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Rule of Law Updates and Perspectives

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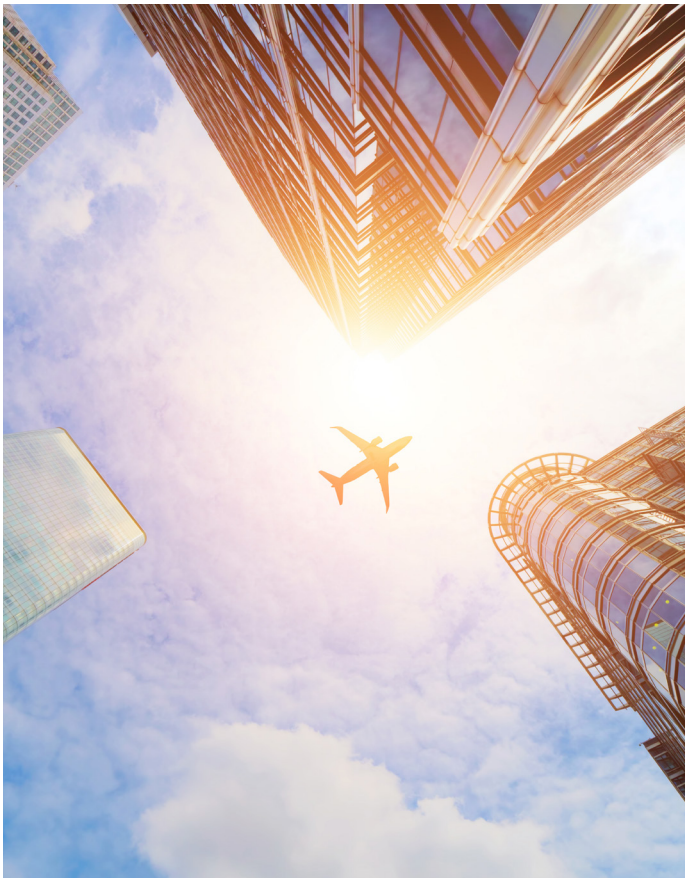

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LexisNexis Rule of Law
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The rule of law is an investment in the future: it has a strong impact on economic growth, sustainable development, human rights, and access to justice. In an ideal world, no one should be above the law, but in reality 57 per cent of the global population is struggling for human rights. This is four billion people, who are not under the shelter of the law. The aim of LexisNexis® is to reduce these numbers by providing outstanding legal solutions and technology services to customers in legal, corporate, government, accounting, tax, and academic institutions. We want to ensure that the administration of justice is maintained, and we want to enable legal professionals to make better decisions and achieve better results. The rule of law is the unifying central premise behind the work of LexisNexis with clients and communities.

To advance the rule of law, LexisNexis engages in strategic partnerships with customers, non-profit and governmental organisations. We are a proud Steering Group member of Business for the Rule of Law (B4ROL), which was introduced by United Nations' Secretary-General Ban Ki-moon in September 2013 at an event co-sponsored by LexisNexis and the Atlantic Council.

The United Nations Global Compact, the largest global corporate citizenship and sustainability initiative that asks companies to support universal principles and to partner with the United Nations, created a strategic working framework for further development of the B4ROL project embracing their 10 principles in the areas of human rights, labour, environment and anti-corruption:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: Make sure that they are not complicit in human rights abuses;

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: The elimination of all forms of forced and compulsory labour;

Principle 5: The effective abolition of child labour; and

Principle 6: The elimination of discrimination in respect of employment and occupation;

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: Undertake initiatives to promote greater environmental responsibility; and

Principle 9: Encourage the development and diffusion of environmentally friendly technologies;

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

The objective is to support and encourage governments to prioritise the rule of law for economic growth and social good. Furthermore, it makes businesses aware of the impact their promotion of the rule of law can have. Nearly 400 senior representatives in 20 countries, including government officials, legal practitioners, academics and members of the civil society, were involved in the consultation process. LexisNexis played a critical part in the inspirational process and made a significant contribution by mobilising 19 consultation workshops around the globe to work on the development of the B4ROL framework. The result is a practical guide with case studies and examples for business, full of ideas on how to take action towards advancing the rule of law. Today, B4ROL is a global initiative that enables the business community to support and observe the rule of law across business interactions respecting the United Global Compact Ten Principles.

Global dialogue created through strategic partnerships is one of the main pillars of bringing businesses together to advance the rule of law. LexisNexis lives and breathes these ten principles in its daily business and we are proud about the part we played in the framework development. With strong passion and commitment, we are continuously working on further projects to drive the rule of law and make the world a better place.

Rachel Travers
Managing Director
LexisNexis NZ

All of our business: why the rule of law is fundamental to human rights

By Professor Gillian Triggs
President, Australian Human Rights Commission

Many Australian businesses now recognise that respect for human rights is not only the right thing to do, it is also beneficial for business. With enhanced innovation and productivity linked to the respect and promotion of human rights, businesses are increasingly taking proactive steps to support human rights: revamping their bullying, harassment and discrimination policies, ensuring there are robust internal grievance processes in place, openly reporting on their ways of working and reviewing their supply chains, and integrating human rights policies into their workplaces. However, there is growing recognition that business has a role to play not only in promoting human rights at an organisational level, but also at a higher institutional level. Respecting the significance of law, and particularly the rule of law, as a mechanism for promoting and enforcing rights is inextricably linked to the way companies engage in business.

While there is no single, universal definition of the rule of law, it is understood, at a basic level, to be the notion that a nation's government and citizens know and obey

(continued)

the law.[1] However, it is also much broader and more complex than this and can have significant implications for rights promotion. With widespread human rights violations continuing to be committed across the globe, the rule of law is directly related to the implementation and enforcement of rights, especially where laws are created to address injustices.[2] Importantly, it is also a way of spreading a culture of respect for human rights. This means that when businesses make upholding the rule of law a priority, they are, by extension, making rights a priority. This filters outwards in a range of directions - towards government as well as society - by indicating that it is a principle worth respecting.

There are few bodies who are as well positioned as businesses to play a leadership role in promoting and protecting the rule of law. Global corporations have a revenue that rivals the entire GDP of many countries. Of the 100 largest economies, 51 are global corporations while 49 are countries.[3] The combined sales of the world's top 200 corporations are far greater than a quarter of the world's economic activity. Indeed, sales of the top 200 corporations combined surpass the combined economies of 182 countries.[4] At an organisational level the figures illustrate the same issue. Microsoft's revenue in 2010 amounted to $62 billion, more than Croatia's GDP of $60b, while GE's revenue of $150b surpasses New Zealand's $140b of GDP. This commercial power gives businesses an important opportunity to ensure the rule of law is respected.

However, this power means more than mere opportunity. Rather, it demands obligation. From a human rights law perspective, it is government that bears the legal duty of promoting the rule of law and enforcing human rights, but the scope and impact of the economy mean business wields power and influence over communities and political bodies and the knowledge and information they receive and prioritise. With such power comes great responsibility. Across the globe, and even among our neighbours in the Asia Pacific, the power of corporations is not always balanced by a government or society that is able to prevent and manage adverse consequences. This creates an even greater necessity for businesses to act ethically and in line with the rule of law.

