





## Introduction

This report summarises the work of the UCL Centre for Ethics and Law (CEL) in the academic year 2019/20.

We offered an extensive calendar of events in term one (September- Dec 2019), successfully engaging with many stakeholders and members of the public who came to our events.

**Ms Philippa Foster Back CBE**

**Professor Dame Hazel Genn QC**, Professor of Socio-Legal Studies and former Dean of the Faculty of Laws, UCL

**Dr John Mair**, Director, Head of Project Integrity, European Bank for Reconstruction and Development (EBRD)

**Professor Stephen Mayson**, Honorary Professor of Law, UCL

**Dr Lucinda Miller**, Senior Lecturer in Laws, UCL

**Professor Richard Moorhead**, Honorary Professor of Law, UCL

**Dr Francisco de la Peña Fernández-Garnelo**, Senior Teaching Fellow, UCL

**Dr Ian Peters MBE**, Director, Institute of Business Ethics (IBE)

**Dr Prince Saprui**, Vice Dean (Equality, Diversity and Inclusion) and Associate Professor in Laws, UCL

**Mark Serföz**, General Counsel & Company Secretary, Spectris

**Dr Kevin Toh**, Senior Lecturer in Laws, UCL

**Dr Michael Veale**, Lecturer in Digital Rights and Regulation, UCL

**Professor Hse-Yu (Iris) Chiu**, Director of the Centre for Ethics and Law, UCL

**Dr Alan Brener**, Teaching Fellow and Deputy Director of the Centre for Ethics and Law, UCL

We also thank our Honorary Associates for working with us in our research and public engagement:

**Paul Gilbert**, LBC Wise Counsel, LawBook Consulting Limited

**Maddalena Neglia**, FIDH and Visiting Associate, CEL

**Roger Barker**, Corporate Governance consultant, Governomics Ltd

**Anna Triponei**, Business and Human Rights consultant, Triponei Consulting Ltd

## Personnel Changes 2019/20

**Dr Danae Azaria** joined the Advisory Board in Jan 2020.

**Professor Barnali Choudhury** joined the Advisory Board in Jan 2020.

**Dr Michael Veale** joined the Advisory Board in October 2019.

**Philippa Foster Black** has retired from the IBE but has agreed to remain as a member of the Advisory Board in a personal capacity.

We welcome **Dr Ian Peters** who takes over from Philippa at the IBE, to the Advisory Board.

**Professor Steven Vaughan**, who has been appointed to be Vice Dean (staffing) from the next academic year, has decided to leave the Centre at the end of May 2020.

## Projects/ Workstreams Supported by CEL

### INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

The summer period following last year's annual report was spent preparing the Review's interim report. The interim report was published on 17 September 2019, and is available with all other Review materials at: <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>. It set out my findings on the challenges within the existing regulatory framework for legal services in England & Wales, and offered a number of propositions and consultation questions. The report attracted some coverage in the *The Times*, as well as in the national legal and social media.

Stephen attended and spoken at four conferences in connection with the Review: International Conference of Legal Regulators (Edinburgh, September 2019); annual conference of the Council on Licensure, Enforcement & Regulation (Minneapolis, September 2019); keynote speech on the outstanding issues in the Review to the Westminster Legal Policy Forum (London, February 2020; text available from the link above); and the Canadian Bar Association Legal Ethics Forum (Toronto, but virtual participation, March 2020). Stephen also had pieces published in the *Journal of the Chartered Institute of Patent Attorneys* (December 2019) and *Modern Law Magazine* (January 2020). The Centre for Ethics & Law held the second of two public events at UCL on 9 October, and 95 people registered to attend.

The original consultation period was due to end on 29 November, but I later extended it to 20 December because of the General Election. The total number of detailed written responses was 45. Stephen also continued during the consultation period to have meetings with interested parties (including with the boards of the Legal Services Board, the Legal Services

Consumer Panel, the Solicitors Regulation Authority, and the Council for Licensed Conveyancers). This brought the total number of people I have spoken to in meetings during the Review to 340, representing statutory bodies, regulators (in legal services and other areas), professional bodies, providers (both currently regulated and unregulated), and consumers. This reflects the very high level of engagement and participation in the Review throughout its history.

