LexisNexis®

RULE OF LAW UPDATES AND PERSPECTIVES

Advancing together

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A publication from LexisNexis Capital Monitor™
to advance the **rule of law** in the Asia-Pacific

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17 LexisNexis® Receives 2017 Corporate Leadership Award from Freedom House for Activism in Advancing the Rule of Law

Hello and welcome to the June 2017 edition of *Advancing Together*.

It's been a busy 2017 for LexisNexis on the rule of law front. Our rule of law commitment and activism recently received a 2017 Corporate Leadership Award from Freedom House , an independent watchdog organisation dedicated to the expansion of freedom and democracy around the world. In addition, we were named among the Top 10 companies by the Australian Centre for Corporate Social Responsibility (ACCSR) for our commitment to embedding corporate social responsibility and sustainability throughout our company. We achieved some notable world firsts with the creation of an international human rights app, as well as a practical resource on social justice topics. We also reached another milestone in our ongoing collaboration with the Government of the Republic of Fiji and have continued our work assisting Myanmar in its transition to democracy.

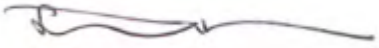
In December last year we launched *RightsApp*, a world-first digital human rights resource, in partnership with the Australian Human Rights Commission (AHRC). This app digitises some of the world's most important international human rights treaties and agreements and provides them in a readily accessible format. Users can quickly and easily search by topic or by right and access the information without reliance upon an internet connection — making the app available anywhere, anytime. This project was conceived by one of our employees and we are extremely proud to have supported it to fruition, and to have partnered with the AHRC to increase access to human rights.

Our second world-first was the release of our complimentary Practical Guidance Social Justice Pacific module, openly available through our website or through your Lexis Advance® subscription. The module is an essential resource for those working on pro-bono cases and social justice issues, and a crucial tool for those with limited access to resources to prosecute their case or defend their rights. In the current global climate, raising awareness and providing resources to further social justice outcomes is crucial. This resource increases access to justice — a central tenet of the rule of law and one that we are proud to actively advance through our work here.

We were proud to launch the *Laws of Fiji* at the end of last year – a project that saw the full collection of Fijian legislation consolidated and published for the first time in two years. The three-volume publication was launched at the 18th Attorney General's Conference in Natadola, Fiji by the Attorney-General Aiyaz Sayed-Khaiyum in front of more than 300 senior members of the legal community. We are privileged to work closely with the Fijian Government and to collaborate on improving access to, and knowledge about, the Fijian justice system. Our work in Fiji is ongoing, with new volumes of the *Fiji Law Reports* currently being developed with support from the Fiji Access to Justice Project.

We continue to work in Myanmar to assist the expansion of the nation's legal system throughout the transition to democracy. Our projects span the Government, Corporate and Academic sectors and recently involved leading a team of specialist lawyers to help train more than 50 Myanmar Government lawyers in international contract law.

Advancing the rule of law helps people in many different ways. By reducing corruption, it creates greater safety and stability for people within their own countries. By creating a conducive environment for business to operate, it generates positive economic outcomes for the members of those communities. It provides greater access to justice and ensures that the most vulnerable people in society have a chance to be heard. Through all of our projects and through our day-to-day work, we are committed to increasing the protection of the rule of law to help all people in need. Please enjoy the thought-provoking articles in this edition and stay up-to-date with our activities in advancing the rule of law across the Asia Pacific region.



Simon Wilkins
General Manager
LexisNexis Australia

The Rule of Law and the rights of older persons in Asia Pacific

Bill Mitchell
Principal Solicitor of Townsville Community Legal Service, and member of the National Association of Community Legal Centre's Older Person's Legal Services Network

The rule of law and human rights are intricately linked. The UN has noted that there is no rule of law within society if human rights are not observed and protected. Conversely, human rights cannot be protected in a society without a strong rule of law.[1] The rule of law is the implementation mechanism for human rights, turning them from principle into a reality.[2] This gap between principle and reality of rights is stark for older persons.

Older persons are the only vulnerable group without their own human rights treaty. This has left them languishing within a normative gap. Existing human rights instruments offer protection, though older persons' relegation to "other status" in international jurisprudence fails to acknowledge, let alone address, elder specificities,[3] nor does it legitimise their political identity. Older persons are often invisible in society, existing without recognition as legitimate rights holders. They are still pitied as passive welfare recipients. We practice benevolent prejudice on a global scale.

In 2011, the United Nations' General Assembly established the Open Ended Working Group on Ageing (OEWGA) with a mandate to investigate the feasibility of a Convention on the Rights of Older Persons.[4] This was a quantum leap in the public discourse of older persons' rights. Historically, the debate about older persons' rights goes back to 1948 when First Lady of Argentina Eva Peron's draft Declaration of Old Age Rights came before the UN. Argentina proposed the declaration alongside the draft Universal Declaration of Human Rights (UDHR). Eleanor Roosevelt, who kept a journal of her observations of the UDHR debates, wondered whether young persons should also be included.[5] Children eventually got their Convention in 1990 but the declaration on old age rights never got off the starting block.