Last year the Australian Human Rights Commission received 19,688 enquiries and 2,223 formal complaints about breaches of human rights.[5] The majority of these complaints involved businesses in their role as an employer or service provider. The outcomes of the complaints process repeatedly show that businesses are keen to proactively take steps to support human rights and in particular to create diverse and inclusive workplaces. Indeed, a common outcome that respondents and complaints seek is a change in organisational culture. Specifically, a culture of respect, justice and equality; one supported by the rule of law.

As the global economy expands and becomes more interconnected, it is crucial that businesses step up as ethical actors to promote this culture. This involves the promotion of four key trends: accountability, transparency, interest and scope. These are principles of the rule of law that go towards human rights promotion. First, greater accountability will see both government and business play a more vigorous role in setting the legal and policy agenda to make human rights a legal and political priority. Second, greater transparency will mean businesses 'know and show' their human rights impacts either through disclosure frameworks or in response to consumer and community pressure. Given that government accountability is not possible without transparency, this also encourages open government. Third, greater interest in the rule of law and human rights requires key business stakeholders, including investors, financiers and directors, to take a more active role in understanding the impact of human rights and linking this with risk management. Finally, greater scope will expand the issues and activities where businesses play a role in ensuring human rights.

During the last decade there has been a global movement promoting the role business can play in supporting and protecting human rights. This has resulted in the United Nations Guiding Principles on Business and Human Rights, which have provided further clarification of the responsibility of business at an international level. The Principles have a three-pillar framework: Protect, Respect, Remedy.[6] Although this is outside the realm of the rule of law as it does not create legal obligations for companies, the Guiding Principles promote its central tenets of transparency, accountability and respect. Not only does this further evidence the link between human rights and the rule of law, it also demonstrates how promoting the values associated with the rule of law can encourage respect for the values underlying human rights.

With businesses playing an increasingly powerful economic, social and political role, it is essential that they ensure they are meeting high standards of good governance, transparency and ethical practices within the communities that they operate. Promotion of the rule of law goes beyond mere adherence and demands a demonstrated commitment to the principles of human rights. This not only separates firms from their competition, but also ensures businesses are acting as responsible global citizens.[7]

1 Rule of Law Institute of Australia, *What Is The Rule Of Law?* (2015) <http://www.ruleoflaw.org.au/what-is-the-rule-of-law/>.
2 Randall Peerenboom, 'Human Rights and Rule Of Law: What's The Relationship?' (2005) 36 *Georgetown Journal of International Law* 1.
3 Sarah Anderson and John Cavanaugh, 'Top 200: The Rise of Global Corporate Power' (2000. Corporate Watch) 3.
4 Sarah Anderson and John Cavanaugh, 'Top 200: The Rise of Global Corporate Power' (2000. Corporate Watch) 3.
5 ustralian Human Rights Commission, *Annual Report* 2013-2014 (2015) 8.
6 Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN GAOR, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) para 1.
7 Rajendra Sisodia, David B Wolfe and Jagdish N Sheth, *Firms Of Endearment* (Wharton School Pub., 2007).

Eliminating violence against women is everyone's business, including the business community

Roseanna Bricknell*
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In Australia alone, a woman is subjected to domestic or family violence every four minutes,[1] and a woman is killed as result of that violence every week.[2] Of women over the age of 15, one in three has experienced intimate partner violence, one in five has experienced sexual violence, and one in four has experienced emotional abuse.[3] A silent, widely underreported crime, these numbers likely only tell part of the whole story.

Violence against women can take many forms, including physical, sexual, verbal, emotional and financial abuse. The problem is undeniably a gendered one:[4] women are over three times more likely than men to experience violence;[5] the overwhelming majority of violent acts committed in Australia are perpetrated by men;[6] and people of both genders are more likely to be subject to violence of any kind at the hands of a man than at those of a woman.[7]

In fact, violence is the leading contributor to death, disability and illness of women aged 15-44.[8] That is, merely being a woman is a more significant risk factor for a person's health than, for example, smoking or obesity.

This violence, especially at the scale of 'epidemic' proportions in which it is occurring in Australia,[9] is a failure of the rule of law to ensure the equality of women with men in our society and protect women's basic rights.

Regardless of the iteration in which it occurs, violence against women is not only illegal, but a violation of international human rights, particularly those enshrined in the *Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women*.[10] It flies in the face of domestic and family violence legislation operating in all Australian States and Territories,[11] as well as criminal prohibitions on assault, sexual crime and murder.[12] In addition, it offends the spirit of state and federal anti-discrimination and equal opportunity laws.[13]

If Australia's domestic laws and obligations under international treaty so clearly state that the perpetration of an act of violence against a woman is repugnant, why do such acts continue to occur, and why are they happening with such egregious prevalence?

(continued)

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Disclaimer: The views expressed in this article do not necessarily represent the views of the Australian National Committee for UN Women.

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1 Australian Bureau of Statistics, 'Personal Safety, Australia' (Cat No. 4906.0, 2012).
2 Tracy Cussen and Willow Bryant, 'Domestic/Family homicide in Australia' (Research in Practice Paper No. 38, Australian Institute of Criminology, May 2015).
3 Australian Bureau of Statistics, above n 1.
4 United Nations Population Fund, United Nations Development Fund for Women and Office of the Special Adviser on Gender Issues and Advancement of Women, 'Combating Gender-Based Violence: A Key to Achieving the MDGs' (March 2005). The United Nations Population Fund and UN Women have recognised that women are disproportionately affected by violence, and that this stems from gender-based disparities of power relationships within families and communities.
5 Australian Bureau of Statistics, above n 1.
6 Ibid.
7 Ibid.
8 Victorian Health Promotion Foundation, 'The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence' (VicHealth, 2004) 10.
9 Australian Human Rights Commission, 'International Day for the Elimination of Violence Against Women' (Media Release, 25 November 2014).
10 Universal Declaration on Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
11 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2008* (Vic); *Domestic and Family Violence Protection Act 2012* (Qld); *Family Violence Act 2004* (Tas); *Domestic Violence and Protection Orders Act 2008* (ACT); *Domestic and Family Violence Act 2007* (NT); *Restraining Orders Act 1997* (WA); *Intervention Orders (Prevention of Abuse) Act 2009* (SA).
12 See, eg, *Crimes Act 1900* (NSW) Part 3. Substantially similar prohibitions operate in all Australian states.
13 See, eg, *Sex Discrimination Act 1984* (Cth) s 3; Equal Opportunity Act 2010 (Vic) s 3.

"Domestic violence is the gravest human rights abuse happening in Australia today."

– Elizabeth Broderick, Former Sex Discrimination Commissioner

There clearly has been a failure in Australian society to uphold the rule of law. Perpetrators are permitted to break the law with impunity – and all Australians need to join the effort to bring justice to their victims.

Violence against women is everyone's business. But it is especially the business of business – because violence against women is a workplace issue. It occurs not just behind closed doors, but everywhere and even in the workplace. It is also an issue that affects *every* workplace: most men who perpetrate violence against women are in paid work, as are most women who are victims of violence.[14]

The biggest predictor of whether a woman will be able to escape a violent domestic situation is her economic security.[15] For the majority of victims, the financial power to leave is contingent upon the ability to remain in paid employment. The workplace may also be one of the first places that signs of violence will manifest, or the place that a victim discloses their violent circumstances.

How a workplace responds to the issue of violence against women is therefore a major factor in the safety and survival of any victims in their employ. Workplaces are often a safe haven for women suffering violence, and are best placed to provide immediate and indispensable support.

