a corporate trustee. It is desirable that the Commonwealth take this action to prevent differences between the legislation of the states and territories, and forum-shopping that seeks to adopt as the proper law of a trust the law of a jurisdiction that has altered the rule.

3.55 Academic commentators have discussed a number of relevant issues, such as: questioning the generality of the rule in *Hardoon v Belilios*;[61] examining the potential application of the rule in the context of superannuation funds;[62] and recommending that collective investment schemes should not operate as a trust given the potential

55 NSW Law Reform Commission (n 56) 5.
56 Ibid 5–9.
57 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money* (Report 65, 1993) [11.37]. Similar recommendations by other bodies are listed in NSW Law Reform Commission (n 56) 9.
58 NSW Law Reform Commission (n 56) rec 2.1.
59 Ibid 11.
60 Ibid 14.
61 Nuncio D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) [3.62]–[3.65].
62 The Hon Kevin Lindgren QC, 'A Superannuation Fund Trustee's Right of Indemnity' (2010) 4 *Journal of Equity* 85.

problems with existing law, instead suggesting a number of potential amendments to the *Corporations Act 2001* (Cth) to increase certainty for investors.[63]

Surrogacy

3.56 A future ALRC inquiry could investigate whether, and if so what, reforms are desirable to achieve uniformity or complementarity between state and territory laws relating to domestic and/or international surrogacy arrangements.

3.57 Adoptee Rights Australia submitted that the ALRC should review state and territory surrogacy laws (and adoption laws) for national consistency and compliance with Australia's international obligations. The submission expressed concern about laws facilitating maternal-neonatal separation at birth, loss of inheritance rights from birth parents, and commodification of children. It estimated that about 200 children per year are subject to surrogacy arrangements within Australia, in addition to larger numbers of children brought into Australia from overseas.

3.58 Previous inquiries into surrogacy have emphasised the complex and sensitive nature of the legal and ethical issues raised.

3.59 In 2016, the House of Representatives Standing Committee on Social Policy and Legal Affairs noted that regulatory requirements for altruistic surrogacy vary between jurisdictions. This inconsistency may make it more difficult to find a suitable surrogate, may mean that full protection and checks may not always be in place, and may contribute to some pursuing offshore commercial surrogacy arrangements. The Committee recommended that the ALRC be tasked with developing a model national law to regulate altruistic surrogacy.[64] In addition, the Committee recommended powers for the Commonwealth Minister for Immigration and Border Protection to make determinations relating to children being brought into Australia when surrogacy laws have been breached.[65]

3.60 In November 2018, the Australian Government responded that it supports greater national consistency in the approach to surrogacy arrangements, and that it would request the Council of Attorneys-General to consider the issue. The Government noted that the ALRC was at that time conducting an inquiry into the family law system, and that the Government would consider any recommendations in that inquiry relating to surrogacy.[66] The ALRC's family law inquiry report suggested that issues relating to

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63 Vince Battaglia, 'The Liability of Members of Managed Investment Schemes in Australia: An Unresolved Issue' (2009) 23 *Australian Journal of Corporate Law* 122.

64 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) recs 2–5.

65 Ibid rec 9.

66 Australian Government, *Australian Government Response to the Standing Committee on Social Policy and Legal Affairs Report: Surrogacy Matters* (2018) 2–5.

surrogacy require a separate inquiry.[67] The Council of Attorneys-General does not appear to have yet discussed the issue of surrogacy laws.[68]

3.61 In November 2018, the South Australia Law Reform Institute inquired into South Australian surrogacy laws and made 69 recommendations, including:

> Recommendation 3
>
> SALRI recommends that South Australia, along with other States and Territories, resume efforts towards a national consensus on this issue and to formulate a national uniform scheme as a matter of the highest priority.
>
> Recommendation 4
>
> SALRI recommends that, where necessary to give effect to Recommendation 3 above, South Australia should refer the jurisdiction of its powers in respect of surrogacy to the Commonwealth and allow the Family Court to exercise jurisdiction in respect of all aspects of surrogacy at its earliest opportunity.[69]

3.62 The report noted that several other Australian states had also reviewed their surrogacy laws recently, and that there were media reports in 2015 that the Attorneys-General had been discussing whether to pursue a national legislative response to the issue of international surrogacy.[70]

3.63 The Law Commission of England and Wales is currently inquiring into surrogacy laws jointly with the Scottish Law Commission.[71]

Credit, debt, and financial hardship

3.64 A future ALRC inquiry could consider effective regulation of debt management services, 'buy now pay later' services, or services targeting people at risk of financial hardship more generally.

3.65 The Consumer Action Law Centre submitted that 'buy now pay later' services are an example of businesses designing products and practices that 'fall between the gaps' of legislative detail, in this case by circumventing definitions of 'credit'. The submission therefore advocated for reform to enact more principle-based regulation as outlined in Chapter 2. Another submission suggested that the legislative treatment of 'buy now pay later' services could helpfully be examined in its own right.

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67 Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) 34.

68 Council of Attorneys-General, *Communique June 2019* (Attorney-General's Department (Cth)).

69 South Australian Law Reform Institute, *Surrogacy - A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (2018).

70 Ibid 47–8.

71 Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law* (Law Commission Consultation Paper 244, Scottish Law Commission Discussion Paper 167, 2019).

3.66 The Consumer Action Law Centre also submitted that the ALRC should inquire into regulation of 'debt management, repair and negotiation activities' not currently subject to licensing requirements. It made a number of specific suggestions for change closely reflecting Senate Committee recommendations relating to dispute resolution schemes, licensing, fees, and obligations relating to conduct.

3.67 Maurice Blackburn submitted that a number of reforms are necessary to enable individuals to effectively challenge inappropriate practices by financial services, including consideration of: model litigant requirements for financial service providers; appropriate time limits for complaints regarding irresponsible lending; whether a service provider unlawfully causing a bankruptcy should be listed as a creditor in bankruptcy proceedings; national consistency in recovery of liabilities from professional indemnity insurers; and issues relating to damages and costs.

3.68 In February 2019, the Senate Economics References Committee expressed concern that:

> The buy now pay later sector is one of Australia's fintech growth stories. Not only does the sector now account for a considerable proportion of consumer credit, but this credit is being taken up by new and young customers who have limited previous experience of managing credit. This growth has largely outstripped the regulatory response.[72]

3.69 The Committee recommended 'that the government consider, in consultation with the Australian Securities and Investments Commission, consumers and industry, what regulatory framework would be appropriate for the buy now pay later sector' and listed a number of principles which could underpin the framework.[73]

3.70 In April 2019, legislation commenced that provides the Australian Securities and Investments Commission with powers to intervene where it identifies a 'risk of significant detriment to retail clients resulting from financial products' including 'buy now pay later' arrangements that are not currently regulated under the *National Consumer Credit Protection Act 2009* (Cth).[74] The Australian Securities and Investments Commission has previously commented:

> As a further step, it may be that buy now pay later providers should be required to comply with the National Credit Act. ASIC has not yet formed a view that this is necessary.[75]

3.71 Also in its February 2019 report, the Senate Economics References Committee observed:

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72 Senate Economics References Committee, *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (2019) [1.55]–[1.56].

73 Ibid rec 9.

74 *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth).

75 Australian Securities & Investments Commission, *Review of Buy Now Pay Later Arrangements* (Report 600, 2018) 16, [72].

> Unregulated provision of debt and credit repair services poses significant risks to vulnerable Australians. While regulated debt agreements can provide administrative support to those who are going through the process of bankruptcy, the emergence of unregulated predatory debt negotiation and debt management firms are impacting those in financially vulnerable situations.[76]

3.72 The Committee recommended 'that the government implement a regulatory framework for all credit and debt management, repair and negotiation activities that are not currently licensed by the Australian Financial Security Authority' and listed a number of components which could be included in that framework.[77]

3.73 Similarly, a review in 2017 recommended that debt management firms be required to obtain membership of a single External Dispute Resolution body, noting the United Kingdom may provide a helpful model.[78] The Australian Securities and Investments Commission additionally noted concerns regarding significant risks relating to debt management firms in 2016.[79]

3.74 Commentators have suggested other ways of identifying and responding to harms caused by financial products, such as imposing a duty on lenders to notify regulators of problems (such as abnormal rates of suicide or insolvency) arising from services they have supplied.[80]

Human tissue

3.75 A future ALRC inquiry could review laws across all Australian jurisdictions regulating the use of human tissue. In October 2018, the Council of Australian Governments Health Council agreed to request that the Commonwealth Attorney-General refer to the ALRC a review of existing human tissue laws. The stated aims were to ensure that human tissue laws are: contemporary; based on principles that can accommodate emerging technologies; nationally consistent; and not operating as barriers to organ and tissue donation. The review would consider issues relating to human tissue donation and transplantation, and to the use of human tissue for therapeutic, educational and research purposes.[81]

3.76 Professor Peter Leonard highlighted issues of potential discrimination and the use of genetic information at a public seminar for this project.

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76 Senate Economics References Committee (n 74) [1.42]–[1.43].

77 Ibid rec 8.

78 *Review of the Financial System External Dispute Resolution and Complaints Framework: Final Report* (Department of Treasury (Cth), 2017).

79 Australian Securities & Investments Commission, *Paying to Get out of Debt or Clear Your Record: The Promise of Debt Management Firms* (Report 465, 2016).

80 Luke Nottage and Souichirou Kozuka, 'Lessons from Product Safety Regulation for Reforming Consumer Credit Markets in Japan and Beyond: Empirically-Informed Normativism' (2012) 34(1) *Sydney Law Review* 129.

81 Council of Australian Governments Health Council, *Communique 12 October 2018* 3.

3.77 Relevant issues are primarily dealt with under state and territory laws specifically relating to human tissue, as well as privacy. In addition, the Commonwealth has a regulatory role, including under the *Australian Organ and Tissue Donation and Transplantation Authority Act 2008* (Cth), the *Privacy Act 1988* (Cth) and standards issued by the National Pathology Accreditation Advisory Council.