The 1991 UN Principles for Older Persons and 2002 Madrid International Plan of Action on Ageing (MIPAA) are both soft law responses without binding effect. The debate within the UN Economic and Social Commission for Asia and the Pacific region has been slow to start but has begun momentum around this issue. In 2014, the UN brought experts together for a workshop on the Rights of Older Persons in the Asia-Pacific region. Participants noted a Convention would create shared definitions in difficult areas such as elder abuse, and provide guidance at national and regional levels, currently lacking in the region.[6]

Academics in the field of elder abuse have debunked the myth that the Confucian virtue of filial piety (the philosophy to respect one's parents, elders and ancestors) remains. China's 2013 law ordering children to visit elderly parents attracted 17 million comments online, many of them negative and disparaging of older persons. Even further back Yamada coined Japan's parasaito shinguru literally "parasite singles" who remain at home until early middle age to enjoy a more comfortable and carefree life – often at the expense of their elderly parents.

(continued)

1 https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/
2 Ibid.
3 Paul De Hert, Eugenio Mantovani, Specific Human Rights for Older Persons, [2011] EHRLR, Issue 4, 400; Frederic Megret, The Human Rights of Older Persons: A Growing Challenge, Human Rights Law Review (2011) 11 (1): 37-66.
4 A/RES/65/182; A/RES/67/139; A/RES/70/164
5 See http://www.encyclopedia.com/politics/news-wires-white-papers-and-books/my-day-9#n3.
6 http://www.unescap.org/events/workshop-social-integration-and-rights-older-persons-asia-pacific-region.

> “It seems elder abuse knows no geographic boundaries and different cultures find characteristic manifestations on their own shores. Some are common to all cultures. In all places elder abuse is an aspect of ageism. It takes many forms including prejudice, discrimination, harassment, vilification, violence, abuse and neglect.”

In an era of ageing in place, this is ideal if the children are looking after their parents, yet this contemporaneity of purpose rarely features.

Yan noted elder abuse is growing in many Asian countries at an unprecedented rate.[7] Her work noted culturally specific forms of mistreatment that differ from Western perspectives. Consistent across the studied countries (China, Taiwan, India, Singapore, Japan, South Korea) was that disrespect was central to actions, attitudes and behaviours. Unlike Western prevalence studies, caregiver neglect ranked higher than financial abuse. Older persons in the studies variously described themselves like a “ball being kicked among relatives” or “transparent”.[8]

It seems elder abuse knows no geographic boundaries and different cultures find characteristic manifestations on their own shores. Some are common to all cultures. In all places elder abuse is an aspect of ageism. It takes many forms including prejudice, discrimination, harassment, vilification, violence, abuse and neglect. Ageism is now said to be more prevalent than sexism and racism and has complex cultural, intergenerational tensions as part of its narrative.

Countries debating whether the world needs a Convention have bickered back and forth about whether substantive gaps exist. They do exist and are multidimensional.[9] Countries with large number of older persons, or with especially ageing populations, count the potential cost of giving older persons rights to health, housing and pensions. Rights do cost. Countries avoid the controversies. Like deciding what rights we should enjoy at end of life. Like how our personal autonomy is respected and maintained against the backdrop increased prevalence of dementia.

These are serious questions from a human rights perspective. How will governments pay for our longevity, or at least for those people who enjoy the benefits of medical advancements? Inequity still plagues society on many levels. Just here in Australia, life expectancy is characterised by a gap of unacceptable proportions. For Australians, life expectancy places us fourth in the world or one-hundred and fourth in the world if you are Aboriginal or Torres Strait Islander.[10] In poorer countries access to basic health care is lacking. Imagine experiencing the pain of terminal cancer without even the most basic pain relief medication. The right to healthcare isn’t always about big shiny hospitals, though they obviously matter. It is also about adult vaccination, access to aids for vision, hearing mobility and so on.

Two regions have recently introduced regional instruments to entrench older persons’ rights. These include including the African Union and the Organization of American States. While these drafts aren’t perfect, they represent serious progress. They represent momentum. At a global level, arguments against a Convention are reductionist and tend to polarise around a few key points. Firstly, the votes on key resolutions show ambivalence for a Convention. Secondly, existing soft law (like the Madrid International Plan of Action on Ageing) or instruments (like the Convention on the Rights of Persons with Disability) or reporting processes (like Universal Periodic Review) are adequate. Thirdly, the cost and compliance burden for countries militates against further proliferation of treaties. Fourthly, a Convention would only be useful where ratified.

In spite of these arguments, there has been an opening of political space within the debate and many countries who were on the fence are beginning to listen more closely to the arguments; making clear they are open to discussion about a new multilateral instrument. They want to know what substantive issues might be included. While commentators scoffed at China’s Elderly Rights Law, perhaps we ought to see it is as both backward and forward looking. It obviously reflects Confucian ideals and also evokes Evita’s 1948 declaration “that if families refuse to care for aged members, then the state should force them to do so by law.”[11] Importantly, it also signals our future, one benefiting from a set of universal expectations for older persons.

Independent Expert on the Enjoyment of all Human Rights by Older Persons, Rosa Kornfeld-Matte has noted current soft laws are not human rights instruments and address ageing issues mainly from a developmental perspective. They are not designed to comprehensively address existing protection gaps and are therefore not sufficient to ensure the full enjoyment of their human rights by older persons.

