

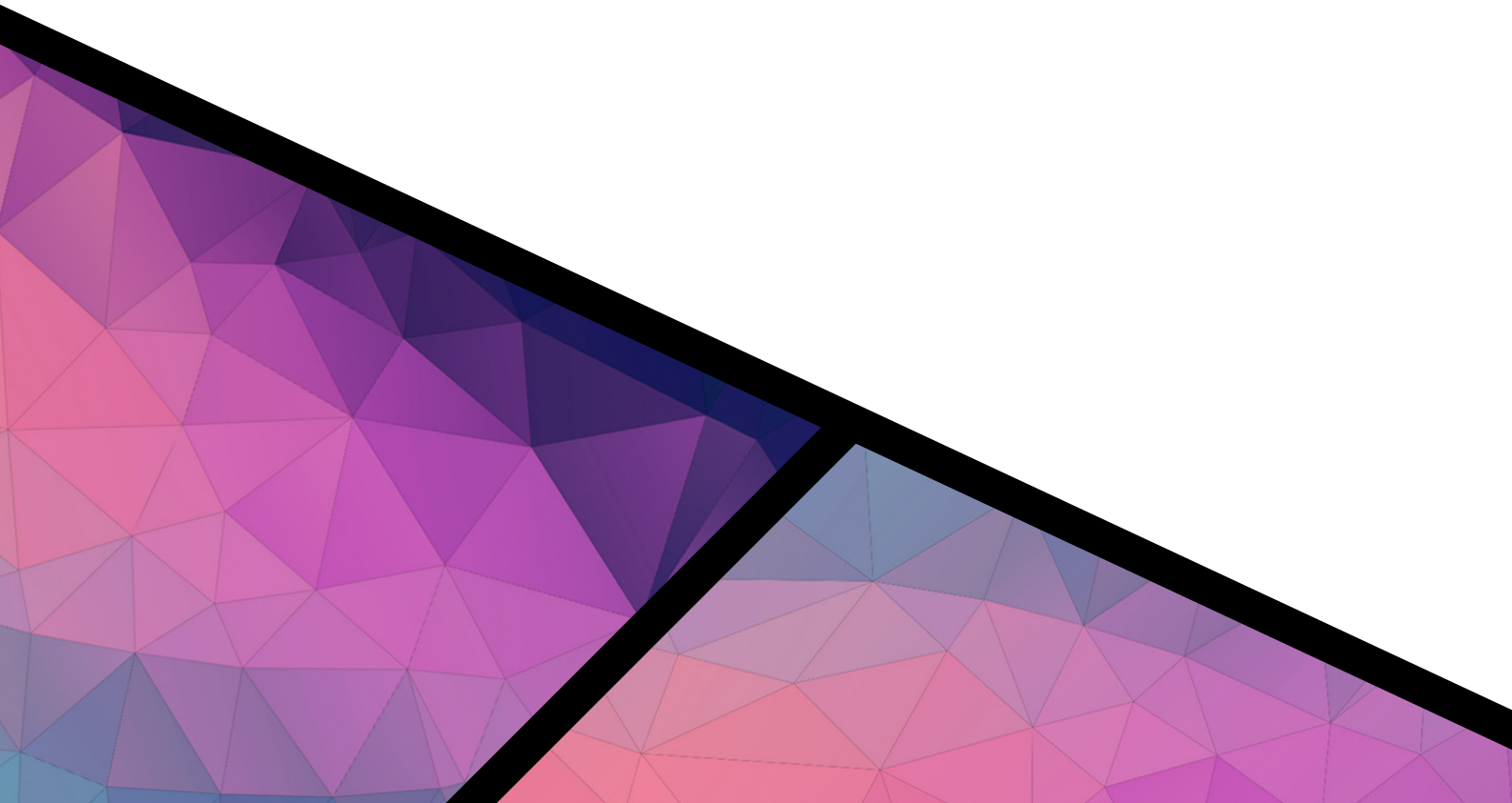


Australian Government

Australian Law Reform Commission

# THE FUTURE OF LAW REFORM UPDATE

October 2020



The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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# EXECUTIVE SUMMARY

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The ALRC's Future of Law Reform report of December 2019 suggested five potential topics for future law reform inquiries. In September 2020 the Commonwealth Attorney-General referred to the ALRC one of those suggested inquiry topics, on simplification of corporate and financial services regulation. This paper summarises recent feedback on, and developments in, the other four topic areas for the Attorney-General to consider in relation to the ALRC's ongoing program of work. The paper also briefly outlines a selection of key developments in other significant topics identified in the primary report.

## 1. INTRODUCTION

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This paper updates the "Future of Law Reform" report released on 2 December 2019, which suggested a program of work for the ALRC for the next five years. This paper is an addendum to that report.

The primary purpose of this paper is to assist the Commonwealth Attorney-General when considering future references to the ALRC. Included in this paper are summaries of stakeholder feedback, and of some key developments in relevant areas of law.

This paper is part of the ALRC's efforts to maintain an up to date suggested program of work for the Commonwealth Attorney-General. By making this paper publicly available, the ALRC seeks to ensure that its stakeholders remain apprised of the project's evolution.

This paper does not represent a comprehensive review of the primary report. The ALRC has not re-assessed the relative priority of the identified topics, and does not suggest in this paper any changes to the suggested program of work as listed in the primary report.

### Process

In relation to the suggested program of work, the ALRC planned a series of public seminars around the country in the first half of 2020 with expert speakers on several of the suggested topics. Due to disruptions associated with the Covid-19 pandemic, these events were ultimately converted into webinars held in July and August 2020 in partnership with a number of organisations (see Appendix). The webinar format enabled broader engagement with stakeholders across the country on each topic. The ALRC expresses its gratitude to its partner organisations, the expert panel members, and the registered online participants (more than 2000), for their valuable contributions to this series of events. Hundreds of participants viewed the webinar events live and contributed comments and questions, all of which were captured and considered by the ALRC following the webinar series. Around 400 additional participants viewed the webinar recordings after the event.

The ALRC also endeavoured to monitor significant developments (such as legislation, reports, and other reviews) in relation to all of the topics covered in the Future of Law Reform report. In relation to some topics the ALRC was assisted by research conducted by students from Monash University who are listed in the Appendix to this paper, and to whom we extend our thanks.