3.78 The ALRC reviewed laws relevant to human tissue and genetic information in 1977 and in 2003, and recommended greater national consistency in some areas.[82] Nevertheless, there are differences between the regulatory approach of states and territories. In 2016, a report commissioned by the Australian Government Organ and Tissue Authority found that capacity to support patient health outcomes has been complicated by legislation at the state level, with no national governance structure. In addition, legislation in each state

> contains inconsistencies and ambiguity that don't reflect change in the sector. Notably, this is reflected in the inability of legislation to remain current to technology and changing practices within the sector.[83]

3.79 The NSW Government completed a review of its legislation in 2018, including consideration of emerging technologies and definitions of human tissue.[84]

82 Australian Law Reform Commission, *Human Tissue Transplants* (Report No 7, 1977); Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No 96, 2003).

83 PricewaterhouseCoopers Australia, *Analysis of the Australian Tissue Sector: Final Report* (Australian Government Organ and Tissue Authority, 2016) 39.

84 NSW Health, *Report on the Statutory Review of the Human Tissue Act 1983* (tabled in Parliament on 23 October 2018) 16–7.

Appendix A
Preliminary Analysis Paper

15 May 2019

Starting the conversation on law reform

Where next for law reform?

We are asking you: where next for law reform in Australia? What areas of law should be the subject of an ALRC Inquiry?

The ALRC has initiated a national conversation about what should be the priorities for law reform over the next three to five years (Priorities for Law Reform). This conversation is about giving Australians a say in what areas of law should be the focus of a law reform inquiry by the ALRC.

Through an online survey available at www.surveymonkey.com/r/lawreformpriorities (closing **30 June 2019**), individuals and organisations will have the opportunity to provide comments on potential law reform topics and make their own suggestions about areas of law they believe are in need of reform. The ALRC will also hold consultations with key stakeholders and conduct public seminars.

This national conversation forms part of the ALRC's longstanding commitment to broad public participation in law reform.

Priorities for Law Reform will culminate in a proposed three to five year programme of law reform projects that the ALRC will submit to the Commonwealth Attorney-General for consideration in mid to late 2019. While it is the responsibility of the Attorney-General to determine which matters are to be examined by the ALRC, the ALRC may make suggestions. By hosting this national conversation the ALRC is asking the public what suggestions it should make to the Attorney-General.

The information below describes the types of problem the ALRC investigates, identifies how the ALRC will select which law reform projects to propose as part of its Priorities for Law Reform, and outlines a number of potential law reform topics so that stakeholders and the general public can comment on those ideas. Additionally, the topics set out in this Paper may assist stakeholders and the public to develop their own law reform topic suggestions. All suggestions will be considered by the ALRC in developing its proposed Priorities for Law Reform.

What types of law reform inquiry will the ALRC conduct?

The ALRC is an independent, non-political Commonwealth agency. Its mandate is to make recommendations to government in order to inform the development, reform, and harmonisation of Australian laws and related processes through research, analysis, community consultation, and reports.

The ALRC is required by law to make recommendations for reform that:

- bring the law into line with current conditions and needs;
- remove defects in the law;
- simplify the law;
- adopt new or more effective methods for administering the law and dispensing justice; and
- provide improved access to justice.

The ALRC can make recommendations that government should make or consolidate particular Commonwealth laws, repeal unnecessary laws, work towards uniformity between state and territory laws, or facilitate complementary Commonwealth, state, and territory laws.

The ALRC makes recommendations regarding policy development, but does not conduct inquiries into matters which are primarily matters for political judgement. In addition, the ALRC does not have investigative powers and does not conduct inquiries into alleged wrongdoing.

Selection Criteria

In deciding which projects to propose to the Attorney-General as part of its three-year Priorities for Law Reform, the ALRC will apply the following criteria:

- Importance
    - To what extent is the law problematic? Consider eg whether it is unfair, unduly complex, inaccessible, or outdated.
- Impact
    - What are the potential benefits of reform? Consider eg the nature and depth of the impact, the number of people and organisations affected, and the costs and benefits (financial or otherwise) of reform.
- Suitability
    - Is the independent, non-political ALRC the most suitable body to conduct the project?
    - Is there a commitment by Government to reform the law in this area?
    - Has the topic been covered by a recent inquiry (eg a Royal Commission, Parliamentary Committee, Expert Panel)?

- Effectiveness
    - Does the nature, scale, and scope of the project make it an appropriate and efficient use of the ALRC's resources?
- Jurisdiction
    - Does the project relate to an area of Commonwealth law?
    - Does the project identify a need for uniform or complementary state and territory laws?

Potential Topics for Reform

In addition to inviting individuals and organisations to share their own proposals for law reform projects, the ALRC sets out below a number of potential topics for public comment. Some of these topics became evident during the ALRC's work on past inquiries, whereas others have been brought to the ALRC's attention through the work of other individuals and organisations.

In developing its proposed Priorities for Law Reform, the ALRC will weigh all projects equally against the criteria for selection — whether the topic is suggested below or is raised during public consultations.

Potential Topic One: The Australian Constitution

Over the course of 40 years, the ALRC has released 91 reports. Having undertaken a review of this body of work, the ALRC has identified that 56 of those reports raised constitutional issues. In a significant number of these inquiries, the *Australian Constitution* has imposed technical limitations on the options for reform. Given the onerous difficulties in amending the *Australian Constitution*, ALRC reports have almost never recommended constitutional amendments in relation to individual inquiry topics. It may therefore be beneficial to consider broader constitutional reforms in a dedicated inquiry.

Further information about the constitutional barriers encountered in the ALRC's prior work is available at www.alrc.gov.au/inquiries/where-next-law-reform.

Potential Topic Two: Banking, Superannuation, and Financial Services

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry resulted in 76 recommendations that seek to reduce misconduct and ensure consumers are treated fairly. The recommendations set out changes to be made to Acts including the *National Consumer Credit Protection Act 2009* (Cth), the *Corporations Act 2001* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Insurance Contracts Act 1984* (Cth). These amendments seek to simplify existing laws and improve the procedures consumers may rely on where a dispute with a large financial institution arises.

The Royal Commission's findings have received widespread media coverage and the Australian community is currently invested in understanding their rights as consumers. Most, if not all, Australians have had dealings with the banks, superannuation funds, or

other financial institutions criticised in the course of the Royal Commission. Serious and widespread misconduct was identified. As such, there is community support for law reform that will increase accountability and integrity within the financial sector.

The scale of the law reform required is large, as the recommendations apply to numerous Acts, as well as industry specific codes, standards, and regulations. It will require cooperation between government regulators, industry associations, law reform commissions, and the government itself for the Royal Commission recommendations to be fully implemented.

Potential Topic Three: Environmental Law

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('the *EPBC Act*') provides a legal framework to protect and manage important flora, fauna, ecological communities, and heritage places of national environmental significance. There is concern that the *EPBC Act* is outdated and fails to account for climate change. Some have suggested a complete overhaul of the legislative framework and enforcement mechanisms is required.

In June 2018, the Senate referred an inquiry on Australia's faunal extinction crisis to the Environment and Communications References Committee. This inquiry is looking into the ecological impact of faunal extinction, the adequacy of Commonwealth environment laws, and the adequacy of monitoring practices, assessment process, and compliance mechanisms for enforcing Commonwealth environmental law.

In order to adequately protect Australia's environment, a broader approach to law reform may be required to complement the work being done in the Senate on faunal extinction.

Potential Topic Four: Commonwealth Anti-Corruption Measures

The current framework for dealing with corruption in the Commonwealth is fragmented. In contrast, the states and territories have been establishing overarching anti-corruption bodies. There is bi-partisan support for establishing a Commonwealth Integrity Commission to investigate corruption; however, there is disagreement about what powers the Commission should have.

The National Integrity Commission Bill 2018 was introduced into the House of Representatives in late 2018 but recently lapsed. The Bill would have established a national integrity commission as an independent public sector anti-corruption commission for the Commonwealth. However, the Bill was criticised for lacking power and resources, as well as its focus on criminal conduct rather than general corruption. There was significant debate as to whether the commission should have power to publish public findings in relation to investigations.

There have also been arguments made that a wider range of reforms are required to combat corruption in the Commonwealth. These include, for example, law reform to: cap political advertising expenditure during election campaigns; strengthen disclosure regime for political donations; make lobbying more transparent; and set clearer standards on potential conflicts of interest for politicians.

Potential Topic Five: Immigration law

The *Migration Act 1958* (Cth) seeks to strike a balance between a number of objectives, including national security and broad economic considerations. There is wide concern with the application of, and deficiencies in, the *Migration Act*. The Act and related regulatory instruments provide an unwieldy legal framework. The Act itself contains over 500 sections and is one of the largest pieces of Commonwealth legislation.

Further adding to the complexity is the fact that the law in this area changes frequently — with some describing it as an 'ever-shifting' system. The *Migration Act* has been amended over 30 times since 2010, resulting in a legal framework that is arguably no longer fit for purpose. In addition, many suggest that law reform may be necessary to bring Australia in line with its international obligations.

This law reform project would provide a considered and thorough review of Australia's overarching approach to immigration.

Potential Topic Six: Tax law

Following a recent White Paper on tax reform, the Australian Government Treasury concluded that 'there is evidence that the economic costs of Australia's tax system are higher than they need to be'. In particular, there are concerns that the current tax system does not reflect the modern (and future) economy that operates in a dynamic global marketplace across new digital and technological frontiers.

Some of these problems are routed in the federal structure established in the constitution. Australia's current tax system raises over $525 billion annually — primarily through personal income tax and company tax. The Commonwealth Government collects 81% of taxes while the states and territories deliver the majority of public services, including in the health, education, and transport sectors. Roughly 45% of state and territory revenue comes from the Commonwealth Government. This creates a vertical fiscal imbalance whereby the taxing authority and spending responsibilities are not properly aligned. This creates economic inefficiency and reduces transparency.

The issues in need of tax reform extend beyond the constitution. For example, charitable tax concessions are one area of tax law ripe for reform. Under Australian tax law some not-for-profit organisations benefit from tax concessions, a policy tool intended to provide support for activities that generate a community benefit. However, a number of reviews — including the *Australia's Future Tax System Review* and the Australian *Productivity Commission's Contribution of the Not-for-Profit Sector Research Report* — have identified tax concessions as inefficient, complex, and administratively costly. Recent discussion has also highlighted concern with a number of categories of NFPs, and specifically how the legislation defines 'charity'.