On a practical level, this could include policies such as family violence leave entitlements, safe disclosure training, provision of security assistance, provision of child care, or any number of additional measures that enable an employee to escape a violent situation while ensuring their safety and ability to remain in employment.

"Our institutions need to do better. Governments, churches and large corporates can all work to identify and prevent family and domestic violence."

– The Hon Marise Payne MP, Federal Minister for Defence

In addition to providing responsive support to women who are victims of violence, it is the responsibility of business, as part of the Australian community, to join the effort to eliminate violence against women altogether. And what's more, business has the power to make a real difference.

That is because a big part of the problem in preventing violence against women is the nebulous concept of 'culture'. Hard to pin down and even more difficult to change, culture is effectively the attitudes and behaviours of a critical mass of people.

Currently, Australian culture undervalues women – the evidence is in the numbers. Not only are a third of women subjected to unlawful domestic or family violence, but the workforce participation rate for women is only 65.1 per cent compared to 78.3 per cent for men;[16] the gender pay gap is 17.9 per cent;[17] and women make up only one in five directors of ASX 200 boards.[18] These numbers reflect our attitudes: only one in six men say they would say or do something to express their disapproval if a man told a sexist joke about a woman at work.[19]

Ultimately, it is culturally entrenched gender inequality that creates an environment where men feel that they can abuse women. This inequality itself is contrary to the egalitarian spirit of the rule of law.[20]

(continued)

14 Scott Holmes and Michael Flood, 'Genders at work: Exploring the role of workplace equality in preventing men's violence against women' (White Ribbon Research Series – Preventing Men's Violence Publication No. 7, White Ribbon, 2013) 8.
15 Kristy McKellar, 'Violence Against Women' (Speech delivered at the 2015 Gender Equity in the Workplace Summit, Sydney, 6 October 2015).
16 Australian Bureau of Statistics, 'Gender Indicators, Australia' (Cat No. 4125.0, August 2015).
17 Australian Bureau of Statistics, 'Average Weekly Earnings, Australia' (Cat No 6302.0, May 2015).
18 Women on *Boards, Boardroom Diversity Index* (2015): 19.9% of directors of ASX01-200 companies are female.
19 Victorian Health Promotion Foundation, 'More than ready: Bystander action to prevent violence against women in the Victorian community' (VicHealth, 2012).
20 See, eg, Paul Gowder, 'The Rule of Law and Equality' (2013) 32 *Law and Philosophy* 565.

> **"Disrespecting women does not always result in violence against women. But all violence against women begins with disrespecting women."**
>
> **– Malcolm Turnbull, Prime Minister of Australia**

The mechanism by which this occurs was perhaps most eloquently stated by Australia's Prime Minister Malcolm Turnbull when launching a package of initiatives to combat violence against women earlier this year: that '... disrespecting women does not always result in violence against women. But all violence against women begins with disrespecting women'.[21] He followed it up with an expression of the goal of cultural change, calling for gender inequality and a lack of respect for women to become 'un-Australian'.[22]

This is where business comes in. Work is where most Australians spend many of their waking hours,[23] and workplace policies and practices foster the attitudes, behaviours and values of those who work there.

Business must bring this issue into the open and exercise courageous leadership to build robust, non-violence-accepting cultures. Over time, leadership from the business community on violence against women will become business as usual, and so drive national change in Australian cultural narratives around the roles of men, women and gender in society.

This leadership might manifest in any number of ways: it might look like a 'no-just-joking' policy on sexist comments at work, or providing bystander training for all staff. It might include making referral information for at-risk males available. It might even be non-domestic-violence-specific policies that are geared at promoting female leadership and participation.

As a key point of contact for victims of domestic violence, and a powerful arbiter of cultural standards in the community, business has a significant role to play in eliminating violence against women and upholding the rule of law.

A world without violence against women is a world where women are treated as equals, at work and at home; a world where female contribution enhances global productivity and leads to the flourishing of economies; and a world where the rule of law is strong.

As a critical point of contact for victims of domestic violence, and a powerful arbiter of cultural standards in the community, Australian business has a significant role to play in realising a violence-free nation where disrespecting women is un-Australian and unheard of. Join the charge.

21 Malcolm Turnbull, 'Women's Safety Package to Stop the Violence' (Speech delivered at Joint Press Conference with Senator the Hon Michaelia Cash, Melbourne, 24 September 2015).
22 Ibid.
23 Holmes and Flood, above n 14, 6.

Targeted recruitment and "special measures" in discrimination law: creating employment opportunities for Aboriginal and Torres Strait Islander people

By Professor Gillian Triggs
President, Australian Human Rights Commission

Introduction

Usually when there is public discussion of Australia's international human rights obligations, it is assumed that it falls to government to ensure that people in Australia enjoy their human rights. However, businesses have a key role to play in achieving practical human rights outcomes.

The Australian Human Rights Commission sees this first-hand through its work of investigating and conciliating complaints under the Racial Discrimination Act 1975 (Cth) (the RDA), Sex Discrimination Act 1984 (Cth), Disability Discrimination Act 1992 (Cth), Age Discrimination Act 2004 (Cth) and Australian Human Rights Commission Act 1986 (Cth). Of the around 22,000 enquiries and complaints the Commission receives each year, two-thirds are related to employment or the delivery of goods and services. The Commission manages to conciliate 72 per cent of these complaints.

The Commission works with the business community because we recognise that it is not only the cause of the problem in many respects, but it is also the solution. The Commission has created resources to help employers promote diversity and prevent discrimination, including a suite of free online resources called *Good Practice, Good Business*,[1] an online hub to assist employers to prevent discrimination, respect human rights and promote diversity,[2] and a Business and Human Rights Network to allow for the exchange of information and discussion about business and human rights issues.[3]

But businesses can play a crucial role not only in respecting and protecting human rights, but also in *promoting* rights. A great example of this is the desire and commitment by many employers to actively increase the representation of Aboriginal and Torres Strait Islander peoples in their workforces.

Recently the Commission became aware through the Business Council of Australia that employers who wanted to conduct targeted recruitment programs for Aboriginal and Torres Strait Islander people were concerned that to do so would risk breaching discrimination laws. They believed that they would need to apply for exemptions from the operation of discrimination laws to proceed with such recruitment.

Generally this is not the case, because almost all discrimination laws allow for "special measures", that is, actions which promote equality of opportunity for disadvantaged groups. The article will discuss the special measure provisions in the federal Racial Discrimination Act 1975 (Cth) and state and territory discrimination laws. It will set out the criteria that a targeted recruitment strategy must meet

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1 Australian Human Rights Commission *Good practice good business factsheets* available at www.humanrights.gov.au.
2 Australian Human Rights Commission, *Employers*, available at www.humanrights.gov.au.
3 Ausralian Human Rights Commission, *Join the network*, available at www.humanrights.gov.au.

But businesses can play a crucial role not only in respecting and protecting human rights, but also in promoting rights.

to qualify as a special measure in any jurisdiction. In most jurisdictions an exemption from discrimination law is not necessary, and therefore may not be granted, for a targeted recruitment program.

The operation of race discrimination laws

At the federal level, the RDA prohibits discrimination on the basis of race, including in employment.[4] There are very few exceptions to the general prohibition on racial discrimination in the RDA, and there is no ability to apply for an exemption from the application of that Act (as will be discussed later in this article).