Working through the written submissions and considering the implications, perhaps not surprisingly, there was generally a difference between the reactions and views held by some of the established professions and those who are currently excluded from regulation or left unprotected or confused by it. Stephen's thinking inevitably moved on after the publication of the interim report, and I have considered carefully how best to deal with this difference in expectations and preferences.

At the time of writing this update, the final versions of the (now) six working papers that were issued during the course of the Review (a total of around 200 pages) have been completed. So too has a draft of the final report. It has developed and elaborated on the issues and propositions raised in the interim report, and offered more detail of how a revised, more inclusive and overtly risk-based, regulatory framework could operate. Also, because of recent developments - particularly the implications for consumer need (wills, probate, employment, housing and benefits) and increased reliance on technology during the Covid-19 lockdown - the final report also contains some emphasis on recommendations for short-term reform as well as maintaining its principal emphasis on longer-term reform. Consequently, the final report is detailed and runs to almost 300 pages. The Final report and recommendations was published and submitted to the Lord Chancellor in June this year.

Stephen has expressed his thanks to the Centre, its staff and the Advisory Board for their support and encouragement during the two years of the Review.

## WORK ON NDAS - GOVERNMENT PROPOSALS ON RESTRICTING THEIR USE

Professor Richard Moorhead is a special adviser to the inquiry into nondisclosure agreements in discrimination cases by the Women and Equalities Parliamentary Select Committee (WESC). He has expressed concern that, while the proposed legislation is symbolic and a bit of progress, the scope looks quite narrow. The legislation would outlaw something that is already illegal. Moreover, it is likely that lawyers advising firms will continue to seek ways to impose disclosure restrictions without breaching the legislation.

In October 2019 the Government published its response to the Women and Equalities Committee's report on the use of NDAs in discrimination cases.

Overall, the Government agrees that the use of NDAs to cover up cases of sexual harassment and discrimination is unacceptable and that they are used to silence and intimidate victims. However, the Government considers there is a legitimate place for NDAs within employment contracts, although that the right balance must be achieved between allowing legitimate use and preventing misuse. The Government restates that it will introduce new legislation to restrict the use of NDAs and ensure that these limits are clearly set out in employment contracts and settlement agreements. The legislation will legislate that no term in an NDA can prevent disclosures to the police, regulated health or care professionals and legal professionals, and require independent legal advice to be provided to individuals who are asked to sign an NDA.

The Government also committed to taking forward WESC's recommendations to:

- produce guidance for solicitors and legal professionals responsible for drafting settlement agreements;
- introduce enforcement measures for NDAs that do not comply with legal requirements in written statements of employment particulars; and
- strengthen corporate governance, requiring companies to meet their responsibilities to protect employees from discrimination,
- require employers to investigate all discrimination and harassment complaints regardless of whether it reaches a settlement.

The Government has also committed to considering further the following WESC recommendations and will:

- consult on whether to introduce a statutory duty on employers to provide a basic factual reference for former employees. The Government accepts that failure to provide a reference can pose a problem for victims of discrimination. See the Government's Press Release on this summarised here,
- run an awarenessraising programme about how to handle grievances fairly and effectively,
- examine the possible adverse effect on individuals of publishing Tribunal judgments online, and exploring what potential safeguards it could put in place,
- consider responses to a consultation on the proposal to extend time limits for claims of sexual harassment, pregnancy and maternity discrimination.
- review the legal aid means test and improve awareness of how people can access legal support,
- consider calling for employers to appoint a named senior manager at board level or similar to oversee anti-discrimination and harassment policies and procedures and to oversee the use of NDAs in discrimination and harassment cases.

## DECENTRALISED BUSINESS MODELS AND CORPORATE GOVERNANCE NORMS

Professor Iris H-Y Chiu, together with Honorary Associate Dr Roger Barker curated a book proposal on business arrangements that are neither markets nor hierarchies, in order to examine their governance needs. These business arrangements are business networks, supply chains, public-private partnerships, platform economies and more recently, blockchain based platform economies. This project was in part inspired by growing research interest in technological phenomena such as blockchain and it is important to take stock of the broader context of business organization in locating and understanding disruptive and unconventional structures.