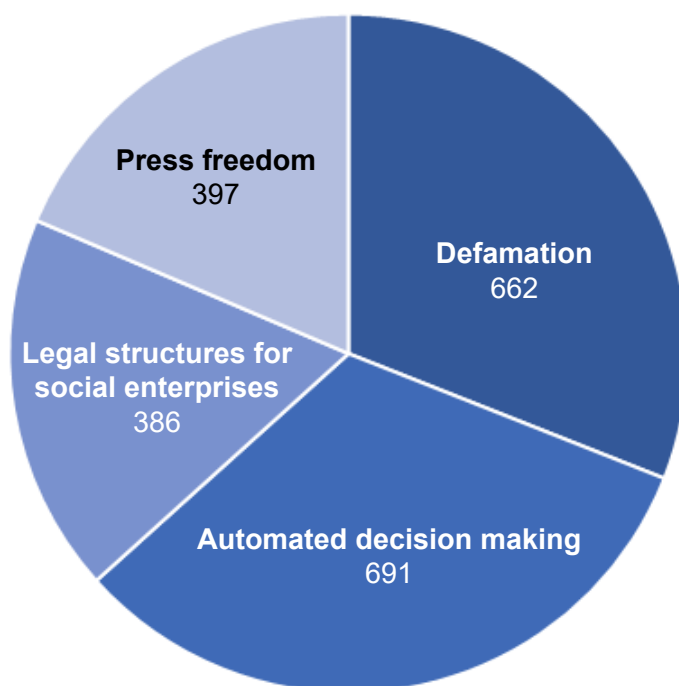
Over the course of this year, as the ALRC became aware of academic and other commentary on relevant topics being published, we sought to generate further awareness and discussion with an increased focus on sharing material through online networks. It has been pleasing to facilitate and benefit from enhanced connections and interaction as a result.

In connection with the series of webinars in particular, the ALRC conducted a number of consultations with specialists in relevant areas. In addition, the ALRC invited written comments relating to the webinar discussions and other aspects of the Future of Law Reform report by 31 August 2020, and received several thoughtful contributions.

A number of stakeholders have commented positively about the process undertaken by the ALRC, and have appreciated the opportunity to contribute to the development of a systematic approach to federal law reform.

Section Two below summarises the outcomes of webinar discussions, consultations, and research for four of the five topics comprising the ALRC's suggested program of work. (There is no discussion of the Principle Based Regulation of Financial Services topic as no webinar or consultations were held specifically on this topic, and the ALRC received an inquiry on this topic in September 2020.) Section Three provides a more limited discussion of the report's eight "other significant topics", covering select significant developments only.

### Webinar Registrations



Defamation	662
Automated decision making	691
Legal structures for social enterprises	386
Press freedom	397
<i>Total registered</i>	<i>2136</i>

## 2. SUGGESTED PROGRAM OF WORK

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### Automated decision making and administrative law

A number of stakeholders expressed strong views in support of an ALRC inquiry into appropriate regulation and facilitation of automation in decision making. Although automation has been used in decision-making for many years, the increasing reach of automation, and technological developments such as data-driven inferencing, present a pressing case for a systematic and principled review of relevant laws. Some agreed with the ALRC's suggested focus on administrative law and laws relating to automation in government agencies, particularly in the shadow of the government's Online Compliance Intervention and its implications which have continued to unfold this year. Others suggested that it would be more appropriate and beneficial to conduct a review at a higher level, identifying common issues relating to machine learning across both the private and public sector, noting that the boundaries are increasingly blurry, particularly with the prevalence of government procurement and outsourcing of services.

### Webinar

The ALRC held an informative and engaging webinar on this topic on 10 August 2020.<sup>1</sup> Important issues raised at the webinar discussion included:

- threshold questions of transparency about how government is using data;
- the critical importance of the data that is used to “train” machine learning systems, and of maintaining oversight of that data;
- explicability of decisions and the interaction with administrative law. What are the appropriate requirements around explanations for different technologies, and what are the circumstances in which we should require more than an impressionistic account of the impact of training data?
- the paradoxical increased need for human oversight as automated systems increase in scale and speed. Should we require regulatory oversight for certain types of high stakes automated systems before their implementation?
- issues to consider when drafting or amending legislation that enables automation, including potential requirements for audits of data and outcomes;
- the potential to categorise decisions by reference to the extent of reliance on automation, and tailor regulation to each of these categories as appropriate;
- the possibility of excluding certain legislation, or certain decisions, from particular levels of automation;
- the need to consider the impact of human rights legislation, and human rights principles more generally.

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1 [www.alrc.gov.au/news/automated-decision-making-and-administrative-law-a-nationwide-conversation-on-law-reform/](http://www.alrc.gov.au/news/automated-decision-making-and-administrative-law-a-nationwide-conversation-on-law-reform/)





## Stakeholder views

Professor Lyria Bennett Moses described the question of how we can appropriately use automation in decision making systems as ‘the question of our age’, noting potential benefits in terms of both fairness and economics. Moses urged that an inquiry should not be confined too narrowly to administrative law issues, but should consider for example systemic and procurement issues that are equally important in achieving appropriate and accountable implementation of automated systems within government. Moreover, a higher-level inquiry into principles of data-driven inferencing applying to both public and private contexts could be more appropriate and helpful. An important contribution would be to identify the types of decisions for which data-driven inferencing is inappropriate and should not be used.

The recently launched Australian Society for Computers and Law informally expressed support for the ALRC’s suggested program of work, especially an inquiry into automation and decision-making, and promoted the ALRC’s suggestions as part of its own series of events in 2020.

Rob Chalmers from Flinders University supported a primary focus on administrative law and public sector decisions, because the inquiry’s findings are likely to have broader implications in any event, and because government behaviour and guidelines can act as a driver to developments in the private sector (both through procurement and indirect standards setting effects). He suggested that any reference be broad enough to also encompass a subsidiary focus on these private sector issues. He suggested a thorough review of Commonwealth and State activities and guidance in this area would be timely. He noted the ALRC could build on the work of the Australian Human Rights Commission on human rights and technology, and could also consider the implications of related developments in digital legislation.

The Queensland Law Society (QLS) suggested that the ALRC should focus on the ‘transparency of automated decisions which result in discrimination or bias due to the datasets used to train this technology’. It noted that machine systems can reproduce bias demonstrated in existing datasets, and that the full basis of automated decisions is rarely



available to affected individuals. QLS stated that the Department of Human Service's Online Compliance Intervention highlighted the dangers associated with the great efficiencies of automated systems. It stressed that processes must allow decision makers to comply with their obligation to provide a statement of reasons to enable scrutiny of decisions. It suggested ALRC proposals for reform should incorporate an ethical framework, privacy principles, and governance principles.