The UN meets in July 2017 to look at two specific issues: 1) Equality and Non-discrimination and 2) Violence, Abuse and Neglect. These two aspects of a potential Convention are fundamental framing elements. Many ESCAP member states will be there. As will National Human Rights Institutions for the first time, thanks to a historic resolution in December 2016.[12] The involvement of NHRIs will broaden and deepen the debate about the rights of older persons. Those from Asia Pacific will bring their own particular experience of the rights of older persons.

A Convention is a way of shifting older persons from invisibility to visibility, from ageism to dignity and respect. The rule of law is the vehicle for the promotion and protection of a multilateral normative framework such as a Convention.[13]

7 Forum on Global Violence Prevention; Board on Global Health; Institute of Medicine; National Research Council. Elder Abuse and Its Prevention: Workshop Summary. Washington (DC): National Academies Press (US); 2014 Mar 18. II.10, ELDER ABUSE IN ASIA—AN OVERVIEW.
8 Ibid.
9 Office of the High Commissioner for Human Rights, Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper, August 2012
10 https://en.wikipedia.org/wiki/List_of_countries_by_life_expectancy#List_by_the_OECD_.282013.29
11 Above note 3.
12 A/AC.278/2016/L.1.
13 Above note 1.

Looking back at the Rule of Law

Stephen Walmsley
Former Judge,
District Court of NSW

The nineteenth century constitutional lawyer, A. V. Dicey, said there were three meanings to the rule of law:

(1) The supremacy of the law over arbitrary power, that a man or woman may only be punished for a breach of the law, not some act or omission which happens to displease a bureaucrat.

(2) Equality before the law, or equal treatment for all, regardless of background, race, class or education.

(3) The constitution of the country is the product of the ordinary law of the land.

The first and second meanings are directly relevant to the quality of the judiciary and its work and both have to my observation improved significantly in Australia in the last 50 years.

Independence of Magistrates

Until 1955 in NSW most magistrates were not required to be legally qualified, gaining their legal knowledge and experience by working as clerks in courts and court house offices. Now, all magistrates are legally qualified. Until 1982, with the passing of the Local Courts Act 1982, magistrates were employees of the Department of Justice, theoretically beholden to their bureaucratic masters. Since then the magistracy has been independent. In my book, *The Trials of Justice Murphy*, I have described the struggle by NSW magistrates to obtain that independence.

Legal Aid

Essential to the proper working of the courts is competent representation. Until the late Justice Murphy became Attorney-General in the Whitlam government, Australia had no universal system of legal aid for those who could not afford to be represented. The introduction by Murphy in 1973 of the Australian Legal Aid Office was the beginning of such a system, particularly important in criminal and family law work.

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Appointment of judges

Until recently the appointment of judges in NSW was an opaque process. It was not unknown for a politician to appoint a friend or colleague to the bench who lacked any judicial qualities. Merit was useful but not compulsory.

In the 2000s some courts began advertising judicial positions, inviting applications accompanied by the names of referees. Some applicants would be interviewed. In theory the system was good, producing worthy applicants who might not have been appointed under the old system. But it had faults, excluding from consideration some of great ability who would not submit themselves to the process. And it did not stop politicians appointing their friends, who would be invited to apply, with an unspoken expectation of success.

The political party in power federally may rid itself of a legally qualified but troublesome colleague when filling a federal court vacancy. The appointment of Justice Murphy to the High Court in 1975 by Prime Minister Whitlam was seen by many as such a device. Fortunately, since that appointment, federal governments of all persuasions have appointed High Court judges who are non-controversial. Federal governments now also consult the states before appointing High Court judges, but they are not obliged to accept their recommendations.

Availability of Law Reports

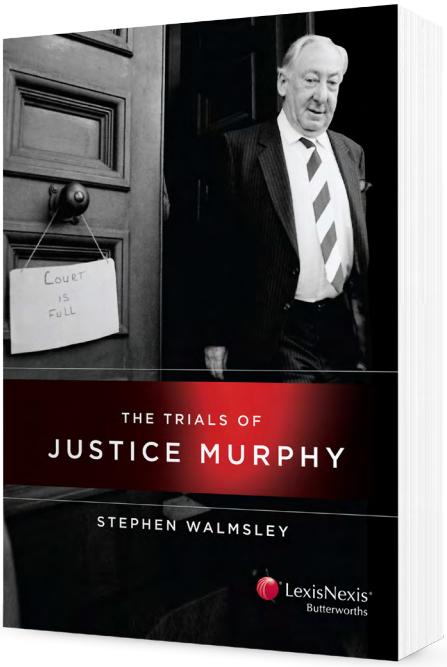
A significant modern improvement in legal practice, and therefore to the rule of law, has been the introduction of online law reports.

Until the late 1990s most barristers had large libraries of law reports. Often it was just not possible to obtain a report of a case when it was needed. If there was a relevant House of Lords report of a case it could be months before the report filtered through to Australian lawyers.

Now, most Australian courts (and all superior courts) put their judgments online, available free of charge, and although English law is far less relevant in Australia now, most significant reports from the UK and other countries are also freely and instantly available online.