However, Section 8(1) of the RDA provides that "special measures" will not constitute unlawful discrimination under that Act.[5]

Employers operating in Australia must comply with the RDA, but also with the discrimination law which applies in whichever states and/or territories in which it operates. All Australian jurisdictions have laws which prohibit racial discrimination in connection with employment.

Each of the state and territory discrimination laws contain exceptions to the general rule that people must be given the same opportunities regardless of their race. The two types of exceptions which are most relevant to employers seeking to conduct targeted recruitment of Aboriginal and Torres Strait Islander people are special measure provisions and "genuine occupational requirement" provisions. The table below sets out the applicable discrimination law in each jurisdiction, and whether it contains one or both such exceptions.

Laws which prohibit racial discrimination		
Law by jurisdiction	Exception for "special measures" which includes recruitment?	Exception for genuine occupational requirements?
Cth - Racial Discrimination Act 1975	Yes – s 8	No
ACT - Discrimination Act 1991	Yes – s 27	Yes – s 42
NSW - Anti-Discrimination Act 1977	No[6]	Yes – s 14
NT - Anti-Discrimination Act 1996	Yes – s 57	Yes – sub-s 35(1)(b)(ii)
Qld - Anti-Discrimination Act 1991	Yes – s 105	Yes – s 25
SA - Equal Opportunity Act 1984	Yes – s 65	Yes – sub-s 56(2)
Tas- Anti-Discrimination Act 1998	Yes – ss 25 & 26	Yes – s 41
Vic - Equal Opportunity Act 2010	Yes – s 12	Yes – sub-s 26(3) and s 28
WA- Equal Opportunity Act 1984	Yes – s 51	Yes – s 50

(continued)

4 The RDA, ss 9 and 15.

5 "Special measures" are not defined in the RDA, rather the definition is drawn from article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

6 Note that the exception for "special needs programs and activities" in s 21 of the Anti-Discrimination Act 1977 (NSW), which permits certain measures to promote equal access to facilities, services and opportunities for persons of a particular race, is currently interpreted by the New South Wales Anti-Discrimination Board as not including employment.

Exceptions for genuine occupational requirements

Each state and territory discrimination law contains one or more provisions which apply to allow discrimination in recruitment if being of a particular race is a genuine occupational requirement for a particular job. An employer wishing to recruit an Aboriginal or Torres Strait Islander person for a role may be able to rely on one of these exceptions if being Aboriginal or Torres Strait Islander is connected to the ability to perform that role. For example, if the role involves liaising with Aboriginal and/or Torres Strait Islander communities, a genuine occupational requirement provision may apply.

The wording and scope of the genuine occupational requirements exceptions vary across the different jurisdictions. For example, subs 25(1) of the Anti-Discrimination Act 1991 (Qld) is drafted in very broad terms, providing that "[a] person may impose genuine occupational requirements for a position". By contrast, in NSW the exception in s 14 of the Anti-Discrimination Act 1977 specifies the types of roles that will be covered:

> **14 Exception-genuine occupational qualification**
>
> Nothing in this Division applies to or in respect of any work or employment where that work or employment involves any one or more of the following:
>
> (a) participation in a dramatic performance or other entertainment in a capacity for which a person of a particular race is required for reasons of authenticity,
>
> (b) participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person of a particular race is required for reasons of authenticity,
>
> (c) working in a place where food or drink is, for payment or not, provided to and consumed by persons in circumstances in which a person of a particular race is required for reasons of authenticity, or
>
> (d) providing persons of a particular race with services for the purpose of promoting their welfare where those services can most effectively be provided by a person of the same race.

Employers will accordingly need to check the wording of the particular genuine occupational requirements exception available in the jurisdiction/s in which it operates to see if the jobs they intend to advertise would fall within that exception.

Note however that the RDA does not include an exception for genuine occupational requirements. Therefore even if being Aboriginal or Torres Strait Islander is a genuine occupational requirement for a position, targeted recruitment for that position must also meet the criteria for a special measure in order to be consistent with the federal law.

Exceptions for special measures

Based on my experience, special measure provisions are perhaps the aspect of Australian discrimination law that are the least well known or understood.

Discrimination laws protect the right to equality and non-discrimination. However, these laws recognise that promoting the right to equality does not always mean identical treatment among different groups. As the Victorian Civil and Administrative Tribunal has recognised, "access to opportunity may not be available to all … unequal results can arise from equal treatment and so steps may need to be taken to create true [substantive] equality".[7] In certain circumstances, it is necessary to take positive action to address the entrenched disadvantage suffered by a certain section of the population, in order that they may have similar access to opportunities as others in the community.

All Australian discrimination laws which prohibit racial discrimination except the Anti-Discrimination Act 1977 (NSW) include provisions which render positive actions taken to ameliorate the disadvantage experienced by a particular racial group lawful, provided certain legislative requirements are met.

These positive actions are referred to as:

- "special measures" in the RDA, the Northern Territory and Victorian laws;[8]
- "measures intended to achieve equality" in the ACT and Western Australian laws;[9]
- "projects for benefit of persons of a particular race" in the South Australian law;[10]
- "equal opportunity measures" in the Queensland law;[11] and
- either "schemes for the benefit of disadvantaged groups" or a "program, plan or arrangement designed to promote equal opportunity" in the Tasmanian law.[12]

For the purposes of this article, the term "special measures" is used generically to refer to these types of positive actions.

A program which targets Aboriginal and Torres Strait Islander people for employment opportunities to redress their under-representation in a workplace is an example of a special measure. Such a program might include:

- reserving certain positions for Aboriginal and Torres Strait Islander applicants;
- guaranteed interview schemes;
- work placements, traineeships or mentoring programs; and
- engaging an Indigenous Recruitment Service to hire trainees, graduates and fill other roles.

Provided a targeted recruitment program meets the requirements of a special measure, it is lawful under discrimination law (other than in New South Wales, where an employer is required to seek an exemption).

(continued)

7 *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236, at [32].
8 The RDA, s 8(1); Anti-Discrimination Act 1996 (NT), s 57; Equal Opportunity Act 2010 (Vic), s 12 (see also Charter of Human Rights and Responsibilities Act 2006 (Vic), s 8(4)).
9 Discrimination Act 1991 (ACT), s 27; Equal Opportunity Act 1984 (WA), s 51.
10 Equal Opportunity Act 1984 (SA), s 65.
11 Anti-Discrimination Act 1991 (Qld), s 105.
12 Anti-Discrimination Act 1998 (Tas), ss 25 and 26.

Employers wanting to promote the rights of Aboriginal and Torres Strait Islander people by conducting targeted recruitment programs should utilise the special measure provisions in the RDA and state and territory discrimination laws.

Five requirements for targeted recruitment to be a special measure

The core elements of a special measure are essentially the same under the RDA and state and territory discrimination laws. The following test consolidates the various requirements under these laws in the different jurisdictions. To meet the test for a special measure in all jurisdictions, an employer must be able to show that a targeted recruitment strategy:

1) is necessary because members of a racial group are disadvantaged because of their race;
2) will promote equal opportunity for members of that racial group;
3) has the sole purpose of promoting equal opportunity (and will be done in good faith);
4) is reasonable and proportionate (including reasonably likely, appropriate and adapted to achieve its purpose); and
5) will stop once its purpose has been achieved.