Law reform may be required to simplify the tax system, improve its fairness, harmonise and modernise definitions, ensure accountability and compliance, and improve overall effectiveness.

Potential Topic Seven: Defamation

There has been significant recent public debate on the appropriate balance to be struck between the right to maintain one's reputation, and the right to free speech. These conversations are not limited to Australia — defamation has been recently examined by law reform bodies in a number of overseas jurisdictions including the UK, Ireland, and Canada.

Defamation law is widely regarded as complex, technical, and arcane. Additional complexity has arisen in the context of the availability of digital publication and social media. More specific issues include whether Australia should adopt a public interest defence, the scope of the defence of contextual truth, and the effectiveness of remedies.

An inquiry on related topics has recently been announced by the NSW Law Reform Commission. However, the issues have ramifications across the country. The last review of defamation law by the ALRC was almost 40 years ago.

Other potential topics for consideration:

In the interest of stimulating further ideas, we set out below some issues that have recently been addressed by law reform bodies in other jurisdictions.

Technology/ Digital Rights

- Access to digital assets upon death or incapacity (NSW Law Reform Commission)
- Automated vehicles (UK Law Commission)
- Electronic signatures (UK Law Commission)
- Smart contracts (UK Law Commission)
- Digital rights [eg *digital inclusion and access, smart cities, digital due process, regulatory sandboxing, social scoring and algorithmic black boxing, digital democracy, and new frameworks for informed online consent*] (Law Commission of Ontario, CA)
- Search and surveillance (NZ Law Commission)

Corporate/ Consumer

- Review of laws relating to beneficiaries of trusts (NSW Law Reform Commission)
- Intermediated securities (UK Law Commission)
- Bills of sale (UK Law Commission)
- Protecting consumer prepayments on retailer insolvency (UK Law Commission)

Procedure

- Administrative review (UK Law Commission)
- Employment law hearing structures (UK Law Commission)
- Sentencing procedure (UK Law Commission)

- Costs in arbitration (Singapore Law Reform Committee)
- Hague Convention Choice of Court Agreements (Singapore Law Reform Committee)

Appendix B
Constitutional Reform Paper

15 May 2019

The Constitution of Australia: Revisiting Reform

The Australian Constitution was one of the potential topics for reform highlighted by the Australian Law Reform Commission (ALRC) as part of the launch of *Where next for law reform?* – a national conversation about what the priorities for law reform should be over the next three to five years. This conversation will inform a proposed three to five year programme of law reform projects that the ALRC will submit to the Attorney-General of Australia for consideration in mid to late 2019.The purpose of this paper is to lay the foundations for public discussion of the Constitution as a potential reform priority by introducing some contemporary constitutional debates and highlighting constitutional issues that have been encountered by the ALRC in the course of previous inquiries.

1. Introduction

The Australian Constitution constitutes the 'invisible architecture' of government in Australia. Its provisions govern the structure, functions, and powers of the three arms of government (the legislature, executive and judiciary), as well as the interaction between the States and Territories and the Commonwealth.

Law reform in Australia is subject to constitutional limits on, for example, the types of functions that may be performed by different bodies and the scope of Commonwealth legislative power. The ALRC must consider these constitutional limits when developing its recommendations for reform of different areas of law. Recommending reforms that exceed existing constitutional limits necessarily entails recommending amendment of the Constitution to make that reform possible.

It is generally recognised that the Constitution should not be viewed as a timeless document whose terms ought to be preserved exactly as they were drafted in the 1890s. A document drafted more than a century ago cannot be expected to adequately provide for changes in the circumstances of Australian society since that time. However, the Constitution cannot be amended or repealed by Parliament in the same way as ordinary statutes.

The special procedure that must be followed to amend the Constitution is contained in s 128. This section requires that a proposed constitutional amendment is first passed by an absolute majority of both houses of Parliament,[1] and is then put to eligible voters in a referendum. Successful constitutional amendment requires the amendment to be approved by a 'double majority' — that is, not only by a majority of voters within Australia, but also by a majority of voters within a majority of states.[2]

Achieving constitutional reform has been historically difficult. Only eight of the 44 referendum proposals that have been put to the Australian public since 1901 have been successful. The most recent (unsuccessful) referendum on amendment of the Australian Constitution took place 20 years ago, in 1999.[3] George Williams and David Hume have described this recent state of affairs as the 'self-fulfilling constitutional drought'.[4] This reflects the reality that constitutional reform is often pre-emptively removed from the agenda because it is assumed to be unfeasible.

The absence of governmental proposals for constitutional reform in recent years does not, however, reflect an absence of contemporary debate on constitutional issues.

2. Contemporary Constitutional Issues

The Australian Constitution has consistently been the subject of prolific public debate. Constitutional issues underpin a broad range of public concerns, from the opaque process of judicial appointments,[5] to the complicated dual citizenship prohibition under s 44 that has plagued federal parliament in recent years.[6] Here we briefly canvass some examples of prominent constitutional debates currently underway in Australian society, to highlight the breadth of issues impacted by the limits of the Constitution, and the potential appetite for reform in Australian society. These are just a sample of the types of constitutional issues that may warrant further enquiry and reform.

Human Rights

Only a handful of rights are expressly guaranteed by the Constitution, including the right to vote, the right to trial by jury, and freedom of religion.[7] The High Court has

1 An alternative pathway is also provided for where the amending law is passed by an absolute majority in one house, but not the other. If the amendment is passed by an absolute majority of the same house three months later, the amendment may progress to the referendum stage.

2 Amendments that would affect a particular state in specified ways must also be approved by a majority of voters in the affected state.

3 The 1999 referendum asked whether Australia should become a republic.

4 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 230.

5 Max Spry, 'Executive and High Court Appointments' (Parliament of Australia Research paper 7 2000-01, 2000) www.aph.gov.au.

6 See generally HK Colebatch, 'Enough is enough on section 44: it's time for reform' (The Conversation, 10 September 2018) theconversation.com; Ian Holland, 'Section 44 of the Constitution' (Parliament of Australia E-Brief, March 2004) www.aph.gov.au.

7 Even these rights have limited application. For example, the right to vote is functionally redundant, in that it only applies to persons who acquired the right to vote before 1902 – that is, persons born before 1881. Others have been limited by the High Court, such as the right to trial by jury, which the High Court has held to only apply to indictable offences: see *R v Archall & Roskruge* [1928] 41 CLR 128, 22–23,

also 'implied' some rights into the constitution, on the basis that they are necessary prerequisites for the functioning of a 'Constitution for a free society'.[8] Examples of implied rights include the right to political communication, the right to a fair trial, and the right to not be detained other than by judicial order.[9] Apart from this limited coverage, the Constitution makes no mention of many fundamental human rights guaranteed by international conventions such as the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*, both of which Australia has ratified.[10] While rights may also be set out in statute, some have argued that only constitutional reform can ensure that rights are adequately protected in Australia.[11]

Indigenous Recognition

Indigenous advocates have called for a number of amendments to the Constitution.[12] Indigenous peoples are not mentioned in the Constitution, but racial discrimination is still expressly permitted under s 51(xxvi) (the 'race power'). The use of this power is inconsistent with the prohibitions contained in the *Racial Discrimination Act 1975* (Cth), the operation of which has at times been suspended by the Australian Government in order to use the race power.[13] Critics have called for removal of the race power and constitutional entrenchment of the right to freedom from discrimination.[14] Others have also

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and subsequent cases. See also George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 2017) 50; Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters Lawbook Co, 2013) 39.

8 The Hon Lionel Murphy, former Attorney-General of the Whitlam Government and Justice of the High Court, quoted in Williams and Reynolds (2017) 60.

9 Williams and Reynolds (2017) 59; Debeljak (2013) 39–41.

10 *International Covenant on Civil and Political Rights ('ICCPR')*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights ('ICESCR')*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). Australia ratified the ICCPR in 1980 and the ICESCR in 1975, but neither instrument has been fully implemented in domestic law: Debeljak (2013) 42; Australian Human Rights Commission, 'Human rights at your fingertips', www.humanrights.gov.au.

11 See generally Diana Perche, 'Ten years on, it's time we learned the lessons from the failed Northern Territory Intervention' (The Conversation, 26 June 2017) theconversation.com.

12 See *Uluru Statement from the Heart* (Resolution of the Referendum Council First Nations National Constitutional Convention, 2017) www.referendumcouncil.org.au/resource.html; Referendum Council, *Final Report of the Referendum Council* (2017) www.referendumcouncil.org.au/final-report.html; Daniel McKay, 'Uluru Statement: a quick guide' (Australian Parliament, Law and Bills Digest Section, 19 June 2017) www.aph.gov.au.

13 In a current example, the race power was used by the Howard Government to implement the Northern Territory National Emergency Response (or NT Intervention), a package of changes to welfare, law enforcement, and land tenure rules, among others, affecting 73 indigenous communities. The enacting legislation suspended the operation of the *Racial Discrimination Act 1975* (Cth) in order to facilitate the policy. See generally Diana Perche, 'Ten years on, it's time we learned the lessons from the failed Northern Territory Intervention' (The Conversation, 26 June 2017) theconversation.com; Sara Everingham, 'Northern Territory Emergency Response: Views on 'intervention' differ 10 years on' (ABC News, 21 June 2017) www.abc.net.au/news; Australian Human Rights Commission, 'About Constitutional Recognition', www.humanrights.gov.au.