Scrutiny of Courts and Judges

Another great contribution to the rule of law in recent years is the increased scrutiny of judges and their decisions, and the way the courts work. When in 1984 *The Age* published allegations about High Court judge, Justice Murphy, there was no mechanism to inquire into such allegations. Two Senate committees later inquired into aspects of the allegations, but both committees had imperfections.



After Murphy's acquittal, and following complaints about another NSW judge, the NSW Judicial Commission was created. In the last 30 years it has done much to educate judges and magistrates, holding regular conferences and seminars on legal issues. Importantly, it also inquires into complaints about judges and magistrates. If a complaint is serious enough it may recommend that Parliament vote for the judicial officer's dismissal.

Not all states and territories have followed NSW's example, but as a result of the Murphy affair the Commonwealth parliament enacted the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act*, 2012 (C'th) which created a mechanism for the Commonwealth parliament to inquire into judicial misconduct before moving to decide whether to dismiss the judge.

On a related topic, and although not all judges regard this as an improvement, modern legislation now permits the press to obtain copies of exhibits and other evidence in a case, and, in some circumstances, to film court proceedings.

Some Backward Steps

Not all recent developments have been beneficial for the courts. Judges give an oath to judge their cases without fear or favour. When they judge without fear, they are often criticised by ill-educated politicians and radio commentators. There has always been criticism of judges, but modern media gives it greater coverage. Judges do make mistakes, and the courts of appeal usually fix up the errors. But before courts of appeal have the opportunity to hear appeals politicians sometimes jump in with ill-considered law changes. These help win votes from ill-informed members of the public, but they can complicate the laws and make them harder to interpret and apply.

It has to be said too that a harshness has entered our criminal laws in recent times, also the result of political pressure. Certain newspapers criticise the right of accused people to have legal aid assistance. They suggest that if police charge people, they must be guilty. They treat the bail laws as though they are there to punish, rather than to ensure attendance at a trial.

The same commentators sometimes criticise judges for decisions they have never read, without any regard for the evidence and arguments which were before the judge, which they have never heard of.

But all judges would probably argue for a free press, and these barbs from the ill-informed are a small price for that.

Attracting the best and brightest female lawyers to the Bar

Ingmar Taylor
Barrister,
Greenway Chambers

On 8 March 2017 Greenway Chambers adopted a policy that allows a chambers member to take a period of six months' leave free of rent and chambers fees following the birth or adoption of a child.

At a recent New South Wales Bar Association seminar Professor George Williams discussed his research into gender equality at the Bar, which revealed how rarely women appear before the High Court, despite the fact that for years more than half of all law graduates have been women. His research did not extend to examining the reasons for this. Although, he discussed that female (but not male) law students regularly questioned him about whether they should go to the Bar. Why? Because they worried that it was "not family friendly". Women make up less than 20% of the NSW Bar.

The structure of the NSW Bar dissuades female law graduates from becoming barristers. I discussed the reasons for this in some detail in an article for Bar News: Parental Responsibilities at the Bar. One of those reasons is the financial effect of taking parental leave, something that usually occurs before a barrister has become senior and well established. Not only is there no paid leave for barristers, who are sole practitioners, but they must continue to meet significant ongoing costs on leave, in particular, the responsibility to pay rent and chambers fees.

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> “Most chambers will do what they can to assist a member to licence their room, and so cover or defray those costs, during a period of parental leave, but the risk remains on the parent taking leave where no licensee can be found. I am not aware of any other chambers that has adopted a policy of allowing a chambers member to be relieved of floor fees and rent during parental leave.”

It has recently been suggested to me that a woman who takes six months maternity leave at the Bar will be about $250,000 worse off than her contemporary who is a senior associate at a large law firm. The senior associate will receive paid leave and will return to work at the same level of income. The barrister will receive no income during leave, reduced income after returning while she rebuilds her practice, and must continue to pay practice expenses while on leave.

In the UK, where Barristers Chambers are regulated by a central authority, all chambers must offer six months' leave free of rent and chambers' fees. In Victoria, where most barristers are in rooms they rent (but do not purchase) from a Bar owned company, barristers can retain their room and pay 25% of their rent for six months.

There are no fixed rules or policies that apply to the NSW Bar as a whole. The Bar Association publishes 'Best Practice Guidelines' which it encourages the various Chambers to adopt, with mixed success.

There remain chambers in Sydney that discourage barristers licensing their room (i.e. subletting it) for any reason, and many refuse to allow sharing of a room for those who have returned from a period of leave and wish to reduce costs while working part-time.

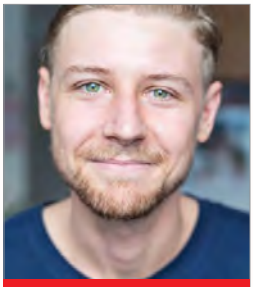
Most chambers will do what they can to assist a member to licence their room, and so cover or defray those costs, during a period of parental leave, but the risk remains on the parent taking leave where no licensee can be found. I am not aware of any other chambers that has adopted a policy of allowing a chambers member to be relieved of floor fees and rent during parental leave.