The Law Institute of Victoria supported the need for an inquiry into automated decision making and administrative law, and provided additional comments on the discussion points raised by the panel of experts at the ALRC webinar. For example, the LIV supported:

- the introduction of specific Continuing Professional Development for lawyers on technologies relevant to legal service delivery;
- specific measures to appropriately identify responsible persons for 'bad decisions' by automated systems in different contexts;
- appropriate legal requirements for explanations of reasons and audits of algorithms;
- investigation of how group-based decisions and systemic issues might be better addressed by administrative law and by courts; and
- an inquiry into the overall governance system for automated decision making, rather than the detail of individual laws.

## Recent developments

Shortly after publication of the ALRC's Future of Law Reform report, in December 2019, the Australian Human Rights Commission released its Discussion Paper *Human Rights and Technology*. A final report is scheduled for release in 2020. The Discussion Paper included:

- chapters on AI-informed decision-making and Accountability for AI-informed decision-making;
- Proposal 2: The Australian Government should commission an appropriate independent body (such as the ALRC or the Australian Human Rights Commission) to inquire into ethical frameworks for new and emerging technologies to: (a) assess the efficacy of existing ethical frameworks in protecting and promoting human rights (b) identify opportunities to improve the operation of ethical frameworks, such as through consolidation or harmonisation of similar frameworks, and by giving special legal status to ethical frameworks that meet certain criteria.
- Proposal 3: The Australian Government should engage the ALRC to conduct an inquiry into the accountability of AI-informed decision making. The proposed inquiry should consider reform or other change needed to: (a) protect the principle of legality and the rule of law (b) promote human rights such as equality or non-discrimination.

In November 2019 orders were made by consent in the Federal Court of Australia containing declarations that the Australian Government's demand for repayment of an alleged debt pursuant to the Online Compliance Intervention (a debt calculated by

reference to income averaging data) was not valid.<sup>2</sup> The ‘notes’ accompanying the orders do not refer to system automation as a factor underpinning the invalidity, but rather focus on the fact that the information before the decision maker did not support the assumptions made. Nevertheless, automation did affect the scale of the program which reportedly issued around 470,000 debt notices.<sup>3</sup> The Australian Government has committed to refunding payments made pursuant to the program,<sup>4</sup> and a class action has been initiated seeking damages.

An Exposure Draft of the Australian Government’s Data Availability and Transparency Bill was due to be released in the first half of 2020, but has been postponed.<sup>5</sup> In September 2020, the Australian Information Commissioner, together with other Information Commissioners in Australia and New Zealand, issued a joint statement emphasising that ‘Open, transparent and accountable governments that proactively release information to the community remain fundamental to a democratic society’.<sup>6</sup>

There have also been a number of related developments internationally. For example, in March 2020 a United Nations report focused on the impact of emerging technologies on human rights, and identified accountability problems and the need to improve the explicability of decisions.<sup>7</sup> In July 2020, a United Nations Special Rapporteur reported on the impact of emerging technologies on racial inequality and discrimination, observing that the increasing prevalence of emerging technologies introduces the risk of ‘systemised discrimination on an unprecedented scale’, and making a number of recommendations.<sup>8</sup>

In July 2020 the New Zealand Government launched its inaugural Algorithm Charter, which aims to make algorithm use by government agencies more transparent and accountable, with 21 initial signatory agencies.<sup>9</sup> In July and September 2020, the Singapore Academy of Law’s Law Reform Committee released reports relating to ethics, artificial intelligence, regulatory reform, data rights, and civil liability.<sup>10</sup> Finally, the Law Commission of England and Wales has a current inquiry into Automated Vehicles.<sup>11</sup>

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2 Amato v Commonwealth of Australia (Order of Davies J made 27 November 2019 in VID611/2019) <[www.comcourts.gov.au/file/Federal/P/VID611/2019/3859485/event/30114114/document/1513665](http://www.comcourts.gov.au/file/Federal/P/VID611/2019/3859485/event/30114114/document/1513665)>

3 Terry Carney, ‘Government to repay 470,000 unlawful robodebts in what might be Australia’s biggest-ever financial backdown’, *The Conversation* (29 May 2020) <[theconversation.com/government-to-repay-470-000-unlawful-robodebts-in-what-might-be-australias-biggest-ever-financial-backdown-139668](http://theconversation.com/government-to-repay-470-000-unlawful-robodebts-in-what-might-be-australias-biggest-ever-financial-backdown-139668)>

4 Services Australia, ‘Information about refunds for the income compliance program’, (accessed 11 October 2020) <[www.servicesaustralia.gov.au/individuals/subjects/information-about-refunds-income-compliance-program](http://www.servicesaustralia.gov.au/individuals/subjects/information-about-refunds-income-compliance-program)>

5 Office of the National Data Commissioner, ‘Data Sharing: Status’ (accessed 27 October 2020) <[www.datacommissioner.gov.au/data-sharing/status](http://www.datacommissioner.gov.au/data-sharing/status)>

6 Office of the Australian Information Commissioner, ‘Joint Statement on International Access to Information Day’ (28 September 2020) <[www.oaic.gov.au/updates/news-and-media/joint-statement-on-international-access-to-information-day-2020/](http://www.oaic.gov.au/updates/news-and-media/joint-statement-on-international-access-to-information-day-2020/)>

7 Report of the Secretary-General to the Human Rights Council, ‘Question of the realization of economic, social and cultural rights in all countries: the role of new technologies for the realization of economic, social and cultural rights’, (4 March 2020, A/HRC/43/29)

8 United Nations Human Rights Council, *Racial Discrimination and Emerging Digital Technologies: A Human Rights Analysis*, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (18 June 2020, A/HRC/44/57)

9 New Zealand Government, ‘Algorithm Charter for Aotearoa New Zealand’ (July 2020) <[data.govt.nz/assets/data-ethics/algorithm/Algorithm-Charter-2020\\_Final-English-1.pdf](http://data.govt.nz/assets/data-ethics/algorithm/Algorithm-Charter-2020_Final-English-1.pdf)>

10 Singapore Academy of Law, ‘Law Reform’ (accessed 11 October 2020) <[www.sal.org.sg/Resources-Tools/Law-Reform](http://www.sal.org.sg/Resources-Tools/Law-Reform)>

11 Law Commission, ‘Automated Vehicles’ (accessed 11 October 2020) <[www.lawcom.gov.uk/project/automated-vehicles/](http://www.lawcom.gov.uk/project/automated-vehicles/)>

## Defamation

The ALRC received mixed support for its suggested inquiry into defamation laws. Expert consultees agreed that the cross-border (both inter-state and international) impact of much allegedly defamatory material in the digital age, and the increased involvement of the Federal Court of Australia in adjudicating defamation disputes, support a national review of the law. In addition, the significant changes brought about by digital communication and social media use in particular justify a principled, rigorous and independent review of the law's content and operation in practice. It was noted that the amendments to the Model Defamation Provisions being negotiated by the Council of Attorneys-General in 2020 did not address issues such as liability of digital intermediaries. However, on 27 July 2020 the Council of Attorneys-General announced that its Defamation Working Party would proceed with a 'second stage' reform process on liability of digital platforms and other issues. Accordingly, it may be preferable to wait until the current reform process has completed, and any resulting changes to the law can be evaluated, before any potential inquiry on the topic of defamation by the ALRC.