A case which illustrates how many of these requirements can be met is the Victorian Civil and Administrative Tribunal decision below.

The Ian Potter Museum of Art (Anti-Discrimination Exemption)[13]

Facts

The applicant museum (part of the University of Melbourne (the University)) applied for an exemption under s 89 of the Equal Opportunity Act 2010 (Vic) (the EO Act) to be able to advertise for and employ an Indigenous person in the role of "Vizard Foundation Assistant Curator". In support of its application, the applicant submitted a copy of the University's *Indigenous Employment Framework 2010-2013*. This document recognised the disadvantage suffered by Indigenous Australians, included reference to relevant statistics from the Australian Bureau of Statistics and the (low) number of Indigenous staff at the University, and stated the University's commitment to increase its number of Indigenous employees.

The applicant also led evidence that as at June 2009, the University employed approximately 7,270 people, only 30 of whom were Indigenous. The applicant itself had one Indigenous employee out of a staff of 15.

The applicant stated that it sought to redress the imbalance in terms of the representation of Indigenous Australians within the University (and within the Australian art museum profession as a whole) by appointing only an Indigenous person to the position.

VCAT decision

The Tribunal assessed the applicant's proposed targeted recruitment measure against the requirements for a special measure under s 12 of the EO Act (these requirements are subsumed within the 5 requirements mentioned above).

In terms of the requirement in the EO Act that the measure be justified because there is a particular need for advancement or assistance (i.e., requirement 1 above, was it necessary because members of a racial group were disadvantaged because of their race), the Tribunal held that:[14]

> The ABS information ... makes clear that Indigenous Australians as a group suffer many forms of disadvantage. Of most relevance here are the lower rates of employment, lower income levels, matters relating to health which impact on a

(continued)

13 Above, n 7.
14 Above, n 7, at [39].

> person's overall wellbeing and the rates of discrimination ... that material establishes the need for advancement and assistance so that Indigenous people have greater opportunities for employment and that an appropriate way to achieve that end is, from time to time, to reserve positions for Indigenous applicants only.

In relation to the requirements in the EO Act that the purpose of the measure be to promote substantive equality for members of that racial group, and that it be undertaken in good faith (covered by requirements 2 and 3 above), the Tribunal found that:

- the purpose of the measure was to provide an employment opportunity for an Indigenous person;
- a second purpose was to increase the employment levels of Indigenous Australians within the applicant and the University as a whole; and
- given the position of Vizard Foundation Assistant Curator was created to achieve these purposes, the proposed conduct was to be undertaken in good faith for those purposes.

Finally, considering whether the targeted recruitment was likely to achieve its purpose and was a proportionate means of achieving that purpose (requirement 4 above), the Tribunal held that it was likely to achieve its purpose as:[15]

> On an Indigenous Australian being employed in this position, that individual will clearly benefit in the way intended. In addition, Indigenous Australians will benefit by another of their number being employed.

In relation to proportionality, the Tribunal stated that:[16]

> At present, out of a staff of 15, only one employee of the applicant is Indigenous. As at June 2009, across the University as a whole Indigenous employees represented less than 0.5% of the staff. That figure is dramatically less than the number required to represent the proportion of Indigenous people in the wider population. In these circumstances, the proposed conduct is a proportionate means of achieving the applicant's purposes.

The Tribunal therefore concluded that the "conduct bears upon its face the clear stamp of a special measure".[17] It accordingly made a declaration (under s 124 of the EO Act) that the proposed targeted recruitment was a special measure as permitted under s 12 of the Act.[18] As the applicant would therefore not discriminate against a person contrary to the EO Act by taking the measure, the Tribunal held that no exemption under s 89 was necessary, and struck out the applicant's application as misconceived.[19]

Applying for exemptions for conduct which meets the requirements of a special measure

As mentioned earlier, there is no relevant special measures provision under the Anti-Discrimination Act 1977 (NSW) (the NSW Act). It is therefore necessary for employers wanting to conduct targeted recruitment for Aboriginal and Torres Strait Islander people in New South Wales to apply for an exemption from that Act.

In all jurisdictions other than New South Wales, the granting of an exemption is not a legal prerequisite for conducting a targeted recruitment strategy, as long as the recruitment program meets the requirements of a special measure. The purpose of an exemption is to exclude the application of a particular law to certain conduct which would otherwise breach that law. However, an action that meets the requirements of a special measure will not be unlawful, because it already falls within a recognised exception to discrimination law.

Despite this, some employers may choose to apply for an exemption for a targeted recruitment strategy, and may be granted one in some jurisdictions, even though the proposed conduct meets the requirements of a special measure. However, when employers apply for exemptions to protect special measure conduct, they may not be successful. The granting of exemptions is discretionary, and the case law in some jurisdictions is inconsistent.

Generally, the bodies with the power to grant exemptions consider whether an applicant requires an exemption in order to avoid breaching discrimination law. If the conduct meets the requirements for a special measure which is permitted under the relevant law, these bodies may refuse to grant an exemption.[20]

Finally, it must be recalled that there is no exemption process under the RDA. This means that even if an employer is granted an exemption under a state or territory discrimination law, its targeted recruitment program must still meet the criteria for a special measure, to comply with the RDA.

Conclusion

Employers wanting to promote the rights of Aboriginal and Torres Strait Islander people by conducting targeted recruitment programs should utilise the special measure provisions in the RDA and state and territory discrimination laws.

For more information about the special measure provisions, and how to design, document and implement a targeted recruitment strategy to meet the requirements of a special measure, see the resource recently published by the Commission: *Targeted recruitment of Aboriginal and Torres Strait Islander people: A guideline for employers*, available at www.humanrights.gov.au.

15 Above, n 7, at [35].
16 Above, n 7, at [36].
17 Above, n 7, at [52].
18 Above, n 7, at [53].
19 Above, n 7, at [52]-[53].
See, for example, the decision in *Downer EDI Mining* [2013] QCATA 276.

The rule of law recaptured – dispossession and disadvantage in Indigenous communities

By Chris Orchard

Introduction

The rule of law in many Indigenous communities is in a state of neglect and disrepair. This state of affairs is a result of 200 years of dispossession. If the rule of law is something to be aspired to, and it is, then its restoration in Indigenous communities can only be achieved by an authentic attempt to return country and the traditional law that is inseparably connected to it. The rule of law and Native Title are therefore inseparably intertwined. To this end Native Title Representative Bodies (NTRBs), for example Native Title Services Victoria, for whom I interned this winter, are not only bodies dedicated to the restitution of dispossessed Indigenous land, but are in fact champions of the rule of law. Their role in promoting the rule of law in Australia is poorly understood and unappreciated. This article seeks to remedy this anonymity.

The rule of law

The rule of law is a remarkably abstract term notoriously difficult to define. For many the rule of law is understood in the context of a strong sovereign of the Hobbesian kind, able to enforce rules to which we are collectively bound. Legalists or positivists might claim the rule of law is simply a general, prospective, consistent and intelligible legal structure under which *omnes inter se aequales*, we are all equal. The doctrine of precedent plays the role of keystone in providing predictability and legal structure.

It may fairly be said that this conception is one of aspiration and not reality. As theorists such as Kymlicka point out,[1] this notion of the rule of law often leaves minority groups at a severe disadvantage in both the creation and enforcement of the rule of law.