14 See generally Dan Conifer, 'Constitutional recognition: Australia's founding document should not embody 'racist past', Pat Dodson says' (ABC News, 23 June 2017) www.abc.net.au/news; Frank Brennan, 'Frank

called for constitutional reforms to recognise Indigenous peoples as the First Australians, and establish a Makarrata Commission and Indigenous Voice to Parliament. These amendments could ensure Indigenous consultation on legislation that affects Indigenous communities, and Indigenous supervision of a process of 'agreement making' and 'truth telling' between Aboriginal and Torres Strait Islander peoples and government.[15] Finally, the High Court is currently considering a challenge to the Commonwealth Government's position that an Aboriginal or Torres Strait Islander person without Australian citizenship is an 'alien' under the Constitution, for the purposes of mandatory deportation laws.[16]

Taxation

The constitutional powers granted to the Commonwealth, together with evolving Commonwealth practice has led to vertical fiscal imbalance between the Commonwealth and State governments. While the States retain primary responsibility for service delivery, they are unable to raise sufficient revenue to provide services and instead rely on tied and untied grants from the Commonwealth. The Commonwealth Government raises more revenue than is necessary to service Commonwealth spending responsibilities and uses the surplus to provide grants to State governments.[17] In 2014-15, transfers between the Commonwealth Government and State Governments amounted to roughly one quarter of Commonwealth spending, and up to 60 percent of States' revenue.[18] The Commonwealth's policy agenda has grown significantly since federation. Through the operation of tied grants to the States, that growth has extended into areas where the Commonwealth otherwise has no constitutional power. Education and health are examples where this has led to claims of duplication, policy dissonance, blame-shifting, and a general lack of accountability between state and federal governments.[19]

Federalism

The federal structure has also created other problems. Commentators have called for clarification of the Commonwealth's legislative power with regard to issues including

Brennan: the case for modest constitutional change' (The Conversation, 21 May 2015) theconversation.com; Lorena Allam, 'Constitution's power to 'enable' race discrimination should be removed, MPs told' (The Guardian, 19 October 2018) www.theguardian.com/australia-news.

15 See generally Dominic O'Sullivan, 'Indigenous recognition in our Constitution matters – and will need greater political will to achieve' (The Conversation, 18 January 2018) theconversation.com; Joint Select Committee on Constitutional Recognition, *Final Report* (Australian Parliament, 2018); Australian Human Rights Commission, 'About Constitutional Recognition', www.humanrights.gov.au; Daniel McKay, 'Uluru Statement: a quick guide' (Australian Parliament, Law and Bills Digest Section, 19 June 2017) www.aph.gov.au.

16 *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (High Court of Australia, B43/2018 and B64/2018, commenced 8 May 2018). See Brooke Fryer, 'High Court will decide if Indigenous people without citizenship can be deported' (SBS News, 8 May 2019) www.sbs.com.au.

17 See National Commission of Audit, *Towards Responsible Government* (Final Report, 2014) App. Vol. 1 [8.3]; Therese Burton, Brian Dollery, Joe Wallis, 'A Century of Vertical Fiscal Imbalance in Australian Federalism' (2016) 36(1) *History of Economics Review* 26, 27.

18 In 2014-15, for example, Victoria received 47 percent of its total revenue from the Commonwealth, while South Australia received 51 percent and Tasmania 61 percent: Brian Galligan, 'Renewing Federalism: what are the solutions to Vertical Fiscal Imbalance?' (The Conversation, 16 September 2014), theconversation.com.

19 Galligan (2014); National Commission of Audit (2014) App. Vol. 1 [8.3].

communications, environmental regulation, social welfare, industrial relations, intellectual property, and family law.[20] As an example of the uncertainty created by the federal structure, the Constitution makes no provision for local government or its funding. This has cast uncertainty over the constitutional validity of Commonwealth funding for local government programs, such as the school chaplaincy scheme, which the High Court rejected in 2012.[21] In 2013, federal parliament passed a constitutional amendment bill, which (if it succeeded in a referendum) would have made specific provision for Commonwealth financial assistance to local government bodies.[22] After a controversial and unsuccessful campaign, however, the referendum was abandoned, and the uncertainty remains.[23] In a more recent example, the environmental crisis in the Murray Darling Basin has raised questions regarding the proper division of Commonwealth and State regulatory power over rivers that flow through multiple states.[24]

3. Constitutional Issues Encountered in Previous ALRC Inquiries

Since its establishment in 1975, the ALRC has produced 91 reports on various areas of Australian Commonwealth law. Of these, we identified 56 reports (61%) in which the Constitution presented one or more obstacles to the effective operation of the law in Australia. Broadly, these obstacles fall into two categories: those where the legal arrangements in need of reform were dictated or underpinned by constitutional requirements; and those where the Constitution itself limited the availability or scope of possible reforms. Despite the prevalence of constitutional issues in previous ALRC inquiries, constitutional reform has only once been recommended by the ALRC.[25] When constitutional issues have arisen, they have typically been beyond the scope of the inquiry.[26] Even when the ALRC has attempted to grapple with the constitutional issues that arise, it is often impeded by uncertainty as to the scope of constitutional provisions, which undermines efforts to recommend appropriate and effective reforms.[27]

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20 See John McMillan, 'Constitutional Reform in Australia' (Australian Parliament Papers, No. 13, 1991) www.aph.gov.au.

21 *Williams v Commonwealth of Australia* [2012] HCA 23. See also ABC News, 'Commonwealth funding of school chaplaincy program struck down in High Court' (20 June 2014) www.abc.net.au/news.

22 The Constitution Alteration (Local Government) 2013 was passed and came into effect in 2013, but did not proceed to a referendum: www.legislation.gov.au.

23 David Spooner and Kirsty Magarey, 'Constitutional Reform—Indigenous peoples and local government' (Australian Parliament, Law and Bills Digest) www.aph.gov.au.

24 See Anne Davies, 'Push for referendum on federal takeover of Murray-Darling river system' (The Guardian, 6 May 2019) www.theguardian.com/australia-news; Lee Godden, Jacqueline Peel, Lisa Caripis, 'Commonwealth should keep final say on environment protection' (The Conversation, 5 December 2012) theconversation.com; cf. Adam Webster, 'A referendum won't save the Murray-Darling Basin' (The Conversation, 13 May 2019) theconversation.com.

25 See below in relation to fundamental rights and freedoms: ALRC, *Equality Before the Law: Part 2: Women's Equality* (Report 69, 1994).

26 See, e.g. ALRC, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report 126, 2015) [1.71]–[1.72]. The ALRC has also at times been instructed not to consider reforms that would require constitutional amendment: ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 2000) [1.4]; ALRC, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report 92, 2001) [1.12].

27 See, e.g. ALRC, *Service and Execution of Process* (Report 40, 1987) [30], [612], [615]; ALRC, *Grouped Proceedings in Federal Court* (Report 46, 1988) [76]; ALRC, *Designs* (Report 74, 1995) [12.13]; ALRC,

Heads of Power

One of the most common issues stems from constitutional limits on the scope of Commonwealth legislative power. The Commonwealth only has the power to make laws with respect to certain subject matters or 'heads of power' set out in s 51 of the Constitution. In several ALRC inquiries, it was unclear which of the available heads of power would be most appropriate to support the proposed legislative reforms, highlighting the limited capacity of the Constitution to meet the evolving legal needs of contemporary Australian society.[28] In others, the ALRC favoured a uniform legislative approach, but was forced to concede that such reform would either require State governments to enact uniform legislation, or necessarily result in functionally incomplete Commonwealth legislation.[29] This shortfall has had serious consequences for the welfare of Australians: the ALRC's most recent report, *Family Law for the Future*, noted that constitutional limitations prevent the federal family courts from hearing some aspects of matters relating to family violence. This has led to the development of a bifurcated legislative regime covering family law issues, in which parenting and property proceedings are heard in federal family courts, while child protection and family violence matters are dealt with in state courts. As a result, some children and victims of domestic violence have been put at risk because the federal judicial officers adjudicating parenting orders have not been made aware of serious violence risks.[30]

Separation of Powers

The constitutionally enshrined 'separation of powers' doctrine limits the types of power that may be exercised by the different branches of Commonwealth government. Notwithstanding the importance of the separation of powers in Australia, this arrangement presents challenges for law reform. The strict separation of powers principles that have emerged from High Court jurisprudence impact on the ability of law reform bodies to think creatively about the most appropriate forums for resolving disputes. Consideration of the use of administrative tribunals and alternative decision-making forums is limited by the principle that federal judicial power may only be exercised by courts which are constituted in accordance with Ch III of the Constitution.[31] In the ALRC's 1986 report on Indigenous customary law, for example, this principle limited consideration of alternative Aboriginal court models.[32] Other potential reforms in ALRC reports have been hampered

Costs Shifting – Who Pays for Litigation (Report 75, 1995), [9.3]–[9.7]; ALRC, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018) 68, 97 fn 30.

28 For example, issues such as privacy and superannuation do not fit neatly into any of the available heads of power: ALRC, *Privacy* (Report 22, 1983) [7]; ALRC, *Collective Investments* (Report 59, 1992) [7.19].

29 See, e.g. ALRC, *Unfair Publication: Defamation and Privacy* (Report 11, 1979) [303]; ALRC, *Debt Recovery and Insolvency* (Report 36, 1987) [16], [149]; ALRC, *Spent Convictions* (Report 37, 1987) [69].

30 ALRC, *Family Law for the Future – An Inquiry into the Family Law System* (Report 135, 2019) ch 4.

31 *NSW v Commonwealth* (1915) 20 CLR 54 ('*Wheat case*'); *Waterside Workers' Federation v J W Alexander* (1918) 25 CLR 434; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. These issues have arisen in various ALRC reports, including: ALRC, *Insolvency: The Regular Payment of Debts* (Report 6, 1977) 39; ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) 413, 533; ALRC, *Secrecy Laws and Open Government in Australia* (Report 112, 2010) 455.

32 ALRC, *Recognition of Aboriginal Customary Laws* (Report 31, 1986) [808], [1021].

by the inability of Chapter III courts to discharge powers other than judicial powers.[33] This limits, for example, the use of sentencing guidelines or guideline judgements which would require Ch III courts to make impermissible 'advisory opinions'.[34] Separation of powers considerations also impact reform proposals by state law reform bodies, albeit to a lesser extent, as the vesting of non-judicial powers in State courts is limited by their role as prospective vessels of federal jurisdiction.[35]

Human Rights

In 2016 the ALRC reported that fundamental rights are inadequately protected in the Constitution, and that inconsistent development of rights through case law has led to uncertainty in relation to the application of rights and the proper balancing of conflicting rights.[36] In 1994 the ALRC recommended the constitutional entrenchment of a proposed Equality Act as the most effective pathway to ensuring equality in Australia. Recognising the challenges of constitutional reform, however, the ALRC conceded that a statutory regime would be more feasible in the near term.[37] Other reports have noted the inconsistency inherent in the practice of identifying some rights as 'constitutionally implied' while designating others as common law rights.[38]

Federalism

Several previous inquiries have contended with the confusion, uncertainty, and inconsistencies created by the federal structure, including the inconsistent exercise of federal jurisdiction or federal functions by state courts or other agencies.[39] In some areas, the lack of constitutional clarity as to whether regulatory responsibility lies with the Commonwealth or the States has led to decades of 'blame shifting and buck passing'.[40] For example, it was difficult for the ALRC to make recommendations to reform privacy protections in Australia, because it is unclear under the Constitution whether responsibility for the regulation of personal data lies with the Commonwealth

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33 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, [270] ('*Boilermakers Case*'). See ALRC, *Insolvency: The Regular Payment of Debts* (Report 6, 1977) 39; ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) 413, 533.