The book proposal was accepted by Routledge in June 2019. The book is an edited volume featuring a few chapters jointly written by Iris and Roger, and Dr Alexandra Schneiders of the UCL Energy Institute

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Danae is an Expert Member of the UK Delegation to the United Nations, General Assembly, Legal Committee (2016-current) and does extensive work with the International Law Commission in the generating of international law standards. She is consultant to the UN and is involved in training governmental officials.

In 2019, Danae was awarded a Starting Grant by the European Research Council (ERC) (€1,5 million) for her research on The Silence of States in International Law. This is a five-year project which will start in September 2020. It seeks to understand the legal significance and effects of the silence of States in international law, State inaction and international law. It looks what happens when a State does or says nothing. Many questions emerge concerning the meaning of silence, why a State may remain 'silent', and the consequence of State silence. The EU-funded State Silence project is the first

comprehensive study of the legal significance of State silence. It includes whether silence can bind States, and if so, under which circumstances; the role of State inaction for State responsibility; and the effect of State inaction in the field of international dispute settlement, including nonappearance before international courts and tribunals. The central aim of the project is to understand the legal effects of the 'silences' of States, the reasoning and theory behind the law, and the reasons for which States remain silent by considering the features of modern international law – where more States and institutions exist, communications are easier, and where more rules that protect community interests exist. CEL will work with Danae in terms of dissemination of her research at interim stages.





## Teaching

The following courses of particular relevance to the Centre's interests ran this year:

- The Future of Legal Practice (Postgraduate)
- Law and Ethics (Postgraduate)
- Comparative Corporate Governance (Postgraduate)
- Corporate Social Responsibility (Postgraduate)
- Philosophical Foundations of the Common Law (Undergraduate)
- Environmental Lawyering (Postgraduate)

## Recent publications by Advisory Board members

### DANAE AZARIA

The International Law Commission as an Interpreter of International Law Journal article; 2020; European Journal of International Law.

The Renewable Energy Arbitrations Under the Energy Charter Treaty Chapter; 2020; [Hart Oxford]

### ALAN BRENER

**Housing and Financial Stability, Mortgage Lending and Macroprudential Policy in the UK and US**, (Routledge Publishing, 2020). This book examines, among other things, ethics and culture in selling mortgages and the regulation of these aspects in the UK and US.

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### IRIS H-Y CHIU

Iris Chiu and Alan Brener, (2019), 'Changing financial services firms' behaviour through a duty of care', (2019) Journal of Financial Compliance, Vol. 3, No. 1, 67-75

'Transforming the Financial Advice Market - The Roles of RoboAdvice, Financial Regulation and Public Governance in the UK', (2019), Banking and Finance Law Review, Vol. 35, Issue 1, 9-35

'Disclosure Regulation and Sustainability' in **The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability**, Beate Sjøfjell and Christopher Bruner (Res345fjnTustainability,

Iris Chiu and Edward Greene, *The Marriage of Technology, Markets and Sustainable (and) Social Finance: Insights from ICO Markets for a New Regulatory Framework*, (2019) *European Business Organization Law Review*, 20, 139–169

#### Forthcoming

Iris H-Y Chiu and Ernest WK Lim, 'Technology vs Ideology: How Far will Artificial Intelligence and Distributed Ledger Technology Transform Corporate Governance and Business?', (2021), *Berkeley Business Law Journal*

'Examining the Wates Principles for Large Private Companies as a Social Contract for Business-Society Relations', (2020) *International and Comparative Corporate Law Journal*

*Between Markets and Hierarchies: Decentralised Business Models and Governance Norms* (with Roger Barker, Routledge, 2020, forthcoming)

*Research Handbook on Fintech* (ed, with Gudula Deipenbrock, Routledge, 2021, forthcoming)

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#### BARNALI CHOUDHURY

Submission to **United Nations Working Group on Business and Human Rights on the standard of liability in the draft Business and Human Rights Treaty (Feb 2019)**, available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>