Indigenous Australians are the most incarcerated people, per capita, on Earth.[2] While it might be said the law, and its strong sovereign, is equal to all, it seems here it is more equal to some than others. To put this another way, Indigenous Australians are faced with both a catastrophic failing of the rule of law, and a powerful sovereign, the Commonwealth and the States, who are all too willing to enforce laws that are, the statistics would suggest, not adapted and disproportionately applied to Indigenous communities.

But to simply decry an inability to see the rule of law realised in Indigenous

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1 Will Kymlicka, Multicultural Citizenship (Clarendon Press: 1995).
2 'World Prison Population List (10th edition)', International Centre for Prison Studies 21/11/2013.

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communities would be to fail in the matter. To lock the discussion into issues of police enforcement and of the courts' ability to effectively administer justice does us all an injustice.

The problem goes deeper. We must treat both the symptoms *and* the root cause of the failure of rule of law in Indigenous communities. The root cause is dispossession. If the rule of law is something we should aspire to, and it is, then remedying the evil of dispossession perpetrated on the First Australians is the first and most important stride towards achieving an improved rule of law. At the vanguard of this push, in the context of the rule of law, are Native Title Representative Bodies.

A return to the rule of law

Current High Court Justice Stephen Gageler has commented that the "...doctrine of precedent is a white-fella's version of respect for elders."[3] This article does not propose to offer a comparative analysis of Indigenous and Commonwealth law. Suffice to say Aboriginal society, as a matter of fact, has for the past 60,000 years been conducted by "government[s] of laws, and not of men."[4] That is 60,000 years of law passed from generation to generation. Viewed in the spectrum of the rule of law, that is quite a body of precedent.

It is this body of cultural and legal jurisprudence that was dispossessed upon colonisation. An attempt was made to have Indigenous law in Australia annulled upon colonisation. It is this wrong that the doctrine of Native Title seeks to redress. This is why NTRBs are so important in the context of re-establishing the rule of law. They seek to realise Native Title to the fullest legal extent possible.

The High Court's decision in *Mabo (No.2)* sought to begin the process of redress. It began this process by recognising the doctrine of Native Title. This doctrine, put simply, allows traditional owners right of access to practise traditions, and laws, on country.

When the Keating Government passed the *Native Title Act 1993* (Cth) in response to *Mabo (No. 2)*, it provided for the establishment of certain Aboriginal Corporations to act as, among other things, statutory (independent) law firms to represent traditional owners in their attempts to attain grants of Native Title. This was recognition of the inherent power imbalance between the dispossessed, traditional owners, and the dispossessor, the State. It was an attempt to see the rule of law satisfied by overcoming this imbalance.

This access would in turn allow counsel for traditional owners to argue for a restoration of access to land under the Native Title Act. A grant of Native Title would then allow a limited ability for traditional owners to reconnect with country and resultantly the law inseparably intertwined with that country. To say this differently, grants of Native Title allow for a reestablishment of the rule of law in Indigenous communities. Amongst other things, Native Title seeks to reanimate the rule of law for traditional owners, who were dispossessed of it upon colonisation.

NTRBs play a vital role in helping to restore this connection and the rule of law for traditional owners. This pursuit represents an attempt to address the root cause of the failure of rule of law in Indigenous communities, dispossession. NTRBs and their Native Title work deserve to be a bigger part of the conversation about justice and the rule of law. Whether or not Indigenous law and Commonwealth law can coexist is a question for another day. For now we must strive to reimage the rule of law in a way that genuinely incorporates Indigenous notions of what that means. NTRBs are an invaluable resource in this regard.

3 Gageler, 'Beyond the Text: A vision for the structure and function of the Constitution', (2009) 32 *Australian Bar Review* 138, 157.
4 Grove Land Rights Case, Blackburn J.

Mass wedding project delivers access to employment and government services

By Yaya Winarno Junardy
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President, Indonesia Global Compact Network
Board member, United Nations Global Compact
Board of Supervisor, Yayasan Pondok Kasih

The challenges

Today, millions of Indonesians lack legal or national identity papers such as marriage or even birth certificates. In the poorest of households up to 55 per cent of couples do not have a formal marriage certificate, while an estimated 47 per cent, or almost 40 million children, either do not have a birth certificate, or the parents claim that they have but cannot produce it (*Baseline Study on Legal Identity: Indonesia's Missing Millions, 2014*). Data from the Ministry of Home Affairs suggests that the figure for those lacking a birth certificate is as high as 76 per cent or more than 50 million individuals from the population in total.

Primarily Muslim-populated, Indonesia mandates that Muslim citizens register their marriages with the Religious Affairs Ministry's local office, while non-Muslim citizens register with the local Civil Registration Authorities. According to Law No. 24/2013 on Population Administration, every child has the right to a free birth certificate, regardless of the status of the parents' marriage. Even if the parents are not married, or only married according to religious customary law, children can still obtain their birth certificate, but are not permitted to have their father's name listed on the document, listing the mother as the sole parent. Needless to say such children face the cultural and social stigma of being "a child of a single mother".

Often trapped in poverty, families can neither financially afford, nor legally overcome the hurdle of obtaining a marriage certificate. Administrative costs and a convoluted process add to the issue. There is also lack of awareness and understanding of the importance for possessing valid papers.

Yet without the papers, families don't have access to national health care, public education, legal rights, formal employment opportunities, even the micro-credit opportunity and "home for the poor". This is in violation of human rights and the State philosophy Pancasila. Without proper education, the future generation is at stake. The impoverished continue to live in poor conditions, and while Indonesia has a demographic dividend for at least 15 years, having millions of young people enter working age but unable to compete for jobs due to lack of education, is bound to create social unrest in the future.

The Mass Wedding Program

With the aim of helping people from underprivileged backgrounds a project for mass weddings, initiated by Yayasan Pondok Kasih (House of Love Foundation) - a non-profit organization based in Surabaya - has been conducted annually since 2004.

The first large scale mass wedding , involving up to 4,541 couples from poor families in Jakarta and the surrounding areas, was held in 2011. The project was easily the world's largest mass wedding reception at the time, attended by more than 20,000 people on 19 July 2011.

In 2014, another mass wedding was conducted, this time with the support of the Global Compact Network Indonesia whereby the local UN Network joined forces in collaborative action with the Jakarta Provincial Government, civil service organisations and businesses to involve 5,115 couples from underprivileged backgrounds. This was followed by a grand mass wedding reception, conducted on 28 January 2015 at Istora Senayan in South Jakarta - another world record.

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The project was easily the world's largest mass wedding reception, attended by more than 20,000 people on 19 July 2011.

The project is not a simple undertaking. It requires coordination of all parties in order to perform the tasks from searching and identification, interview and screening for eligibility, completing all the requirements, holding the marriage according to religion, registration process at the local Civil Registration Authorities, mobilising transportation and logistics for wedding reception, and finally the issuance of marriage and birth certificates.

Muslim couples have to now register with the Office of Religious Affairs (KUA), or in some special cases, with the Religion Court to legalise religious marriages that were previously not registered, while non-Muslim couples register their marriage with the local Population and Civil Registration Agency.

Up to 400 social workers from Jakarta's Social Affairs Department are deployed to support the project. The event also has the support of the Indonesian Army, especially when it comes to logistical support for mass wedding receptions and security.

The future solution

A breakthrough is needed in order to implement a permanent solution nation-wide. Initiated by the Ministry of Social Welfare, cross ministerial government policy was recently issued to address, simplify, and speed up the current process.