## Webinar

The ALRC held the first webinar in its series on this topic on 27 July 2020.<sup>12</sup> The expert panellists identified some key reasons why they considered a reference to the ALRC would be appropriate and timely, including the increased Federal Court caseload in defamation cases, and the Commonwealth's legislative responsibility for the majority of modes of dissemination of information. The speakers and participants further identified a number of key potential questions for an ALRC review:

- The implications of the implied freedom of political communication for defamation law;
- The need for amendment of related Commonwealth legislation, including the *Broadcasting Services Act 1992* (Cth);
- How to reduce costs in defamation proceedings;

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12 <[www.alrc.gov.au/news/defamation-a-nationwide-conversation-on-law-reform/](http://www.alrc.gov.au/news/defamation-a-nationwide-conversation-on-law-reform/)>

- Clarifying or reforming the available defences to an action for defamation;
- The need for a range of appropriate remedies, including ‘take down orders’;
- The ability of defamation law to remain medium neutral in light of the different types of litigation, interests and problems that arise in different types of cases;
- The interaction between defamation issues and the liability of online intermediaries in other contexts, such as copyright, other torts, contract, civil content regulation, criminalised speech, and consumer law.

## Recent developments

On 1 June 2020, the NSW Court of Appeal upheld a ruling that several Australian media companies were liable for defamatory comments posted by users on the companies’ Facebook page. The Court of Appeal held that the third-party companies had sufficient control over comments to be liable.<sup>13</sup>

On 2 July 2020, the Full Court of the Federal Court of Australia dismissed an appeal from the Daily Telegraph to overturn defamation charges in favour of actor Geoffrey Rush, who had been awarded over \$2 million in damages.<sup>14</sup>

On 27 July 2020, the Council of Attorneys-General (‘CAG’) approved amendments to Australia’s Model Defamation Provisions and agreed to enact the provisions into their respective states’ legislation as soon as possible.<sup>15</sup>

Also on 27 July 2020, CAG agreed to progress a second stage reform process focusing on the responsibilities and liability of digital platforms for defamatory content published online.<sup>16</sup>

A number of defamation law developments have also been taking place in foreign jurisdictions. In the United States of America, “interactive computer service providers” enjoy some protection against civil liability under section 230 of the Communications Decency Act 1996. In May 2020, the President of the United States of America issued executive orders requiring government agencies to “ensure that their application of section 230(c) properly reflects the narrow purpose of the section”, and requiring the Secretary of Commerce to file a petition for rulemaking with the Federal Communications Commission to clarify the scope of section 230.<sup>17</sup>

In March 2020, the Law Commission of Ontario, Canada, released a law reform report on defamation law in the internet age with 39 recommendations for reform.<sup>18</sup> In Quebec, Canada, a Bill is currently before Parliament including a provision regarding dissemination of personal information that “causes the person concerned serious injury in relation to his right to the respect of his reputation or privacy”.<sup>19</sup>

13 *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102

14 *Nationwide News Pty Limited v Rush* [2020] FCAFC 115

15 Council of Attorneys-General, ‘Communique 27 July 2020’ <[www.ag.gov.au/about-us/publications/council-attorneys-general-communique-july-2020](http://www.ag.gov.au/about-us/publications/council-attorneys-general-communique-july-2020)>

16 <[www.justice.nsw.gov.au/justicepolicy/Pages/lpcld/lpcld\\_consultation/review-model-defamation-provisions.aspx](http://www.justice.nsw.gov.au/justicepolicy/Pages/lpcld/lpcld_consultation/review-model-defamation-provisions.aspx)>

17 <[www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/](http://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/)>

18 Law Commission of Ontario, ‘Defamation Law in the Internet Age: Final Report’ (2020) <[www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf](http://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf)>

19 Government of Québec, ‘Bill 64 – An Act to modernize legislative provisions as regards the protection of personal information’,

In Scotland, a Bill is before Parliament that aims to modernise and simplify defamation law because in “the view of the Scottish Ministers, the current defamation law in Scotland is no longer fit for modern day purposes”.<sup>20</sup>

In August 2020, the Singapore Academy of Law published a summary of developments in defamation law in a number of jurisdictions, noting that Singaporean defamation statutes “remain substantively unchanged since the pre-internet era”, and foreshadowing a Law Reform Committee report on “legal issues regarding the misuse of private information and the remedies available to those affected by malicious disclosures”.<sup>21</sup>

## Legal structures for social enterprises

Reactions to the ALRC’s suggested inquiry topic relating to legal structures for social enterprises were mixed. There appeared to be a level of consensus that social enterprises face a range of challenges relating to a number of aspects of their operation. However, stakeholders were divided on the question of whether focusing on a potential dedicated legal structure for social enterprises would be the most helpful contribution the ALRC could make in this area. Some stakeholders suggested that it would be more beneficial for the ALRC to have a broader scope of inquiry. For example, the ALRC, potentially in partnership with a non-legal body, could assess the effectiveness of existing systems in promoting and demonstrating organisational ‘purpose’, and enabling access to appropriate forms of capital. A number of stakeholders emphasised that significant social, economic, and practical issues are closely tied up with legal issues in this area.



s 28.1, <[www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-64-42-1.html](http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-64-42-1.html)>  
20 The Scottish Parliament, Justice Committee, ‘Defamation and Malicious Publications (Scotland) Bill: Stage 1 Report’, (SP Paper 822, 14 October 2020), <[www.parliament.scot/parliamentarybusiness/CurrentCommittees/114155.aspx](http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114155.aspx)>  
21 <[www.sal.org.sg/Resources-Tools/Law-Reform/Bulletin](http://www.sal.org.sg/Resources-Tools/Law-Reform/Bulletin)>



## Webinar

The ALRC held a public webinar on this topic on 17 August 2020.<sup>22</sup> The expert panelists highlighted that practitioners have found ways to make social enterprises work within existing legal structures, but it would be beneficial to minimise the need for bespoke legal advice and increase certainty for investors to promote scaling-up. In addition, there has been a significant cultural shift in recent years around the role of ‘purpose’ in corporations more generally, and that has altered perceptions around the need for a dedicated legal structure to facilitate purpose-driven organisations.