The NSW Bar has historically prided itself as being the home of the best and brightest legal minds in the country. But if it wishes to attract and retain the best of the 50% of graduates who are women, it needs to address the structural issues that dissuade many of them from coming to the Bar.

And so I was very pleased that, on International Women's Day, my fellow floor members agreed to adopt a policy that I proposed. The policy assists members taking leave to licence their rooms, permits rooms to be shared, and removes from members the obligation to pay rent and floor fees while taking parental leave for six months.

*A version of this article will appear in the 2017 Autumn ed. of *BarNews*

Australasia's longest-running study of CSR practices commends LexisNexis for its commitment



Max Becker
Communications Specialist, LexisNexis Australia

LexisNexis has been named in the CSR Top 10 by the Australian Centre of Corporate Social Responsibility (ACCSR) for its policies and commitment to embed corporate social responsibility (CSR) throughout the organisation.

The ACCSR's Annual Review of the State of CSR in Australia and New Zealand is an ongoing annual research study of CSR capabilities, practices and trends in the region. The initiative is in its ninth year and recognises organisations that demonstrate an ongoing commitment to aligning business strategies to corporate responsibility and sustainability, along with those who lead the industry in terms of stakeholder engagement, dialogue, and values alignment.

TJ Viljoen, CEO at LexisNexis Asia Pacific, said he was proud to be recognised in an area that is integral to the organisation's culture and vision.

"The ACCSR's acclaim is significant as it reflects our pledge to making a difference, which for us is centred on our corporate vision to advance the rule of law globally," he said. "Key corporate social responsibility measures are closely tied with our rule of law initiatives, as we believe that the rule of law is a cornerstone of sustainable global development."

The theme of the 2017 report is Re-imagining Sustainable Value. It expands on previous research into the adoption of the United Nation's Sustainable Development Goals (SDGs) in Australia and New Zealand, and explores the changing landscape for corporate reporting.

There were 1,215 respondents to the 2017 study, which found that mandatory sustainability reporting

for all organisations is supported by 53 per cent of businesses across Australia and New Zealand. The report also found that companies are increasingly using SDGs to inform business and sustainability strategy, predominantly in terms of Gender Equality and Good Health and Well-Being.

As a signatory for the United Nation's Global Compact, LexisNexis embeds the 10 principles in its Code of Ethics and Business Conduct and Supplier Code, as well as participates in driving forward responsible business initiatives such as the Business for the Rule of Law Framework (B4RoL) and the LexisNexis Rule of Law Impact Tracker.

The Award has been presented to LexisNexis at the launch of the ninth Annual Review of the State of CSR at a private event hosted by La Trobe Business School in Melbourne.

Lawyers travel to Myanmar to train government legal staff on international contract law

Polina Madorsky
Marketing Communications Manager, LexisNexis Australia

LexisNexis joined with Colin Biggers & Paisley Foundation to test a new initiative called *The Juris Pilot* in Myanmar to connect legal professionals with legal bodies in developing countries for pro bono opportunities that advance the rule of law.

Myanmar was chosen as the launch pad for the initiative due to the ongoing rule of law work of LexisNexis in the country. In addition, the lifting of economic sanctions against the newly democratic country has created a number of opportunities but also legal uncertainty as the judiciary struggles to keep pace with the rapid expansion of the country's economy.

Veronica Rios, Executive Manager, Rule of Law, LexisNexis Asia Pacific, explains: "As democracy has been introduced to Myanmar, the legal professionals acting on behalf of the government have been faced with new challenges of negotiating contracts with other countries – an area of law that was previously largely unused."

Charles Brannen, special counsel at Colin Biggers & Paisley (Australia), Matthew Rickards, partner at Ashurst (Japan), and Guillaume Stafford, senior associate at Herbert Smith Freehills (currently on secondment in Myanmar) were led by Ms Rios and joined with local lawyer Minn Naing Oo, managing director at Allen & Gledhill (Myanmar) Co.

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> This initiative builds on the existing LexisNexis Myanmar Law School Programme, where in 2015 LexisNexis partnered with the Electronic Information for Libraries (EIFL), to provide online legal research solutions and training for Myanmar's Yangon Law School and Mandalay Law School. In addition, after the devastation of Typhoon Nargis in 2016, LexisNexis partnered with the Philippine Group of Law Librarians (PGLL) to facilitate a trip to restore the damaged Yangon Law School.

"We've been able to leverage our skills and resources to support a truly useful and significant initiative with LexisNexis and the Union Attorney General's Office in Myanmar," Mr Brannen comments on the importance of the program to both the individuals and Myanmar as a nation.

"By bringing together other experts from large law firms in Australia and around the world, we have been able to collaborate and share ideas, whilst helping to further expand the legal knowledge and skills of a key group of local legal professionals who are representing the newly emerging Myanmar government. It's a critical period for Myanmar as a relatively new player to the international arena whilst experiencing rapid progress by the influx of foreign investors."

Using LexisNexis research materials, three lawyers built a curriculum to conduct intensive training over two days in April on international contract law to more than 50 public prosecutors from the Union Attorney General's Office (UAGO) and other government ministries including the Department of Energy, Construction and the Auditor General at the offices of the Attorney General in Naypyidaw, Myanmar.