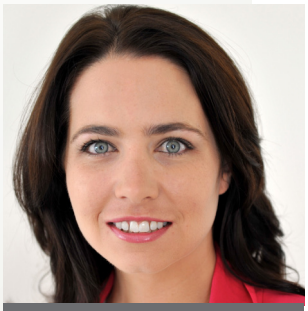
This should be followed by policy and implementation guidance for all parties involved in order to ensure every new birth is registered with a birth certificate automatically, and without any complicated bureaucratic procedures.

There are important factors that need to be considered:

1) Wedding and birth registration, and the certification that accompanies it needs to be provided for free;
2) The process needs to be decentralised to the village level in order to speed it up;
3) Data needs to be nationally centralised to ensure data integrity and so it can be utilised for all purpose;
4) All discriminatory requirements for birth certificates need to be removed; and
5) There needs to be a clear coordination among all parties involved in the process.

Lastly, the Government should draw on Mohammad Yunus' Grameen Bank policy, where he says: "the poor people are afraid to come to the bank, and therefore, the bank should come to the poor". This is true for Indonesia's marriage and birth certificate process also whereby the Government should not wait for the people to come to the registration office, instead the Government should go to the people.

Navigating weak rule of law in South-east Asia



By Lauren O'Neil, Senior Consultant, Asia-Pacific Control Risks, Singapore
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South-east Asia is a region of immense diversity, and difficult to manage effectively without a nuanced, market-specific, strategy. The opportunities are significant. And so are the challenges. South-east Asia is home to some of the fastest growing middle-class economies, while frontier markets such as Myanmar present numerous opportunities as the country looks to open its doors to global trade for the first time following decades of military rule. Whether investing in, or operating a business in the region, weak rule of law, erratic regulation and poor governance present significant risks. The uncertainty is compounded by weak institutions, pervasive corruption and significant contractual risks.

In a country like Indonesia, for example, investors often avoid seeking legal redress as a first response as a direct result of the archipelago's persistently weak rule of law and unreliable judiciary. Although Indonesia has introduced a number of successful reforms during the past decade, which have improved some of the country's legal structures and provided more formal mechanisms to consolidate the rule of law, corruption in the judicial system remains endemic. Numerous cases have arisen in recent years implicating law makers and judges at all levels of the Indonesian legal

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system. While the fact that those cases have ever even emerged is a testament to the declining atmosphere of impunity within the judiciary, they also underline the extent of the malfeasance.

Businesses also remain vulnerable to regulatory harassment (e.g. expropriation and permit cancellations) as local authorities seek to influence unclear legislation and vague and contradictory national and district level regulations, to their own advantage. Numerous foreign companies in Indonesia have faced extortion efforts by the local authorities who threaten to delay processing or to revoke permits unless illicit payments are made. These instances are, at times, compounded by threats of criminal charges against staff.

In Myanmar, weak rule of law is one of many legacy issues inherited from the former military rule. Before Myanmar's transition to semi-civilian rule in 2010 the military was heavily entrenched in every aspect of Myanmar. Many of Myanmar's commercial deals were veiled in secrecy with little visibility of how deals were awarded, who the ultimate beneficiaries were and how this intertwined with issues such as human rights abuses associated with ethnic tensions and communal conflict throughout the country. To a lesser extent, it still is.

Myanmar's judiciary is not independent, it can be unreliable and is easily influenced by vested interests (often linked to the military or military-linked business groups); regulations are commonly applied arbitrarily. Ongoing debate over legal reform is a positive development and, while not perfect, demonstrates forward momentum in the government's efforts to improve the business environment. However, Myanmar's rapid post-transition development has, at times, meant its judicial and legislative ambitions have outpaced the government's capacity to introduce implementing regulations and by-laws, which have been haphazard at best. As such, foreign investors in Myanmar remain vulnerable to the arbitrary interpretation of the country's laws and how local authorities might apply them.

In both Indonesia and Myanmar we have seen extensive efforts by a number of international organisations and NGOs to improve the operating environment. However, business also has a major role to play. By acting responsibly and taking responsibility for all that they do, business positively reinforces best practice and supports development of the rule of law in that market.

However, adopting best practice in an imperfect market is not easy and can disrupt business operations or even result in lost business. For example, in response to Control Risks' International business attitudes to corruption 2015/16 survey respondents in Indonesia noted that refusing to pay facilitation payments in Indonesia had resulted in 36 per cent facing major delays, 39 per cent minor delays and 7 per cent of respondents' operations had ground to a halt.

To effectively mitigate corruption risks (for which Myanmar ranks 156th and Indonesia 107th[1]), businesses operating in the region need to go beyond simply developing an anti-bribery and corruption policy, and also work on its effective implementation on the ground. This often necessitates a set of measures rather than just one solution: it means providing employees with practical guidance on what to do when faced with a corrupt demand, as well as conducting regular localised training and establishing appropriate internal controls (including procedures for managing third parties) combined with clearly articulated messages from senior leadership. For example, one company (operating in both Myanmar and Indonesia), in recognition that it is often a company's employees who are on the frontline of such demands, issued its employees with 'zero-tolerance' cards. Should a bribe be requested the card, in the local language and English, clearly states the individual is not able to provide it.

In Myanmar significant reputational risks persist. In addition to conducting comprehensive due diligence, development of robust mitigation frameworks, including extensive consultation with community, government and non-government stakeholders, and development of environmental and human rights standards that span the company's entire supply chain, can help to mitigate reputational risks.

Improving rule of law in the region will remain challenging but not impossible. Control Risks' experience suggests that, there is no one size fits all risk-mitigation strategy. Businesses seeking to improve the rule of law require a fundamental understanding of the market and regulatory environment, effective thought leadership and practical ways to entrench pro-active and meaningful policies (and methods for their practical application e.g. anti-corruption and community engagement programs) into their corporate cultures. In the absence of a strong country-level regulatory framework and reliable judicial system, it is essential for companies to build resilience into their operations, including by conducting effective due diligence and engaging strategically with a broad-range of stakeholders, including government, advocacy groups, industry, NGOs and local communities.

Control Risks is an independent, global risk consultancy specialising in helping organisations manage political, integrity and security risks in complex and hostile environments.

1 Transparency International's 2014 Corruption Perceptions Index, ranking 175 countries (with 175th being the worst).

Advancing the rule of law in the Maldives

By Gaythri Raman

"Two of the most important sources of law in any country are legislation and case law. If ambiguity or vagueness exists in either of these, then a state of general legal uncertainty prevails. Similarly, the larger a body of statute and case law becomes, the greater the potential for legal uncertainty should these laws be out-of-date, inaccessible and unconsolidated. In such circumstances, access to and knowledge of the law is effectively denied. An inevitable consequence of this is the impediment of the administration of justice."

TJ Viljoen, CEO of Asia Pacific, LexisNexis Legal & Professional in his speech delivered at the launch of the Consolidated Laws of Maldives, August 7th 2015 in Malé

As a business, LexisNexis relies on a sound legal structure to thrive, one in which those who administer justice and those who seek it reference the law, apply it and are bound by it. We strive in multiple ways to create, enrich and deliver premium legal content to legal professionals. Our work results in providing clarity to the law and this in turn, enables the rule of law to flourish, creating a sound economy.