During the webinar, a number of suggestions were made about issues that could be the focus of a future ALRC review, including:

- a broad investigation of the corporate regulation regime, and the role of purpose in corporations generally;
- the interplay of corporate purpose with the evolving nature of directors’ duties;
- the appropriate roles to be played by regulators, and reporting requirements;
- the potential that a dedicated ‘for purpose’ legal structure could unhelpfully reinforce shareholder primacy in other legal structures;
- interpretive questions of how to assess whether a particular benefit is ‘public’ or ‘private’ in practice, and how to determine what an organisation’s purpose actually is;
- the availability of ‘off the shelf’ structures, along with templates for reporting and compliance;
- a potential national approach to governance and regulation, including accreditation;
- unpacking policy arguments for and against non-distribution constraints on social enterprises;
- enforcement mechanisms to deal with allegations that an organisation has departed from its purported purpose.

## Stakeholder views

Stakeholders conveyed a range of views on the potential focus of any future ALRC inquiry.

Keith Rovers of Minter Ellison provided detailed comments, framing the key issue as examining whether current legal, tax and accounting frameworks offer the ‘best approach to providing (financial and other forms of) capital to promote sustainable purpose based organisations and whether the current system has negative externalities or other unintended consequences’.

Rovers suggested a number of areas that could be examined in a future ALRC inquiry, including:

- the role of the corporate structure in society;

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22 <[www.alrc.gov.au/news/legal-structures-for-social-enterprises-a-nationwide-conversation-on-law-reform/](http://www.alrc.gov.au/news/legal-structures-for-social-enterprises-a-nationwide-conversation-on-law-reform/)>



- the responsibilities that should appropriately accompany the privilege of incorporation, and the societal outcomes that should be sought in frameworks that allow incorporated entities;
- how fiduciary duty, reporting and regulatory frameworks could be re-set around the purpose of a corporate entity;
- how purpose and impact can be measured and reported (and who should be responsible to pay for associated monitoring and evaluation);
- the appropriate use and control of data regarding corporate entities' impact;
- comparative study of bespoke legal forms adopted in other jurisdictions;
- clearer regulation and more efficient registration processes;
- appropriate tax treatment of social enterprise, and corresponding integrity measures;
- whether current Deductible Gift Recipient categories are fit for purpose;
- the benefits and risks of social procurement, and ways to promote it appropriately.

Rovers cautioned against combining issues relating to Social Impact Investing with issues facing social enterprises. He emphasised that the majority of social enterprises (such as those certified by Social Traders) are 'not for profit', and are not a neat fit with impact investing models. Nevertheless, he urged that the framing of any ALRC review should be based on an analysis of the body of work that has been completed in other related reviews.

Social Traders, a not-for-profit organisation that certifies social enterprises in Australia, stressed that the potential introduction of a dedicated corporate structure for social enterprises should be treated as a distinct issue from the encouragement of purpose-driven activity in mainstream businesses. It described the two topics as 'parallel opportunities' for reform. Key issues relating to a dedicated corporate structure include appropriate tax treatment, access to capital, asset locks, and an evaluation of public benefit.

Justice Connect agreed and suggested the priority for the ALRC should be investigating a fit-for-purpose legal structure for social enterprise, rather than corporate purpose more generally, or social impact investing. Justice Connect highlighted the difficulties faced by the organisations it works with in trying to navigate the complex not-for-profit legal landscape, let alone the additional complications facing social enterprises. While precedent documents and other tools may assist as workarounds, it is worthwhile inquiring into the potential utility of a dedicated legal structure as an efficient and cost-effective option for social enterprises. Appropriately defining social enterprises would be key to maintaining integrity in the system, and an inquiry could examine the relationship between the existing industry-led certification scheme and any new regulatory regime.

Michael Ryland of the Centre for Social Finance Law suggested that an ALRC inquiry might be better framed as examining 'legal structures for social purpose', rather than for social enterprises. He argued that would fit more neatly with the work of the Social Impact Investing Taskforce being overseen by the Department of Prime Minister and Cabinet. He stressed that the issues to be considered by the ALRC should adequately cover the range of not-for-profit entities and issues as well as issues arising under the *Corporations Act 2001* (Cth). Ryland suggested a review could first address technical legal issues such as: directors' duties in corporations that have expressly adopted a social purpose. Secondly, it could address legal barriers to establishing and growing social enterprises

and social investment. Thirdly, it could seek to create legal infrastructure that will enable social enterprises and social investment to grow into a robust sector with market integrity.

Ann Apps and Robyn Donnelly (also supported by the Business Council of Co-operatives and Mutuals) emphasised the role of co-operatives as an existing legal structure available for social enterprises. They argued that a lack of education about co-operatives has led to the underdevelopment of legal, accounting, and financial professional skills to assist the formation, growth, and recognition of co-operatives as social enterprises. Rather than looking to develop a new legal model, they suggested an ALRC inquiry should seek to understand the legal models that are already available, and consider what changes may be necessary to optimise their operation. In particular, they suggested an inquiry could examine:

- how regulating co-operatives at state and territory level affects policy development and administrative clarity;
- how impact measurements for social enterprise can be made more reliable; and
- how regulators can be equipped to ensure that social enterprises continue to act in pursuance of their purpose.

The Business Council of Co-operatives and Mutuals recently published a Discussion Paper on Co-operatives and Mutuals as Social Enterprises.

Similarly, Professor Bronwen Morgan suggested it would be beneficial to have a broad spectrum of possible legal models considered. She noted that the model utilised by the Business Council of Co-operatives and Mutuals could also be useful in the context of social enterprises.

The Social Enterprise Legal Models Working Group, associated with Employee Ownership Australia, noted its history working towards a new legal model for social enterprises. The Group submitted proposed amendments to the *Corporations Act 2001* (Cth) which would recognise 'Social and Community Enterprise Companies' and impose restrictions on those companies' ability to transfer assets, pay dividends, or amend their constitution. The Group noted its proposed model is closely aligned with the Community Interest Company model introduced in the United Kingdom. Employee Ownership Australia also commended an August 2019 report analysing the social enterprise sector in the United Kingdom, including various legal structures utilised by social enterprises.<sup>23</sup>

## Recent developments

Several webinar panellists highlighted the importance of a statement issued in August 2019 by Business Roundtable, an association of chief executive officers from American companies, redefining the purpose of a corporation in promoting 'an economy that serves all Americans', rather than the traditional focus on the primacy of shareholder interests.<sup>24</sup>

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<sup>23</sup> Zahra Maronesy, 'An analysis of the social enterprise sector in the UK', (ANZSOG Occasional Paper, September 2019)  
<sup>24</sup> <[www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans](http://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans)>

In January 2020, the Social Impact Investing Task Force established by the Department of Prime Minister and Cabinet delivered its interim report.<sup>25</sup> The interim report suggests that the final report will focus on support for early-stage social entrepreneurs; support to increase outcomes-based contracting; and establishment of an impact investing wholesaler. Webinar participants commented that once the final report is available, an important question to ask will be whether appropriate legal infrastructure is available to implement the recommendations in the report.