**International Investment Law and Non-Economic Issues**, 53 *Vanderbilt Journal of Transnational Law* 1 (2020) (Lead Article)

Solicited submission to **United Nations Working Group's 2021 Report to the UN General Assembly: Negotiating Human Rights-Compatible International Investment Agreements** (May 2020) [Not publicly available; only available to members of the UN's Working Group on Business and Human Rights]

#### Forthcoming

**Book chapters:** Using Corporate Soft Law to Define Investor Responsibilities in International Investment Law in J. Ho and M. Sattorova (eds.), **Investor Obligations in International Investment Law** (Hart, 2020) (Forthcoming)

**Corporate Purpose and Short-Termism** in A. Afsharipour and M. Gelter (eds.), **Research Handbook on Comparative Corporate Governance** (Edward Elgar, 2020) (co-author) (Forth-coming)

**Article Investor Obligations for Human Rights**, *ICSID Review* (2020)

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#### RICHARD MOORHEAD

'Professional Ethics and NDAs: Contracts as lies and abuse?' in *Contents of Commercial Contracts: Terms Affecting Freedoms*, P Davies and M Raczynska, (eds.), (Hart Publishing, 2020)

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#### PRINCE SAPRAI

**Contract Law Without Foundations: Toward a Republican Theory of Contract Law** (OUP, Oxford 2019)

'Promising Under Duress' *Law and Philosophy*, (2019) *Law and Philosophy*, Vol.38, 465–480

'Moving Beyond Promise: A Response to the Choice Theory of Contracts', (December 2019) *J f*

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## MICHAEL VEALE

'A Critical Take on the Policy Recommendations of the EU High-Level Expert Group on Artificial Intelligence', (2020) *European Journal of Risk Regulation*, 1-10

Michael Veal was one of four advisors creating the 'Cybersecurity for Elections: A Commonwealth Guide on Best Practice'; (2020); Commonwealth Secretariat, [https://thecommonwealth.org/sites/default/files/inline/Cybersecurity\\_for\\_Elections\\_PDF\\_0.pdf](https://thecommonwealth.org/sites/default/files/inline/Cybersecurity_for_Elections_PDF_0.pdf)

Midas Nouwens, Ilaria Liccardi, Michael Veale, David Karger, Lalana Kagal, 'Dark Patterns after the GDPR: Scraping Consent Popups and Demonstrating their Influence', (January 2020), arXiv:2001.02479

Professor Carmela Troncoso and others including Michael Veale, Report on Decentralized Privacy-Preserving Proximity Tracing: Overview of Data Protection and Security', (April 2020) <https://arxiv.org/abs/2005.12273>

Michael Veale and Irina Brass, 'Administration by Algorithm? Public Management Meets Public Sector Machine Learning' in *Algorithmic Regulation*, Karen Yeung and Martin Lodge (eds), (Oxford University Press, 2019)

Michael Veale (Lead Author), 'Algorithms in the Criminal Justice System Report', (The Law Society of England and Wales, 2019)

Lilian Edwards, Michèle Finck, Michael Veale and Nicolo Zingales, 'Data subjects as data controllers: a Fashion(able) concept?', (2019) *Internet Policy Review*, <https://policyreview.info/articles/news/data-subjects-data-controllers-fashionable-concept/1400>

Jef Ausloos, Réne Mahieu and Michael Veale, 'Getting data subject rights right: A submission to the European Data Protection Board from international data rights academics, to inform regulatory guidance', (2019), *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 10 (3), <https://www.jpipitec.eu/issues/jpipitec-10-3-2019/5031>

## Forthcoming

Sylvie Delacroix and Michael Veale, 'Smart Technologies and Our Sense of Self: Going Beyond Epistemic Counter-Profiling', in *Life and the Law in the Era of Data-Driven Agency*, Mireille Hildebrandt and Kieron, (eds). (Edward Elgar Publishers, 2020)

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UCL Centre for Ethics and Law web-site: <https://www.ucl.ac.uk/ethics-law/>