34 *Huddard, Parker & Co Pty Ltd v Moorehead* (1909) 9 CLR 330, 357; *Wong v The Queen* (2001) 207 CLR 584. See, e.g. ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) 413, 533; ALRC and NSWLRC, *Family Violence: A National Legal Response* (Report 114, 2010) 602; ALRC, *Principled Regulation: Federal and Civil Administrative Penalties in Australia* (Report 95, 2003) 883–5, 889.

35 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

36 ALRC, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws* (Report 129, 2016) 16, 19, 22, 34–5.

37 ALRC, *Equality Before the Law: Part 2: Women's Equality* (Report 69, 1994) [4.16], rec 4.2.

38 See, e.g. ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, 2004) 382.

39 ALRC, *Criminal Investigation* (Report 2, 1975) [20]; ALRC, *Evidence* (Interim Report 26, 1985) 2; ALRC, *Evidence* (Final Report 38, 1987) 20–21; ALRC, *Sentencing of Federal Offenders* (Interim Report 15, 1980) [5]–[7], [10], [68]–[74], [144], [153]; ALRC, *Sentencing* (Report 44, 1988) [3]; ALRC, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report 92, 2001) [2.85]–[2.91]; ALRC, *Uniform Evidence Law* (Report 102, 2006) [1.15]–[1.16].

40 Sharon Scully, 'Does the Commonwealth have constitutional power to take over the administration of public hospitals?' (Australian Parliament Research Paper no. 36 2008–09, 2009) www.aph.gov.au.

or State governments.[41] This issue also manifests in areas of law that are governed by a complex and confusing patchwork of laws and regulations that sometimes encompass all three levels of government. Apart from the inefficiencies inherent in this approach to governance, it also generates particular challenges where the Commonwealth seeks to override relevant inconsistent state laws, which the Constitution permits under s 109.[42] The ALRC's 1986 report on Indigenous customary law, for example, noted that many of the law reform options considered sat within the existing administrative scope of the States and Territories, and that 'Commonwealth involvement in these areas would undoubtedly raise sensitivities.'[43]

4. Starting the Conversation on Constitutional Reform

Twenty years have elapsed since the public was last asked to vote on amending the Australian Constitution. The 'constitutional drought' of the 21st century does not, however, reflect the satisfactoriness of current constitutional arrangements. As outlined above, there are a range of ongoing debates which raise questions about the need for constitutional amendment. The challenges of current constitutional arrangements have also been apparent in the work of the ALRC over the past 40 years.

The law reform process inevitably occurs in the shadow of the historical difficulty of pursuing constitutional amendment. Reform options that would require constitutional amendment are liable to be discounted without full consideration of their merits because it is assumed that constitutional amendment is unfeasible, or at the very least would be beyond the scope of the inquiry in question.

It is on this basis that the ALRC puts forward the Constitution itself as a potential topic for law reform. A law reform inquiry may reinvigorate the conversation on constitutional reform in the 21st century and provide an impetus for government to engage with the amendment process. The ALRC anticipates such an inquiry would represent a particularly valuable opportunity to review some of the technical and structural aspects of the Constitution that have not attracted public debate, but may have significant impacts on law reform – recognising that the Constitution governs much more than 'the vibe'.

The ALRC welcomes your comments on the Constitution as a potential reform priority. You can contribute to the conversation by participating in our online survey **available at** www.surveymonkey.com/r/lawreformpriorities (closing **30 June 2019**) or by attending one of our upcoming public seminars. This is also an opportunity to comment on other potential areas of reform identified by the ALRC in *Where next for law reform?*, or to suggest further topics. Please visit www.alrc.gov.au/inquiries/where-next-law-reform for more details on how to get involved. Further seminar dates and locations will be added in the coming months.

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41 ALRC, *For Your Information: Australian Privacy Law and Practice* (Report 108, 2008) 615.

42 See, e.g. ALRC, *Debt Recovery and Insolvency* (Report 36, 1987) [16]–[17], [149]; ALRC, *Recognition of Aboriginal Customary Laws* (Report 31, 1986) [1026]–[1028]; ALRC, *Criminal Admiralty Jurisdiction and Prize* (Report 48, 1990) [23].

43 ALRC, *Recognition of Aboriginal Customary Laws* (Report 31, 1986) [1022].

Appendix C
Survey Form

Where next for law reform?

This survey provides Australians with the opportunity to make comments on potential law reform topics proposed by the ALRC or suggest a different area of law they believe is in need of reform.

The ALRC Priorities for Law Reform survey is open until **30 June 2019**. To access the survey visit: www.alrc.gov.au/inquiries/where-next-law-reform.

For ease of access, the online survey questions are set out below. Please answer as many of these questions as you can, as fully as you can. You do not need to answer all of the questions in this survey. ***Only questions marked by an asterisk require a response.***

Privacy

As responses to this survey provide the evidence base for potential law reform projects, the ALRC may draw on the survey responses and quote from them or refer to them in publications. Responses to this survey will be considered to be in the public domain. Please visit www.alrc.gov.au/about/policies for further details about how the ALRC handles requests for access to information.

If you wish to make a confidential contribution, please email us at reformpriorities@alrc.gov.au.

Details for Submission

Please tell us about yourself.

*Name (individual/organisation):

State/Territory:

*Email:

Phone:

Please highlight the category that best describes in what capacity you are making this submission:

Member of the public	Academic
Parliamentarian	Community Organisation/Not-for-profit
Member of the judiciary	Commercial sector/business
Public servant	Student
Lawyer	Other (please specify)

Potential topics for law reform proposed by the ALRC

*Please put an 'X' in the box below to indicate the strength of the need for law reform for each of the following projects.

For a description of the proposed topics, please visit: www.alrc.gov.au/inquiries/where-next-law-reform.

	High	Moderate	Low	No need	Do not wish to comment
Potential Topic One: The Australian Constitution					
Potential Topic Two: Banking, Superannuation and Financial Services					
Potential Topic Three: Environmental Law					
Potential Topic Four: Commonwealth Anti-Corruption Measures					
Potential Topic Five: Immigration law					
Potential Topic Six: Taxation law					
Potential Topic Seven: Defamation					

If you would like to provide comments on a potential topic, please respond to the questions below. You can copy and paste this section to provide comments on multiple potential topics.

I would like to provide comments on Potential Topic _____.

Are there particular issues within this topic that you think are in need of reform?

Please describe how the law is unfair, unduly complex, inaccessible, or otherwise problematic.

What impact does the problem have on people/organisations?

- Can you give us an example of what happens in practice? Are some groups of people/ organisations more affected by this issue than others? Are you able to tell us what the scale of the problem is?

Do you have suggestions for what needs to be done to solve the problem?

- What are the potential benefits and costs (eg economic, societal, environmental, etc) of reform? Can you tell us about how the problem is approached in other legal systems?

Is there related material to which you would like to refer us?

- You might be able to tell us about court cases, legislation, journal articles, or reports that illustrate or expand on this problem. You might also be aware of recent inquiries (eg Royal Commissions, Expert Panels, etc) that have studied related issues.

Additional Comments:

New topic for law reform

Please use this section to tell us about a different area of law you think is in need of reform. If you would like to provide multiple suggestions, you can copy and paste this section.

Please highlight the area of law to which the problem relates.

I don't know	Employment law
Administrative law	Environmental law
Bankruptcy and Insolvency	Legal procedure
Commercial or contract law	National security and counter-terrorism
Consumer law	Technology and the law
Criminal law	Other(pleasespecify):_____

In general terms, please tell us about the legal problem that you suggest requires reform?

- Please describe how the law is unfair, unduly complex, inaccessible, or otherwise problematic.
- Keep in mind that the ALRC generally addresses legal problems that either (1) relate to an area of Commonwealth law or (2) require uniformity or complementarity across the states and territories.

What impact does the problem have on people/organisations?

- Can you give us an example of what happens in practice? Are some groups of people/organisations more affected by this issue than others? Are you able to tell us what the scale of the problem is?

Do you have suggestions for what needs to be done to solve the problem?

- What are the potential benefits and costs (eg economic, societal, environmental, etc) of reform? Can you tell us about how the problem is approached in other legal systems?

Is there related material to which you would like to refer us?

- You might be able to tell us about court cases, legislation, journal articles, or reports that illustrate or expand on this problem. You might also be aware of recent inquiries (eg Royal Commissions, Expert Panels, etc) that have studied related issues.

Additional Comments:

Thank you.

Thank you for taking the time to complete our survey. We look forward to publishing the results of our work later in 2019. If you would like to stay informed about developments in this — and other — ALRC projects, please subscribe to the ALRC Brief at www.alrc.gov.au/mailchimp/subscribe.

Appendix D
Survey Data

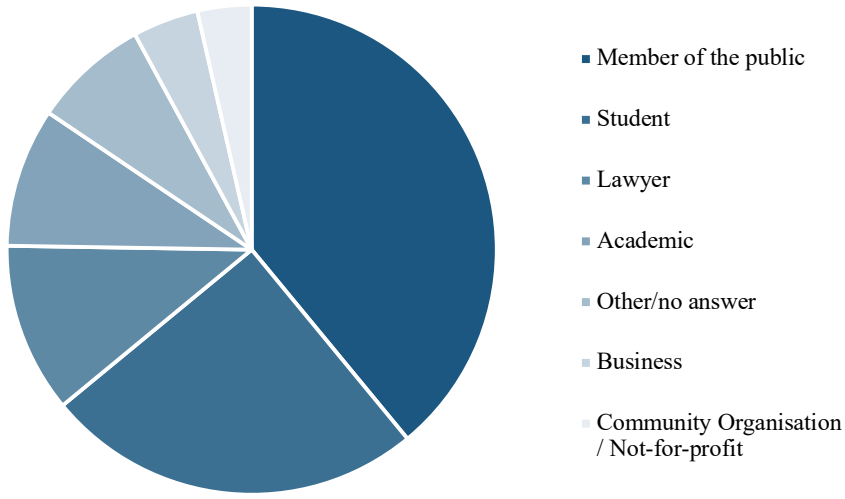
Word cloud

Respondent background

Survey respondents were asked to indicate the primary capacity in which they were responding to the survey. Not all respondents answered the question.