Also in January 2020, the European Commission released a comparative summary of social enterprises in Europe, including the nature of their legal recognition in each jurisdiction.<sup>26</sup>

On 6 March 2020, the Australian Government released its response to the 2018 Australian Charities and Not for profits Commission Legislation Review.<sup>27</sup> Government commitments include reducing the administrative burden on not-for-profits, for example by simplifying reporting requirements and harmonising regulatory requirements across jurisdictions. On 31 March 2020, the Australian National Audit Office released a report on the Australian Charities and Not-for-profits Commission, finding (amongst other things) that the Commission had established a number of initiatives to reduce the red tape burden on registered charities.<sup>28</sup>

In May 2020, the Centre for Social Impact launched a research program to understand and support the short-term needs of the for-purpose sector, including charities, not-for-profit organisations, philanthropy, social enterprises and businesses. The Centre will be undertaking twice-yearly sector surveys to identify pressing issues and needs identified across the for-purpose sector.<sup>29</sup>

In June 2020, the British Academy held a Summit on ‘Purposeful Business in Times of Crisis’,<sup>30</sup> building on its November 2019 report that outlined ‘necessary reforms to company law, corporate governance, finance, measurement, and the role of regulators.’<sup>31</sup> These initiatives form part of an ongoing program on the ‘Future of the Corporation’, seeking to embed a new definition of the purpose of business, being ‘to profitably solve the problems of people and planet, and not profit from creating problems’.<sup>32</sup>

25 Department of the Prime Minister and Cabinet, *Social Impact Investing Taskforce – Interim Report* (31 January 2020) <[www.pmc.gov.au/resource-centre/domestic-policy/social-impact-investing-taskforce-interim-report](http://www.pmc.gov.au/resource-centre/domestic-policy/social-impact-investing-taskforce-interim-report)>

26 European Commission, ‘Social Enterprises and their ecosystems in Europe’ (January 2020) <[europa.eu/!Qq64ny](http://europa.eu/!Qq64ny)>, 56–65, 108–120

27 <[treasury.gov.au/publication/p2020-61958](http://treasury.gov.au/publication/p2020-61958)>

28 Auditor-General Report No.29 2019–20 – Regulation of Charities by the Australian Charities and Not-for-profits Commission (ACNC) (31 March 2020) <[www.anao.gov.au/work/performance-audit/regulation-charities-australian-charities-and-not-profits-commission](http://www.anao.gov.au/work/performance-audit/regulation-charities-australian-charities-and-not-profits-commission)>

29 The Centre for Social Impact, ‘National rapid-response research program to guide for-purpose sector through Covid-19’ (Media Release, 6 May 2020) <[www.csi.edu.au/news/media-release-national-rapid-response-research-program-guide-purpose-sector-through-covid-19/](http://www.csi.edu.au/news/media-release-national-rapid-response-research-program-guide-purpose-sector-through-covid-19/)>

30 <[www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/events/purpose-summit/](http://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/events/purpose-summit/)>

31 The British Academy, ‘Principles for Purposeful Business’ (November 2019) <[www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/](http://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/)>

32 See research outputs at: <[www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/](http://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/)> and <[www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/research/](http://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/research/)>

## Press freedom and public sector whistleblowers

Feedback received by the ALRC was generally supportive of a law reform inquiry on topics relating to press freedom and/or whistleblowing. Views differed on whether an inquiry should focus on either press freedom, or public sector whistleblowers, or both. Some considered that while there is inevitably overlap between these topics, they are fundamentally distinct, and would require different treatment. For example, it would be insufficient to inquire into whistleblower protections from the perspective of their impact on press freedom, and it would be insufficient to inquire into press freedom from the perspective of its impact on public sector whistleblowers. Arguably, each topic would be better analysed separately on its own merits.

### Webinar

The ALRC held a webinar on the topic of Press Freedom on 24 August 2020.<sup>33</sup> Although some issues relating to whistleblower protection were raised during the webinar, it was not the primary focus. Key points raised by expert panellists and online participants included:

- broad issues relating to the need (or otherwise) for fundamental legal recognition of the role of free press in our democracy;
- decriminalisation of journalists undertaking “good faith public interest journalism”;
- inconsistent protection of journalist sources across Australia;
- how to define “the press” and “journalists”;
- the interplay between press freedom and national security;
- the extent to which oversight of the use of security powers may reduce the need for substantive law reform;



33 <[www.alrc.gov.au/news/press-freedom-a-nationwide-conversation-on-law-reform/](http://www.alrc.gov.au/news/press-freedom-a-nationwide-conversation-on-law-reform/)>

- the interplay between press freedom and open justice, including the arguably inconsistent use of suppression orders and closed court proceedings;
- the importance of the changing media ownership landscape in Australia, including foreign media ownership, concentration of ownership, and barriers to entry for market participants.

## Stakeholder views

Professor Charles Sampford highlighted the importance of distinguishing between individual human rights and organisational rights in the context of press freedom. In public discourse, the rights of journalists to express views can become conflated inappropriately with their employers' rights. In his view, journalists have fundamental human rights to express views, while media companies, in contrast, should enjoy the privilege of broadcasting views only to the extent that it benefits others, or contributes to the realisation of their rights – such as the right to receive information to inform their vote. An inquiry might helpfully analyse whether some extensions to press freedom may be appropriate – for example relating to shield laws, protection of sources, and less stringent defamation laws. In addition, it could consider whether there should be additional benefits or privileges for media organisations that voluntarily sign up to tougher ethical regimes.