Not all countries in the world have this ideal legal structure and that is where our CEO's words serve as a reminder of the role of LexisNexis in advancing the rule of law.

I met Mohamed Anil, the Attorney General of Maldives, in a conference in June 2014. We quickly discovered a mutual passion for the law, and he began to tell me about his country, the challenges they face and their vision for the future. I learned that the laws were not consolidated, so someone who wanted to reference the law would not be assured of knowing all the subsequent amendments that came into effect. This resulted in uncertainty, and the Attorney General recognised it. Maldives laws were enacted in the national language, Dhivehi, and most have not been translated into English, making it a challenge for foreign investors to do business in the country.

They knew that the laws of the country needed to be made more accessible to their citizens and also to the rest of the world, but they were overwhelmed. It is a mammoth undertaking, and they lacked the resources and the skills to do so. Our chat turned into an earnest discussion about how we at LexisNexis could apply our knowledge and skills towards supporting the Maldives. Thus, a powerful partnership came into being. We created a team, applied our resources, editorial skills and our proprietary technology towards consolidating all legislation, translating it into English, and making it available, both in the printed format and via a bilingual online legal website.

Both the Attorney General's Office and LexisNexis have assembled teams of the best people for the project. Everyone understands the significance of this work and how it would benefit this country and the world at large. We created a structure, and a process for receiving, compiling and managing the laws, and we also created a new referencing framework for the country,

Not all countries in the world have this ideal legal structure and that is where our CEO's words serve as a reminder of LexisNexis' role in advancing the rule of law.

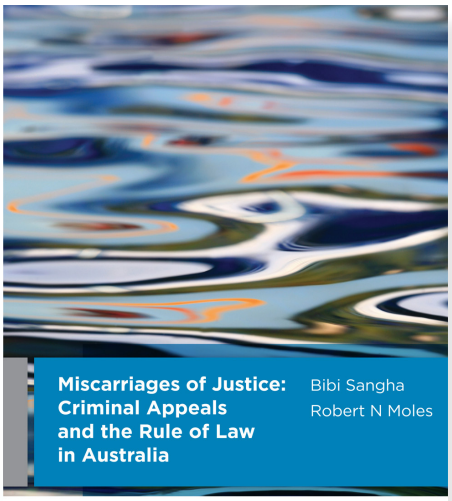
setting precedents by creating new terminology which would enable a clear reading and understanding of these laws.

Come early 2016, the complete set of consolidated and translated laws will be made available, resulting in a nation empowered by knowledge of the law. As we work on this project together, we at LexisNexis have committed to building competency and capacity for the Attorney General's Office, whose staff will learn from customised training workshops designed to equip them with the skills and knowledge to sustain this work in the future.

Partnering with the Maldives in this undertaking has enabled us to appreciate our own work more. Using our resources and expertise in enabling access to laws has allowed us to directly impact society in such a positive way, and creating a structure for businesses to flourish and succeed. This journey has inspired our employees to think innovatively and reminded all of us yet again that our work matters, and that we contribute to society in a significant way. It has not only created goodwill throughout the region but it clearly also makes good business sense.

Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia 2015 By Bibi Sangha and Robert N Moles

Review by the Honourable Malcolm McCusker AC CVO QC



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In his foreword to this thought-provoking book, the Honourable Michael Kirby AC CMG wrote:

> "Practical individuals with conscience can sometimes help to change the world. Occasionally, they are lawyers"

Bibi Sangha and Bob Moles are lawyers and practical academics (not always an oxymoron), and they have what Kirby aptly describes as "a well targeted passion" for justice. By painstaking research and reason, they have exposed flaws in Australia's criminal justice system, and the resultant miscarriages of justice. The case they make for reforms is compelling - and their book makes compelling reading for everyone who believes, as an eminent jurist once put it, that

> "Wrongful imprisonment is the nightmare of all free people. It cannot be accepted or tolerated".

Some have experienced that nightmare. Their stories make chilling reading. Anyone with a conscience would close the book, determined that something must be done. The authors show the way.

The main causes of wrongful convictions are identified, and recommendations made to reduce the chance of them being repeated – the dangers of "eye-witness" identification, often found to be wrong, albeit honestly made; the fallibility and subjective nature of "expert" evidence, in such areas as handwriting, fingerprints, time and cause of death; failure to disclose exculpatory information to the accused; false confessions; and faulty investigations.

The chapter on "Expert Witnesses" notes the role of expert evidence in criminal trials. It warns against too readily accepting "expert opinion" (which juries tend to accept as "gospel") and instances a number of cases in which faulty and unreliable "expert" evidence has resulted in a miscarriage of justice - Eastman, Chamberlain, Rendell, Wood, Gillham for example, and Keogh, who spent more than 18 years in prison after being convicted of the murder of his fiancée.

Keogh's conviction was based substantially on the "expert" evidence of a Dr Manock, whose evidence was later revealed to be "mere speculation".

He had unsuccessfully appealed against his conviction, in 1995. The discovery of Dr. Manock's lack of qualifications, and that his evidence at trial was not expert but "mere speculation", did not mean that Keogh could appeal again. It may come as a surprise to many that in every Australian State, however strong the evidence of a miscarriage of justice, there was no right to a second appeal (a judicial view the correctness of which the authors question). The only course open was to ask the Attorney-General to refer the case back to the Court of Appeal. That procedure was adopted from England more than 100 years ago; but in 1997, as a result of the exposure of scandalous miscarriages of justice suffered by the "Birmingham Six" and the "Guildford Four", the UK established an independent (CCRC) which took the decision on referral out of the hands of the Executive.

Since then, English Courts of Appeal have upheld appeals in 380 cases

This excellent book is eminently readable, with helpful comprehensive references and index.

referred by the CCRC (a far greater number per annum than when referral was at the discretion of the Executive). Many of them were murder convictions (for which, in four cases, almost certainly innocent men had been hanged. But the Australian States made no changes.

Keogh petitioned the SA Attorney-General three times to refer his case back to the Court of Appeal to no avail.

To the authors, Bob Moles and Bibi Sangha (and others), it was clear that Keogh had been wrongfully imprisoned. They were shocked that Keogh's successive petitions had been rejected. Believing in the dictum, "Equity will not suffer a wrong to be without a remedy", they were instrumental in having a Private Member's Bill, to establish a Criminal Cases Review Commission, introduced in 2010. Their cogent arguments had the added support of the Australian Human Rights Commission. Unfortunately, on the recommendation of the SA Legislative Review Committee (LRC), that did not proceed. However, to the great credit of the South Australian Attorney-General of the time, the Honourable John Rau QC, the LRC, and the South Australian Parliament, legislation was enacted, which enabled a second appeal to be brought, directly to the Court of Appeal, instead of the old "petition procedure". Mr Keogh was at last able to have his appeal heard. It was promptly upheld, in December 2014.

Tasmania is now on course to enact similar legislation. The authors express the hope that the other states will follow. But that (as they explain) will not put an end to all their concerns. We must never be complacent or, although we have a good justice system, think that it is perfect.

This excellent book is eminently readable, with helpful comprehensive references and index. Judges, defence lawyers, prosecutors, police, forensic experts, academics, students, politicians, and law officers will undoubtedly find it absorbing, and a valuable guide and source of information about the criminal justice system; but it is also a book which everyone with a social conscience and an interest in justice will find enlightening, and the authors hope, will stir them into supporting the important reforms the authors advocate.

August 2015