Member of the public	153	40%
Student	98	25%
Lawyer	44	11%
Academic	36	9%
Other	30	8%
Business	17	4%
Community Organisation / Not-for-profit	14	4%

Respondent background

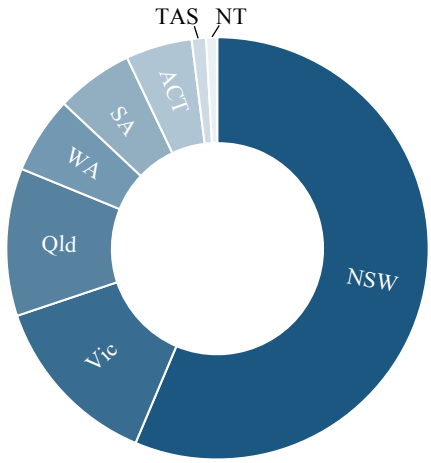


Distribution of respondents by jurisdiction

Respondents were asked to identify the state or territory with which they were primarily associated. Not all respondents answered the question.

NSW	Vic	Qld	SA	WA	ACT	Tas	NT
200	48	40	21	21	18	4	3

Distribution of respondents by juridiction

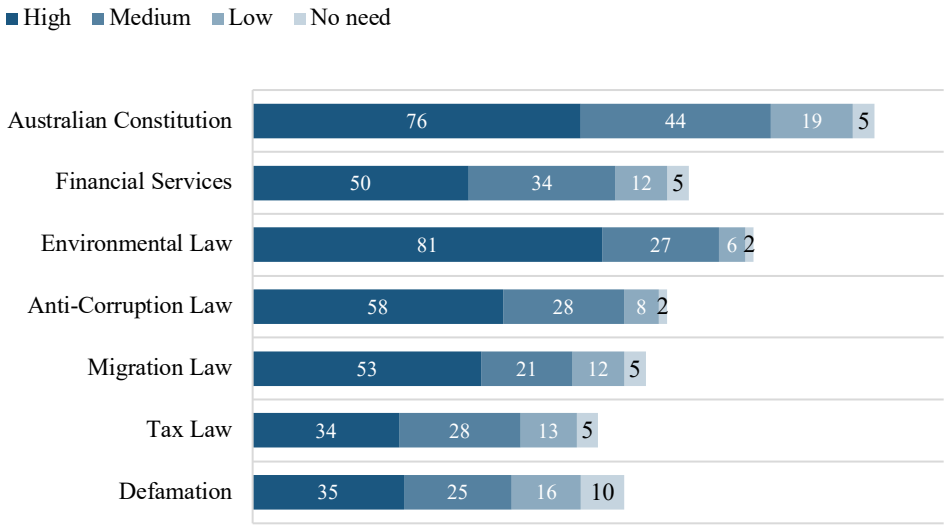


Strength of need for reform in example topic areas

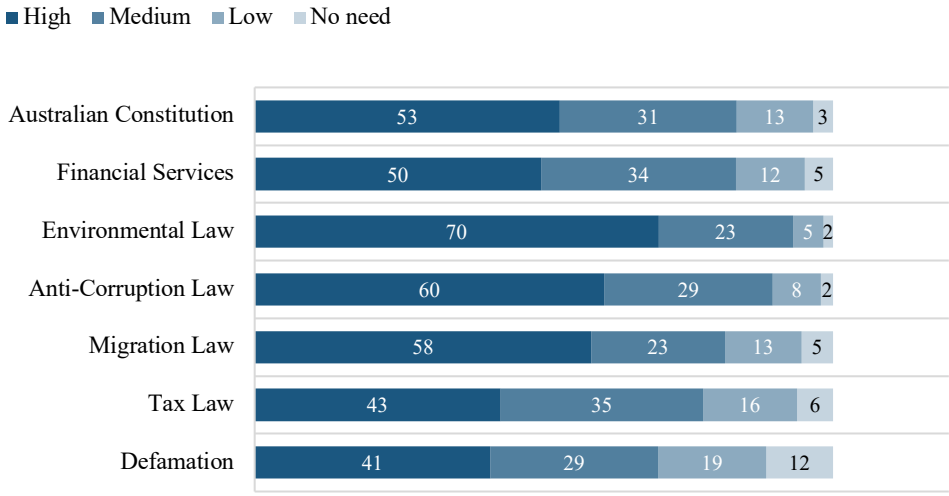
For each of seven example law reform topics, respondents were asked to indicate whether they considered there to be a 'high', 'medium' or 'low' level of need for reform. Respondents could answer the question in relation to as many, or as few, example topics as they wished. The topics are presented below in the same order they were presented in the survey.

	High	Medium	Low	No need	Total
Australian Constitution	76 (53%)	44 (31%)	19 (13%)	5 (3%)	144
Financial Services	50 (50%)	34 (34%)	12 (12%)	5 (5%)	101
Environmental Law	81 (70%)	27 (23%)	6 (5%)	2 (2%)	116
Anti-Corruption Law	58 (60%)	28 (29%)	8 (8%)	2 (2%)	96
Migration Law	53 (58%)	21 (23%)	12 (13%)	5 (5%)	91
Tax Law	34 (43%)	28 (35%)	13 (16%)	5 (6%)	80
Defamation	35 (41%)	25 (29%)	16 (19%)	10 (12%)	86

Strength of need for law reform – number of respondents



Strength of need for law reform – percentage of respondents



Appendix E
Summaries of Public Seminars

Results in Brief: Seminar on the Future of Public Law Reform

On 29 May 2019, the Australian Law Reform Commission and the University of NSW hosted a conversation on the future of law and constitutional reform in Australia. The event launched the ALRC's new project that seeks public input in identifying areas of Australian law that may benefit from reform.

The panel's discussion provided insightful suggestions for reform.

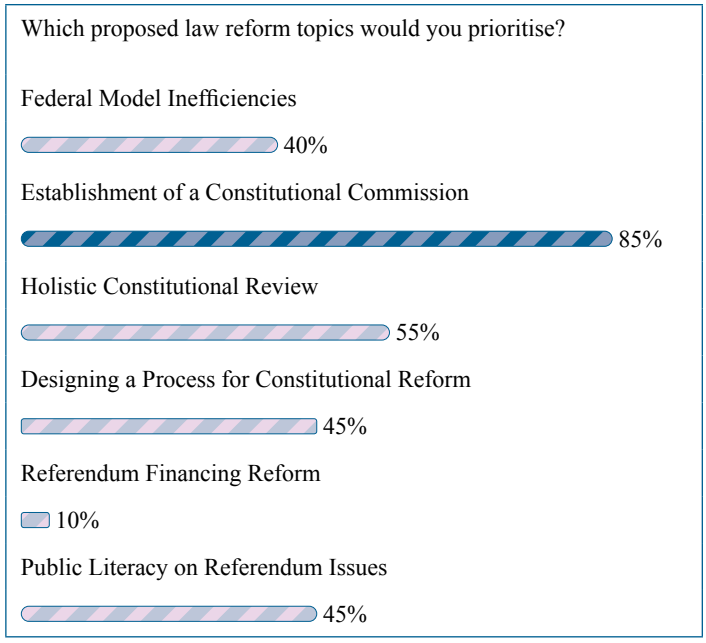
Prof George Williams AO noted that Australia is overdue for a comprehensive constitutional review and that there are practical and economic consequences of inaction on constitutional reform due to inefficiencies in the federal model. He proposed a standing Commission to conduct ongoing review of the Constitution and propose potential reforms.

Gemma McKinnon identified an urgent need for constitutional reform in order to implement the First Nations Voice to Parliament called for in the Uluru Statement from the Heart. However, she urged that reform should not be delayed by any future law reform inquiry (accordingly, attendees were not asked to vote on this proposal in our brief poll below).

Dr Paul Kildea offered concrete ideas around improving the process for constitutional reform, and advocated for increased public engagement (such as citizens' assemblies), and ways to combat misinformation.

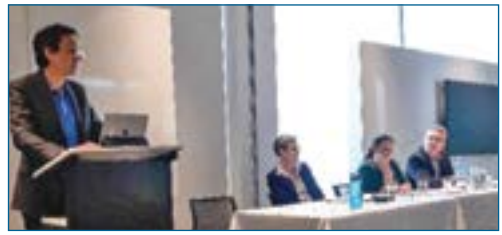
Following the seminar, participants were invited to vote for their top three priority topics for a law reform inquiry. Attendees' top concern was the need to establish a standing Constitutional Commission. This was followed by the need for holistic review of the Constitution, enhancing the process for constitutional reform, and improving public literacy on referendum topics.

The ALRC is holding a number of seminars across the country and is hosting an online survey (until 30 June 2019). We encourage you to take the opportunity to participate and help to shape the future of law reform in Australia. More details are available at: www.alrc.gov.au/inquiries/where-next-law-reform.



Results in Brief: Seminar on the Future of Law Reform — Technology and the Law

On 12 June 2019, the Australian Law Reform Commission and the Australian National University College of Law hosted a conversation on the future of law reform in Australia. The Director of ANU's Law Reform and Social Justice program, Associate Professor Matthew Zagor, chaired an engaging conversation that focussed on Technology and the Law. The event was the second in a series of seminars that form part of the ALRC's new project, which seeks public input in identifying areas of Australian law that may benefit from reform.



The panel's thought-provoking discussion raised a broad range of issues for reform.

Dr Lesley Seebeck cautioned that in order to ensure Australians live in a digital democracy that respects individual liberty, a deliberative process needs to occur. This requires assessing the existing legislative framework and pruning laws that are not fit for that purpose.