## Recent developments

In February 2020 the Federal Court of Australia held that the warrant used for a 2019 Australian Federal Police raid on the Australian Broadcasting Corporation was valid.<sup>34</sup>

In April 2020 the High Court of Australia ruled that a warrant relating to journalist Annika Smethurst was invalid but did not order destruction of evidence.<sup>35</sup> In May 2020 the Australian Federal Police indicated it would not lay charges against Ms Smethurst.<sup>36</sup>

In June 2020 the Senate Economics Legislation Committee released a report incorporating several recommendations relevant to protections of whistleblowers. The Committee considered that existing public interest disclosure frameworks may be too complex and confusing.<sup>37</sup>

In August 2020 the Parliamentary Joint Committee on Intelligence and Security released its final report with 16 recommendations including amendments to: *Public Interest Disclosure Act 2013* (Cth); *Crimes Act 1914* (Cth); *Surveillance Devices Act 2004* (Cth); *Telecommunications (Interception and Access) Act 1979* (Cth); and *Australian Security Intelligence Organisation Act 1979* (Cth).<sup>38</sup> The Committee did not recommend that warrants be 'contestable', but rather set out a role for Public Interest Advocates to

34 *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133

35 *Smethurst v Commissioner of Police* [2020] HCA 14

36 <[www.abc.net.au/news/2020-05-27/afp-will-not-lay-charges-annika-smethurst-raid/12291238](http://www.abc.net.au/news/2020-05-27/afp-will-not-lay-charges-annika-smethurst-raid/12291238)>

37 Senate Economics Legislation Committee, Parliament of Australia, *Performance of the Inspector-General of Taxation* (Report, June 2020) [4.72]

38 Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (August 2020), Parliament of Australia <[www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/FreedomofthePress/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Report)>



“represent the interests of the principles of public interest journalism” before an authority considering whether to issue a warrant.<sup>39</sup>

In its 2020 World Press Freedom Index, Reporters Without Borders ranked Australia at 26<sup>th</sup> in the world, being five places lower than the previous year. The report stated that although Australia was previously considered the best model of press freedom in the Asia-Pacific region, it “is now characterised by its threats to the confidentiality of sources and to investigative journalism”.<sup>40</sup>

Also in 2020, a bill was introduced into the United States of America House of Representatives relating to “whistleblower protections for government contractors and private sector workers who may witness waste, fraud, or abuse or be victims of misconduct with respect to a COVID-19 ... pandemic-related program, project, or activity”.<sup>41</sup> Another bill has been introduced for purposes including “to authorize appropriate disclosure of classified information”.<sup>42</sup>

In New Zealand, the Protected Disclosures (Protection of Whistleblowers) Bill 2020 was introduced to Parliament in June 2020.<sup>43</sup> Its stated purpose is “to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and by providing protection for employees and other workers who report concerns”.<sup>44</sup>

Finally, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression issued a report concerning freedom of expression in pandemics, including a basic requirement of the ‘protection of journalists and promotion of access to information extend[ing] to the protection of sources and the protection of whistle-blowers.’<sup>45</sup>

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39 Ibid, rec 2.

40 <rsf.org/en/2020-world-press-freedom-index-entering-decisive-decade-journalism-exacerbated-coronavirus

41 H.R.7227 - COVID-19 Whistleblower Protection Act <www.congress.gov/bill/116th-congress/house-bill/7227>

42 S.3402 - Espionage Act Reform Act of 2020 <www.congress.gov/bill/116th-congress/senate-bill/3402>

43 <www.publicservice.govt.nz/resources/protected-disclosures-act-reform/>

44 Protected Disclosures (Protection of Whistleblowers) Bill (NZ), Government Bill 294—1, Explanatory note.

45 United Nations Human Rights Council, *Disease pandemics and the freedom of opinion and expression: report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, (23 April 2020, A/HRC/44/49) [33]



### 3. SELECT DEVELOPMENTS IN OTHER IDENTIFIED TOPICS OF SIGNIFICANCE

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A number of developments have also taken place in relation to the other significant topics identified by the report. The summary below highlights a small number of key developments.

#### Australian Constitution

In May 2020 the Prime Minister announced “a significant reform to Commonwealth-State relations” in the form of a new National Federation Reform Council, comprising the National Cabinet, the Council for Federal Financial Relations, and a number of Reform Committees and Taskforces.<sup>46</sup>

Participatory democracy models such as citizens’ assemblies, relevant to the discussion of reform of the Australian Constitution, have continued to be employed across the world in 2020 – although often online rather than in person since the onset of the COVID-19 pandemic. These include a ‘citizens’ convention on climate’ in France established by President Emmanuel Macron (concluding in June 2020), and a ‘climate assembly’ in the United Kingdom (concluding in September 2020). Further large-scale deliberative processes are ongoing including ‘*Deliberación País*’ in Chile (focussing on pension reform and health care) and a citizens’ assembly in Scotland established by First Minister Nicola Sturgeon, to discuss broad questions about the country’s future (scheduled to report in December 2020).

#### Environmental law

In relation to Australia’s environmental protection laws, as noted in the Report, the government had commissioned an independent statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to report in October 2020. In his interim report, released in July 2020, the independent reviewer, Professor Graeme Samuel AM, concluded that the Act is ineffective and ‘does not enable the Commonwealth to play its role in protecting and conserving environmental matters that are important for the nation’.<sup>47</sup> According to the report, ‘[f]undamental reform of national environmental law is required, and National Environmental Standards should be the foundation’.<sup>48</sup>

#### Migration law

In December 2019 the Senate established a Select Committee on Temporary Migration to inquire into the impact temporary migration has on the Australian economy, wages and jobs, social cohesion and workplace rights and conditions. The committee is to present its final report in August 2021.<sup>49</sup> Much of the activity relevant to the area of migration law in

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46 <[www.pmc.gov.au/domestic-policy/effective-commonwealth-state-relations](http://www.pmc.gov.au/domestic-policy/effective-commonwealth-state-relations)>

47 <[epbcactreview.environment.gov.au/resources/interim-report/executive-summary](http://epbcactreview.environment.gov.au/resources/interim-report/executive-summary)>

48 Ibid

49 <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Temporary\\_Migration](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Temporary_Migration)>

2020 has been in relation to the significant consequences of the COVID-19 pandemic on international travel. In addition, a Bill is before Parliament which would allow the Minister to determine that a thing is a “prohibited thing” in relation to immigration detention facilities and detainees, such as drugs, mobile phones, and SIM cards. The Bill also includes a new statutory power to search facilities.<sup>50</sup>

## Statutory Drafting Practices

As noted in the Future of Law Reform report, this topic is closely linked to the suggested topic of principle-based regulation of financial services. The ALRC now has an active inquiry on corporate and financial services regulation. Many of the issues raised under the topic of ‘Statutory Drafting Practices’ will therefore be addressed in a more focused way in the context of corporations and financial services legislation. In February 2020 the ALRC was invited to join a workshop on approaches to creating machine-readable legislation, held by the Australian Government’s Digital Legislation Working Group.<sup>51</sup> CSIRO’s Data61 has also funded research to be conducted by the Queensland University of Technology’s Digital Media Research Centre on ‘Classifying the Legal and Coding Challenges of Digitising Commonwealth Legislation’.<sup>52</sup>