One of the key objectives set out by the UAGO, according to its five year strategic plan, is to improve the legal advice it provides to the Government. The plan recognises that "To advance the rule of law, the Government at all levels must adhere to the legal framework. This requires better trained legal advisors with specialized expertise."

This initiative builds on the existing LexisNexis Myanmar Law School Programme, where in 2015 LexisNexis partnered with the Electronic Information for Libraries (EIFL), to provide online legal research solutions and training for Myanmar's Yangon Law School and Mandalay Law School. In addition, after the devastation of Typhoon Nargis in 2016, LexisNexis partnered with the Philippine Group of Law Librarians (PGLL) to facilitate a trip to restore the damaged Yangon Law School.

The efforts of LexisNexis to advance the rule of law in Myanmar were originally noted and commended by United Nations Secretary General Ban Ki-moon (in 2014), whose Special Advisor to the country, Ambassador Vijay Nambiar, had been facilitating engagement for LexisNexis with UN agencies working in the country, to ensure a structured approach to legal aid. From this, the inaugural "Business for the Rule of Law" Consultative Workshop with the United Nations Global Compact was run by LexisNexis in Yangon, inviting the business community to discuss challenges they face in the country and ways in which the business community can strengthen the rule of law in Myanmar.

Image: Trainers in the front row include (L-R) Hannah Lim (Allen & Gledhill , Myanmar), Guillaume Stafford (Herbert Smith Freehills), Matthew Rickards (Ashurst), Charles Brannen (Colin Biggers & Paisley) and Veronica Rios (LexisNexis). Others in the image include members from the legal advice department at the Union Attorney General's Office Myanmar and there were also representatives from the Ministry of Finance and Planning, Auditor General's Office and the Ministry of Electricity and Energy.

Human rights, hair styles, Brexit, and law drafting: 2017 CALC Conference

Ross Carter
Parliamentary Counsel
New Zealand Parliamentary Counsel Office

Law drafting for, or bearing in mind, human rights inconsistency, is, was, and perhaps always will be, on law drafters' minds.

This was the key message of a paper and presentation I gave as a New Zealand drafter at the at the 29 to 31 March 2017 Commonwealth Association of Legislative Counsel (CALC) Conference in Melbourne, Australia.
The 2017 CALC Conference was held with the generous support of LexisNexis.

I compared four "parliamentary", "ordinary statute", or "interpretative" Bills of Rights (not overriding or supreme constitutions) in New Zealand, the United Kingdom, and Australia (ACT and Victoria). I asked what human rights laws and processes exist in those four jurisdictions – and how do they work and differ? I also looked at what challenges they give law drafters instructed to achieve human rights-consistent meanings. Rights-(in)consistency was discussed as one kind of inconsistency with other legislation (and with other basic legal values). The paper also explored law drafters' roles, and tools and techniques law drafters can use, in developing new legislation that affects human rights.

The theme-song of my talk was "You were always on my mind." The song's words and tone suggest being mindful, with regret, at what might have been. But if human rights are on drafters' minds, all concerned are less likely to look back with regret!

The theme song itself has of course been revisited ("recycled") many times (for example, by Elvis, Willie Nelson, and The Pet Shop Boys). Each revision aligns the song with different musical styles and contemporary values (for example, of avoiding unjustified discrimination, or of equality). This fits with human rights consistency arising at all stages of a legislative project, and with rights featuring each time a law is applied or reviewed and replaced.

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My presentation noted a New Zealand High Court decision on 16 March 2017 — *Smith v Attorney-General* [2017] NZHC 463 — which shows how human rights cases often nowadays involve unpopular minorities. A blogger Law Professor in New Zealand, Andrew Geddis, has said the *Smith* decision "is going to turn the talkback outrage meter right up to 11".

The plaintiff, Philip John Smith (also known as Philip John Traynor) is a balding convicted murderer and child sex offender. Smith sought, and was given, in 2012, approval to have in prison, as an item of approved property, a custom-made toupee or hairpiece.

The approval was to improve the prisoner's self-esteem and self-confidence. It was supported by a prison psychologist and a prison manager, as it would aid rehabilitation and posed no overriding security concerns. A related approval also allowed, for the hairpiece, the required glue, solvent remover, and cleaner and shampoo.

On 6 November 2014, while on a 74-hour temporary release to prepare him for life in the community if granted parole, Smith escaped from custody and from New Zealand (by boarding a LAN Chile flight from Auckland, New Zealand, to Santiago, Chile).

Smith had obtained a passport while in prison, and his temporary release was not supervised properly by the required sponsors. As a serving prisoner, Smith managed to pass unimpeded through immigration and security checks at Auckland International Airport.

Smith was in contact with New Zealand news media while he was in Brazil. As a result, his escape, his arrest in Brazil, and his later deportation, attracted significant news media interest. Smith wore the toupee – including at Auckland airport – when escaping to Chile and then Brazil, where he was recaptured and returned to New Zealand.

After Smith's return to New Zealand on 29 November 2014, the prison director on 1 December 2014 revoked the authorisation permitting Smith to retain the hairpiece.