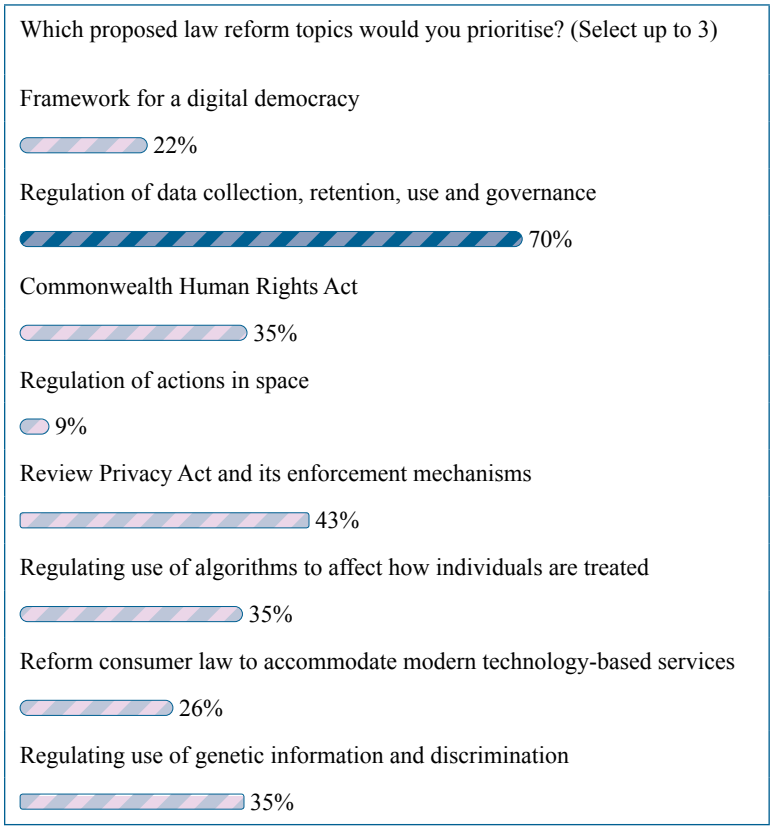
Professor Peter Leonard elaborated on concerns relating to the absence of a robust regulatory framework for data governance. He noted specific concerns, including how

algorithms are used to affect the treatment of individuals, and discriminatory use of genetic information.

Dr Imogen Saunders took the discussion beyond this world to the regulation of space. She noted that while Australia currently regulates how humans and objects get into space, there is little regulation of what happens once they are there.

Following the seminar, participants voted for their top three priority topics for a law reform inquiry. Attendees' top concern was the regulation of data collection, retention, use, and governance. This was followed by the need for a review of the Privacy Act and its enforcement mechanisms.

The ALRC is holding a number of seminars across the country and is hosting an online survey (until 30 June 2019). We encourage you to take the opportunity to participate and help to shape the future of law reform in Australia. More details are available at: www.alrc.gov.au/inquiries/where-next-law-reform.



Results in Brief: The Future of Law Reform — Constitutional and Immigration Issues

On 18 June 2019, the Australian Law Reform Commission and the University of Melbourne hosted a conversation on the future of law reform in Australia. Justice John Middleton chaired an insightful conversation focusing on issues relating to both the Australian Constitution, and Immigration Law. This was the third seminar in a series asking about areas of Australian law that may benefit from reform.

Professor Cheryl Saunders observed that many proposals for constitutional change may have failed because the reform process was too "top down". She noted the establishment of 'citizen assemblies' in some other countries, and suggested that the ALRC could play a role in educating the public about options for change. Perhaps section 44 of the Constitution could helpfully be reviewed using such a process.

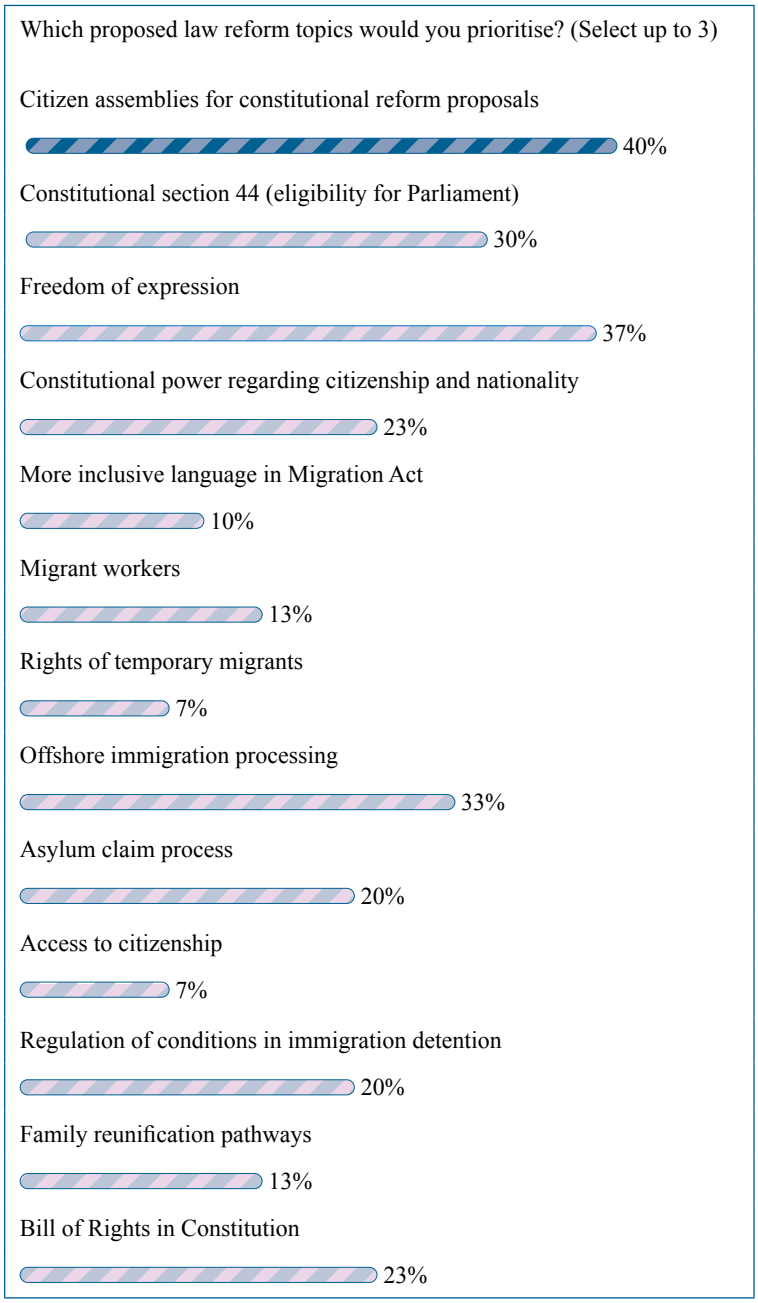
Professor Adrienne Stone argued that legal protections for freedom of expression could the subject of careful reform. She argued that the right to freedom of political communication implied in the Australian Constitution could in fact be equally as strong as express rights found in other countries' constitutions, and urged a deliberative "bottom-up" approach to reform. Legislative protections for journalists and whistleblowers could be improved in the meantime.

Professor Susan Kneebone highlighted the political nature of many issues in Immigration Law, often involving broad ministerial discretion. She suggested that the constitutional power to make laws relating to 'naturalization and aliens' had fostered a culture of control and exclusion which had infused the Migration Act. A review could consider a new constitutional power relating to 'citizenship and nationality', and more inclusive legislative objects and language. Temporary migrant workers could also benefit from a review of their family rights.

Ms Katie Robertson advocated for review of legal processes such as claiming asylum, applying for citizenship, and sponsoring family members to come to Australia. She noted that immigration detention conditions are not currently regulated, and that many other immigration issues require political or cultural change, rather than a law reform inquiry.

Attendees voted as their priority law reform topics: establishing citizen assemblies, protecting freedom of expression, and reviewing offshore immigration processing.

The ALRC is running an online survey until 30 June 2019 to capture your ideas. More details are available at: www.alrc.gov.au/inquiries/where-next-law-reform.



Results in Brief: Public Seminar on Energy, Resources and Environmental Law

On 20 June 2019, the Australian Law Reform Commission hosted a conversation at the Federal Court in Brisbane on the future of law reform in Australia. This was the third seminar in a series asking about areas of Australian law that may benefit from reform. An expert panel spoke and answered questions on the focus topic of Energy, Resources and Environmental Law.

Professor Jonathan Fulcher suggested harmonisation of water planning should be a priority, particularly because several water sources span multiple jurisdictions. He discussed issues including the Free, Prior and Informed Consent of affected communities, making the national energy grid a more level playing field for renewable energy, and addressing inefficiencies which may be exacerbated by competition laws.