## Creditors and Trusts

In November 2019, the NSW Parliament implemented a recommendation of the NSW Law Reform Commission and amended the *Trustee Act 1925* (NSW) to abolish “the rule of equity known as the rule in *Hardoon v Belilios*.”<sup>53</sup> The new provisions limit the circumstances in which a beneficiary is liable to indemnify the trustee for any act, default, obligation or liability of the trustee. The Hon Joseph Campbell QC noted that whether or not the new NSW provision will apply in relation to a particular trust that has some connection with NSW and also other jurisdictions will depend on the principles of conflicts of laws. In addition, the interaction with Commonwealth laws such as the *Corporations Act 2001* (Cth) and the *Bankruptcy Act 1966* (Cth) remains of significance.<sup>54</sup>

## Surrogacy

The Future of Law Reform Report foreshadowed that surrogacy laws may receive further attention from the Council of Attorneys-General (CAG). In November 2019, the CAG agreed to establish a Working Group on Surrogacy to advise on opportunities for ‘attaining greater national consistency in legal and policy frameworks regulating surrogacy in Australia’.<sup>55</sup> Its report has been delayed due to the impact of the COVID-19 pandemic.<sup>56</sup>

50 Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (Cth)

51 <[www.dta.gov.au/blogs/exploring-opportunities-digital-legislation-policy-and-rules](http://www.dta.gov.au/blogs/exploring-opportunities-digital-legislation-policy-and-rules)>

52 <[research.qut.edu.au/dmrc/projects/classifying-the-legal-and-coding-challenges-of-digitising-commonwealth-legislation/](http://research.qut.edu.au/dmrc/projects/classifying-the-legal-and-coding-challenges-of-digitising-commonwealth-legislation/)>

53 *Trustee Act 1925* (NSW) s 100A, inserted by the *Justice Legislation Amendment Act (No 2) 2019* (NSW) sch 1 cl 1.23

54 The Hon Joseph Campbell QC, ‘The New Section 100A Trustee Act 1925 (SW): When a Beneficiary is Personally Liable to Indemnify a Trustee’, (Conference Paper, Society of Trust and Estate Practitioners, NSW Branch, 17 June 2020)

55 Council of Attorneys-General, ‘Communique 19 November 2019’ <[www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-November-2019.pdf](http://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-November-2019.pdf)>

56 Council of Attorneys-General, ‘Communique 27 July 2020’, <[www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-cag-communique-27-july-2020](http://www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-cag-communique-27-july-2020)>

South Australia also passed its new *Surrogacy Act* in late 2019.<sup>57</sup> Overseas, the Law Commission of England and Wales has continued its review into surrogacy laws, and expects to make recommendations for reform in early 2022.<sup>58</sup>

## Credit, debt, and financial hardship

In May 2020, the Australian Finance Industry Association and major Buy Now, Pay Later (BNPL) providers published a draft Code of Conduct for BNPL. The draft Code has been criticised by consumer groups and ASIC as lacking adequate consumer protections, but is expected to come into force on 1 January 2021.<sup>59</sup> In September 2020, a Senate inquiry concluded that the BNPL sector does not need to be regulated under national consumer credit laws and could appropriately self-regulate.<sup>60</sup> In the same month, the Senate Economics Legislation Committee recommended that legislation designed to enhance consumer protections for small amount credit contracts and consumer leases be blocked in the Senate,<sup>61</sup> and – more broadly – the Australian Government announced that it would wind back the general responsible lending provisions found in national consumer credit legislation.

## Human tissue laws

In February 2020 the Commonwealth Department of Health released the report of the government-commissioned *Review of the Australian organ donation, retrieval and transplantation system*.<sup>62</sup> This review, which had been completed in December 2018, was carried out by EY and overseen by the Organ Review Steering Committee. The report makes 57 recommendations to support the future growth and sustainability of donation and transplantation. These recommendations will now be considered by a committee of government officials representing all jurisdictions and the Organ and Tissue Authority with the view to development of a future national strategy.<sup>63</sup>

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57 *Surrogacy Act 2019* (SA)

58 <[www.lawcom.gov.uk/project/surrogacy/](http://www.lawcom.gov.uk/project/surrogacy/)>

59 James Eyers, 'ASIC lashes buy now, pay later', *Australian Financial Review*, 11 June 2020

60 Senate Select Committee on Financial Technology and Regulatory Technology, *Interim Report* (September 2020)

61 Senate Economics Legislation Committee, *Report on National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2)* (September 2020)

62 <[www.health.gov.au/resources/publications/review-of-the-organ-donation-retrieval-and-transplantation-system-final-report](http://www.health.gov.au/resources/publications/review-of-the-organ-donation-retrieval-and-transplantation-system-final-report)>

63 Department of Health (Cth), 'All Governments' Statement: Review of the Australian organ donation, retrieval and transplantation system' (Media Release, 21 February 2020) <[www.health.gov.au/resources/publications/review-of-the-organ-donation-retrieval-and-transplantation-system-final-report](http://www.health.gov.au/resources/publications/review-of-the-organ-donation-retrieval-and-transplantation-system-final-report)>

## 4. APPENDIX – ACKNOWLEDGEMENTS

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### WEBINAR CO-HOSTS AND PANELLISTS

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27 July 2020

Co-host: The University of Sydney

Topic: Defamation

Panellists: Professor David Rolph, The University of Sydney  
Judge Judith Gibson, District Court of NSW  
Bruce McClintock SC, NSW Bar  
Georgia-Kate Schubert, Australia's Right to Know coalition

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10 August 2020

Co-hosts: QUT Law and the ARC Centre of Excellence for Automated Decision-Making and Society

Topic: Automated Decision Making and Administrative Law

Panellists: Professor Dan Hunter, ARC Centre of Excellence for Automated Decision-Making and Society  
Professor Marek Kowalkiewicz, QUT Business School  
Dr Anna Huggins, QUT Law  
Lisa Keeling, Services Australia

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17 August 2020

Co-host: The University of Melbourne

Topic: Legal Structures for Social Enterprises

Panellists: Professor Matthew Harding, The University of Melbourne  
Associate Professor Rosemary Langford, The University of Melbourne  
Michael Ryland, Centre for Social Finance Law  
Trevor Danos AM, Advisor  
Andrew Davies, B Lab

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24 August 2020

Co-host: The University of Queensland

Topic: Press Freedom

Panellists: Professor Peter Greste, Alliance for Journalists' Freedom  
Jacinta Carroll, Australian National University  
Georgia-Kate Schubert, Australia's Right to Know coalition  
Dr Rebecca Ananian-Welsh, The University of Queensland

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