THE AUSTRALIAN

The bald truth: Kiwi killer Phillip John Smith wins toupee lawsuit

Bald truth: Convicted murderer Phillip John Smith.

AFP 12:00AM March 17, 2017

A man convicted of murder and child molestation in New Zealand won a lawsuit yesterday arguing that prison authorities breached his rights by confiscating a toupee he used to disguise himself when fleeing the country.

The prison director's only reasons given about this time – one week later on 8 December 2014 – were that he had withdrawn his approval of the hairpiece "due to the actions conducted by the prisoner." In a later affidavit, the prison director gave, as reasons for withdrawing the approval, the absence of the grounds supporting the original approval, and the safety and security of the prisoner and prison.

> "Justice Wylie rejected an argument by the Crown that the New Zealand Bill of Rights Act 1990 section 14 right of free expression is not engaged by wearing a toupee — because wearing a hairpiece does not convey or attempt to convey a meaning."

Relevant to this was an allegation that Smith may have hid in the hairpiece, while being returned to New Zealand, a red sleeping pill that when ingested made Smith intoxicated on his return to Auckland. Smith maintained the pill was hidden in his sock, it was given to him by Brazilian prison authorities, and he had overlooked it.

In August 2015, Smith complained to the Ombudsman, who in April 2016 released a determination on Smith's complaint that the decision to revoke the approval for the hairpiece was not unreasonable. Efforts to resolve the dispute were unsuccessful, and Smith in June 2016 brought judicial review of the prison director's revocation.

The grounds included breach of natural justice and failure to take into account a mandatory relevant consideration: Smith's right of free expression.

Smith represented himself in the High Court. Smith succeeded in obtaining an order quashing the revocation for failing to take into account a relevant consideration.

Justice Wylie rejected an argument by the Crown that the New Zealand Bill of Rights Act 1990 section 14 right of free expression is not engaged by wearing a toupee. The

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Crown said that wearing a hairpiece does not convey or attempt to convey a meaning. Justice Wylie said Smith's action in wearing a hairpiece was a physical activity that, in this case, had expressive content. The Judge said: "Mr Smith was trying to say — this is who I am and this is how I want to look. He was trying to affect the perception that others would have of him."

It followed that Justice Wylie held that the section 14 free expression right was engaged.

The Judge rejected an argument, based on *R(SB) v Denbigh High School Governors* [2006] UKHL 15 and *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, that process doesn't matter if the result is rights-consistent. As the prison director failed to take into account Smith's right to free expression or any justified limit to it, the decision to revoke the approval was inadequate, and declared to be so.

was required — and had not occurred. However, the quashing order would lie in court for 14 days, so the prison director (to whom the Judge remitted the matter) had enough time to make properly a fresh decision and finalise the reasons for it.

Also damages were precluded by the Prisoners' and Victims' Claims Act 2005 because, for this prisoner's "specified claim," the declaration and quashing were held to be a sufficient remedy to vindicate Smith's right. As a self-represented prisoner, Smith cannot seek an award of costs, but can seek reasonable disbursements incurred.

The New Zealand Government's Department of Corrections on 10 April 2017 indicated it will appeal against the decision of Wylie J. Auckland Prison director Andy Langley said Corrections would appeal the decision because of its precedent-setting nature and the effect it could have on the department's decision-making abilities.

presenter, namely Nalini Persad-Salick (Course Director for Legal Drafting and Interpretation , Council of Legal Education, Hugh Wooding Law School, St Augustine, Trinidad, West Indies).

Nalini's presentation, entitled "Interpreting Freedom of Religion – A Commonwealth Caribbean Perspective," included discussion of the case of *Hinds v Attorney-General of Barbados* (High Court – Civil Division No. 1424 of 1993). In this case, Hinds, an inmate of the Glendairy Prison in Barbados and a member of the Rastafari faith, sought an injunction restraining the Superintendent of Prisons from cutting (as was required under the Prison Rules) his hair or "dreadlocks".

That action (the hair cutting) would, Nalini said, have been in breach of Hinds's right of conscience, and would have hindered him in the enjoyment of his freedom of conscience (as the long unkempt hair is a central practice of the Rastafarian faith).

A full step-by-step rights-consistency analysis, as discussed in the leading case of *Hansen*, was held not to be required from the prison director — who was accepted to be a relatively low-level non-legal managerial decision-maker. However, a brief and transparent record of consideration of this implicitly mandatory relevant consideration

However, Langley said Smith would be allowed to keep his hairpiece, under certain conditions, while he was currently held at the prison at Paremoremo (on Auckland's North Shore).

Hairstyles and human rights were also covered by another 2017 CALC Conference

The Court denied the application on the point that the issue of religion ought to have been expressly stated in the motion as originally filed. This ruling on a procedural technicality may, said Nalini, have denied the court the opportunity to apply the "compelling state interest test" as set out in section 19 (6) of the Barbados Constitution

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(a reflection of Article 9(2) of the European Convention on Human Rights). That is, the haircutting would be a limitation on the right, reasonably required in the interest of public health and public safety (of prison officers and other inmates).