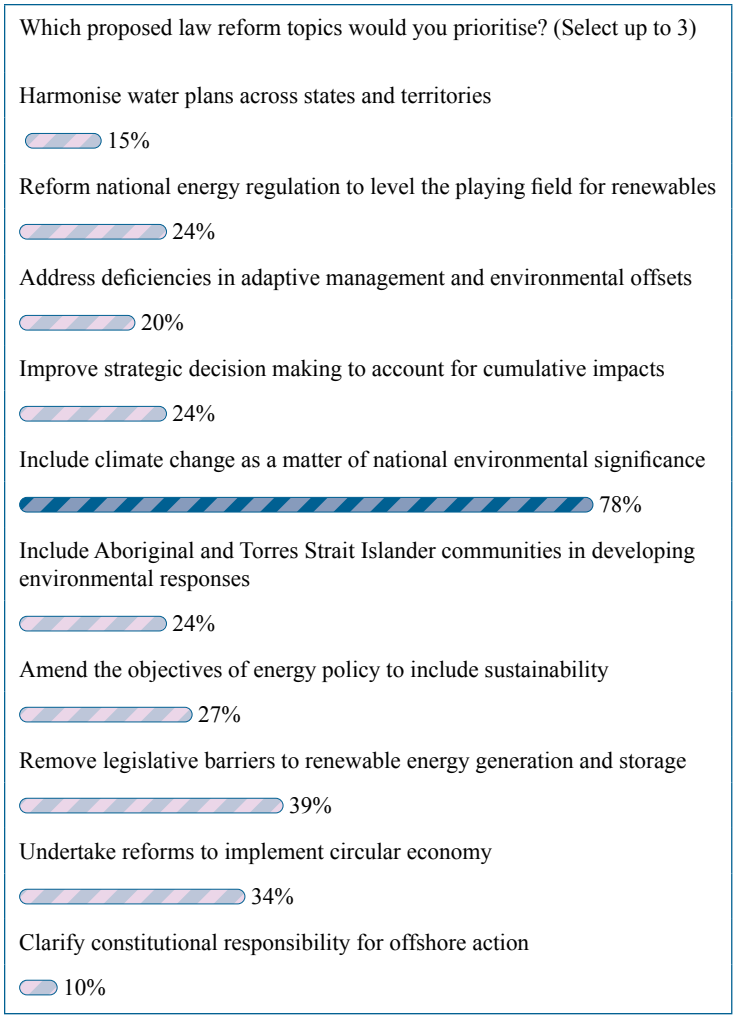
Dr Justine Bell-James argued that the Environmental Protection and Biodiversity Conservation Act is no longer fit for purpose; it could be significantly amended or a new Act could be drafted to replace it. Decisions are increasingly being made administratively, without public scrutiny, and before all relevant scientific information is known. She suggested laws could be amended to: include climate change as a 'matter of national environmental significance'; consider the cumulative impact of multiple projects; establish an independent body to advise government; and provide for merits review of decisions.

Dr Russell Reichelt discussed the involvement of Aboriginal and Torres Strait Islander groups in environmental decision making, basing regulatory reforms around eco-system functions, the importance of planning and integrated management, and harmonisation of federal, state and territory laws.

Professor Karen Hussey advocated for the inclusion of 'sustainability' as an overarching objective of energy legislation. She noted that barriers to environmental initiatives may arise across many areas of law, and suggested a review to ensure consistency across eg planning, corporate and environmental laws. She observed that applying the principles of a 'circular economy' may require wide-ranging legal review, such as amending the definition of 'waste'.

Attendees contributed other ideas and ultimately voted for their priority law reform topics: including climate change as a matter of national environmental significance, removing barriers to renewable energy generation and storage, and implementing circular economy principles.

The ALRC is running an online survey until 30 June 2019 to capture your ideas. More details are available at: www.alrc.gov.au/inquiries/where-next-law-reform.



Results in Brief: Public Seminar on Shortlisted Topics

On 26 August 2019 the Australian Law Reform Commission conducted an interactive seminar generously hosted by the Law Society of Western Australia in Perth on the future of law reform in Australia. This was the fifth public seminar in a series asking about areas of Australian law that may benefit from reform. The event was also available online for participants outside Perth in the form of a webinar.

Participants were given an overview of the objectives and process of the 'Future of Law Reform' project. An outline was then provided of each of the shortlisted topics which were under consideration for suggestion to the Attorney-General. The major topics included the Australian Constitution, freedom of speech, freedom of the press, regulation of financial service providers, alignment and coherence of environmental legislation, federal allocation of environmental responsibilities, and the impact of automated decision making.

Attendees emphasised that administrative governmental decisions are already increasingly being automated, and there is real urgency to consider how the law needs to change to keep up with these developments. There was also significant interest in mechanisms for considering constitutional reform proposals. Finally, some of the discussion revolved around making the ALRC's processes as inclusive as possible, and reviewing the impact of ALRC recommendations. The discussion was highly valuable and will inform the ongoing development of the Future of Law Reform project.

More details are available at: www.alrc.gov.au/inquiries/where-next-law-reform.

Appendix F
Other Topics Raised in Submissions

Below is a high-level summary of the future law reform topics suggested to the ALRC by the public in survey responses, submissions, consultations, and public seminars. The list is not comprehensive, but gives an idea of the categories of law reform topics raised with the ALRC during the course of the project, focusing on those topics which are not specifically the subject of suggested future inquiries in this report.

1. The Australian Constitution

- the race power
- becoming a republic
- standing in constitutional litigation
- heads of power
- holistic reform
- the electoral system
- fixed four year parliamentary terms
- state representation in the senate
- protection of academic freedom
- protection of religious freedom
- protection of human rights
- courts, judicial review and judicial power
- separation of powers
- judicial appointment processes
- the role of the Attorney-General as spokesperson to defend the courts
- judicial retirement age
- scrutiny on limits of executive power
- separating ministers (executive) from parliament (legislature)
- public literacy and education
- recognition of the natural environment

2. Financial Services

- independence of superannuation fund boards
- transparency in use of superannuation funds, including fees
- complexity and lack of transparency of regulation
- regulation of lending and bank leaders

- laws supporting mutually beneficial human interaction, not greed
- enforcement mechanisms for consumers
- penalties for white collar crime
- regulation of information provided to consumers by insurers
- evidentiary burden for punitive damages
- quantum of damages for non-pecuniary loss
- litigation cost consequences
- time limits for complaints about irresponsible lending
- service providers unlawfully causing bankruptcy as creditors in bankruptcy proceedings
- loss assessment methodologies
- compensation schemes of last resort and professional indemnity insurers
- regulation of professional indemnity insurers
- recovery of liabilities from insurers
- regulation of money supply and banking competition

3. Environment

- the recommendations of the Australian Panel of Experts on Environmental Law and The Places You Love Alliance
- stronger objects
- overall system of laws and regulations
- making the *Environmental Protection and Biodiversity Conservation Act* fit for purpose (or replacing it)
- focusing on outcomes more than processes
- enforcement issues
- informed participatory decision making
- a statutory agency to represent nature in litigation
- nature rights
- support recycling
- compliance with international law obligations
- framework for a circular economy
- greenhouse gas capture and isolation of aquifers
- scope 3 emissions
- regulation of Australian company environmental impacts overseas
- stronger penalties
- land clearing and extinctions
- planning and heritage buildings

4. Corruption

- establishing a federal anti-corruption commission
- honesty in political advertising and campaigns
- stronger ministerial codes of conduct, and stronger penalties
- clearer conflict of interest standards for politicians
- making all public service providers subject to administrative law
- consistent anti-corruption laws nationally
- improper ministerial influence on administrative decision making
- the influence of media on politicians and voters

5. Migration

- the family violence provisions
- compliance with international obligations
- reconsider the supremacy of domestic law over international law
- visa fees and processing times
- ministerial discretion and review powers
- due process and procedural fairness
- tribunal appointments
- temporary visa conditions
- compassion
- level of immigration
- oversight of migration agents
- superannuation access
- deportation of non-citizen prisoners
- regulation of detention conditions

6. Tax

- corporate tax loopholes and franking credit loopholes
- holistic review
- GST rate and base
- inefficient state taxes
- CGT discount amount
- negative gearing
- multinational corporations and offshore profits
- definition of charities
- deductions for managing tax affairs
- voluntary tax

- tax rates
- gaps in bilateral double tax agreements
- duplication of personal and company tax
- transfer pricing

7. Defamation

- application of the *Evidence Act*
- media reporting of cases
- dissemination of children's information online
- balancing of competing rights
- federal legislation

8. Other

- administrative law – standing for public interest cases
- adoptee rights
- bankruptcy
- child protection
- consumer law – codification of damages assessment
- copyright – commercial use of content on social media
- corporations
    - shareholder liability, piercing the corporate veil
    - corporate social responsibility (duties to consider interests of other stakeholders, non-financial matters, corporate culture and bullying)
    - shareholder rights and guidance motions
    - over-regulation generally
    - holistic review
- criminal law
    - uniformity of sex offender registration
    - Commonwealth weapons prohibitions
    - internet scams
    - pill testing
    - legalising marijuana
    - abolish life sentences
    - child detention
    - age of criminal responsibility
    - abortion
    - euthanasia
    - criminal records
    - fines as a percentage of income
    - right to appeal

  - false rape accusations
  - decriminalise not voting
  - systems analysis of wrongful convictions
  - compensation for wrongful convictions
  - unexplained wealth laws
  - asset seizure and confiscation laws
  - the 'monetisation of justice' and fines
  - Indigenous incarceration rates
- national register of powers of attorney
- elder abuse – the role of police
- employment
- age discrimination
- Fair Work Ombudsman powers and corruption
- family law
- family violence
- human rights
- Indigenous customary law
- the legal system
  - *Uniform Evidence Act* overhaul
  - access to justice
  - the adversarial system
  - qualifications for judges
  - corruption
  - rights to legal representation
  - priority protection for vulnerable people
  - legal aid
- national security
  - the right to a fair trial
  - overlapping state and federal laws
- native title – the obligation on state governments to recognise and protect the exercise of native title rights
- political honesty
- technology and the law
  - bullying and cybercrime
  - accountability and safety
  - political manipulation of social media
  - gaming micro-transactions
  - cellular and genic science
  - regulation of activity in space

Appendix G
Consultations

- Professor Greg Reinhardt, Australian Institute of Judicial Administration
- Australian Institute of Company Directors
- President Rosalind Croucher AO and Commissioner Ed Santow, Australian Human Rights Commission
- Mohammad Al-Khafaji, Federation of Ethnic Communities' Councils in Australia
- Alan Cameron AO, NSW Law Reform Commission
- Suzanne Milthorpe and Tim Beshara, Wilderness Society
- Professor Simon Bronitt and Professor Simon Rice OAM, University of Sydney
- Professor John Williams, South Australian Law Reform Institute
- Professor Sally Wheeler OBE, Australian National University
- Dr Simon Longstaff AO, The Ethics Centre
- Dr Warren Mundy
- Professor Elise Bant and Professor Jeannie Paterson, University of Melbourne
- The Hon Anthony North QC, Victorian Law Reform Commission
- Law Council of Australia, Business Law Section
- Department of the Environment and Energy (Cth)
- Department of Human Services (Cth)
- Department of Employment, Skills, Small and Family Business (Cth)
- Department of Treasury (Cth)
- Professor Nicolas Suzor and Dr Anna Huggins, Queensland University of Technology, and Centre of Excellence for Automated Decision-Making and Society
- Professor Peter Billings, University of Queensland
- Attorney-General's Department (Cth)
- Department of Finance (Cth)