The Public Service Pensions Act 2013 (UK) section 18(1) involves mandatory closing of an existing pension scheme, as part of transfer to a new and less favourable one. Exceptions to section 18(1) are set out in transitional provisions in Part 2 of

Judges win landmark fight over discrimination in pensions

Those cases can also be compared and contrasted with other "hairstyles and human rights" cases – in Hong Kong and in New Zealand. See LEUNG KWOK HUNG ALSO KNOWN AS "LONG HAIR" v. COMMISSIONER OF CORRECTIONAL SERVICES [2017] HKCFI 65 (about HKSAR CAP 480 Sex Discrimination Ordinance s 67 Government), and *LC Battison suing by his Litigation Guardian TP Battison v P Melloy* [2014] NZHC 1462 (school 'hair rule' held invalid for uncertainty, cf *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA)).

But human rights protect all people. Over 200 UK judges won recently a landmark ruling that the Lord Chancellor and the Secretary of State for Justice discriminated unlawfully against them by making changes to their pensions based on age.

Schedule 2 of the Judicial Pensions Regulations 2015. But the exceptions (either "full protection" or "tapered protection" exceptions) are based on judges' ages. In the London Central Employment Tribunal, Employment Judge Williams held that, through the regulations, the respondents have treated and continue to treat the claimants less favourably than their comparators because of their age. Judge Williams also held that the respondents have failed to show their treatment of the claimants to be a proportionate means of achieving a legitimate aim.[1]

The Equality Act 2010 (UK) implements the Employment Equality Framework Directive 2000/78/EC, and the Act's statutory authorisation exception (see section 191 and Schedule 22 of that 2010 Act) applies only if the discrimination occurs due to a requirement of (so not use of a discretion in) an enactment.

The Equality Act 2010 (UK) was also looked at by two London OPC drafters, Lydia Clapinska and Jessica de Mounteney. In their presentation "Towards Equality: A Legislative Journey", Clapinska and de Mounteney analysed *FirstGroup Plc v Paulley* [2017] UKSC 4, in which the Supreme Court allowed an appeal by a wheelchair user, finding that a bus operating company (in breach of the Equality Act 2010 (UK)) had not made reasonable adjustments to avoid disadvantaging passengers who were wheelchair users. The case arose from the refusal of a passenger with a pushchair to give up a wheelchair space in favour of the wheelchair user.

Perhaps the highlight of all the Conference presentations about human rights was one on "The Future of British Human Rights Jurisprudence post-Brexit" given by Duane Allen, from the Isle of Man's Attorney-General's Chambers. Duane analysed insightfully his topic, concluding somewhat reassuringly that, whatever Brexit may bring with it, human rights are anchored firmly not only in international law, but also in domestic common law.

Veronica Rios, Head of Rule of Law & Emerging Markets, Asia Pacific, LexisNexis, also spoke, at a welcome drinks function. Veronica stressed how legislative drafters and LexisNexis support the rule of law, and its importance for countries in and outside the Commonwealth. CALC and LexisNexis certainly help ensure human rights, haircuts, the rule of law, and weaving human rights into the whole of our laws, have been and will continue to be on all law drafters' (and indeed on all other practising lawyers') minds.

CALC's Conference, which is held every two years, was regarded (by attendees and organisers) as a great success. (Conference papers will in due course be published in CALC's journal, *The Loophole*, available at calc.ngo).

1 https://www.judiciary.gov.uk/judgments/mccloud-and-others-v-ministry-of-justice/ . See also http://www.legislation.gov.uk/uksi/2015/182/schedule/2/made and http://www.thetimes.co.uk/article/judges-win-landmark-fight-over-age-discrimination-in-pensions-hhj2tcfdd

LexisNexis receives 2017 Corporate Leadership Award from Freedom House for activism in advancing the Rule of Law

Stephanie Sommese
VP Global Communications,
LexisNexis Legal & Professional

On 27 April 2017, LexisNexis received the Corporate Leadership Award from Freedom House for activism in promoting and advancing the rule of law globally at an event in Washington, D.C.

Freedom House is an independent watchdog organisation dedicated to the expansion of freedom and democracy around the world. Additional 2017 award-winners included Secretary General of the Organization of American States Luis Almagro, U.S. House Democratic Leader Nancy Pelosi (D-CA), U.S. Senator Lindsey Graham (R-S.C.), actor and activist Richard Gere and clothier H&M.

"LexisNexis pursues the deep belief that rule of law is essential to freedom and the promise of basic rights, ideas directly aligned with the guiding principles of Freedom House," said Michael J. Abramowitz, President, Freedom House. "Their core mission to advance the rule of law in emerging and developing nations brings greater transparency to the legal system, which strengthens human rights and the judiciaries safeguarding them. Thanks to this work, people of those nations can better access justice, making LexisNexis a model for other corporations."

"We are honored and humbled to receive this award from Freedom House, which shines a spotlight on the vital role that rule of law plays in building prosperous and peaceful societies," said Mike Walsh, CEO, LexisNexis Legal & Professional. "When rule of law flourishes, citizens across the world experience a better life – this means improved economics, lower crime, lower child mortality and longer life expectancy. Yet today, four billion people live outside the umbrella protection of the rule of law and our mission is to bring that number down to zero."

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RULE OF LAW UPDATES AND PERSPECTIVES

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