Advancing Together

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Rule of Law Updates and Perspectives

Volume 2 • Issue 2
December 2013

Contents

A publication from
LexisNexis Capital Monitor to advance
the **Rule of Law** in the Asia-Pacific

The concept of the Rule of Law underpins the Australian justice system and helps to define the relationship between the individual and the state, and between the different arms of government. It is centred on notions of fairness and equality and, more specifically, on the idea that because everyone is equal before the law and no one is above the law, governments must act lawfully, and individuals must be treated fairly when decisions are made about their rights.

How scrutiny of new and existing laws helps promote the Rule of Law in Australia

By Michael Colbran

Professionals help scrutinise new laws

Though the precise meaning of 'Rule of Law' is debated, the principle has a central and undisputed place in Australia's justice system. The concept of the Rule of Law underpins each facet of practising lawyers' work as they assist in delivering justice to the community.

Protecting and promoting Australia's compliance with the Rule of Law, and ensuring legislative and executive action complies with fundamental individual rights, is of great importance to professional associations and civil society groups such as the Law Council of Australia.

The Law Council has developed its own statement of Rule of Law Principles that provides a framework to evaluate proposed and existing laws. By examining laws in this way, the Law Council can highlight circumstances where a law is operating unfairly or requires improvement or amendment to achieve its stated purpose. The Law Council seeks the assistance of experienced legal professionals who work with these laws and uses their experience to suggest improvements through submissions and responses to government inquiries.

Parliamentary processes and the Rule of Law

The work of professionals and civil society groups is enhanced by the work of the Federal Parliament, which also examines proposed and existing laws for compliance with Rule of Law principles and human rights standards. Much of this work is done by the well established Senate Scrutiny of Bills Committee, and the newer Joint Parliamentary Committee on Human Rights, or Human Rights Committee for short. Both committees play an important role in informing Parliament and the community about laws that conflict with or affect these rights and principles. For example, the Scrutiny of Bills Committee notes when a proposed law seeks to operate retrospectively, and the Human Rights Committee draws attention to laws that may hinder individuals' right to privacy.

The Human Rights Committee is made up of members of both Houses of Parliament and from a cross-section of political parties. Its role is to examine existing and proposed laws and legislative instruments for compatibility with the rights contained in the seven key international human rights conventions to which Australia is a party.

The committee can also inquire into and report on any matter relating to human rights referred to it by the Attorney-General.

When this Committee was established in 2012, a requirement for new laws to be accompanied by a statement of compatibility with human rights was also introduced. Statements of compatibility assist the Parliament and encourage government departments and agencies to consider human rights in a systematic, rigorous and consistent way.

The Human Rights Committee typically considers whether a proposed law conflicts or unfairly impacts upon international rights and principles; whether there is a rational connection between the law or regulation's intended purpose and any limitation on human rights; and whether the limitation will be implemented in a way that is reasonable, necessary and proportionate.

Civil society and professional groups help parliament scrutinise new laws

Experts and representative bodies such as the Law Council can contribute to the Parliament's processes by making submissions highlighting particular aspects of the proposed laws that raise concern or warrant consideration by the committee. For example, the Law Council is well placed to point out where new laws might operate to remove or dilute procedural fairness or the right for individuals to seek independent review of government decisions.

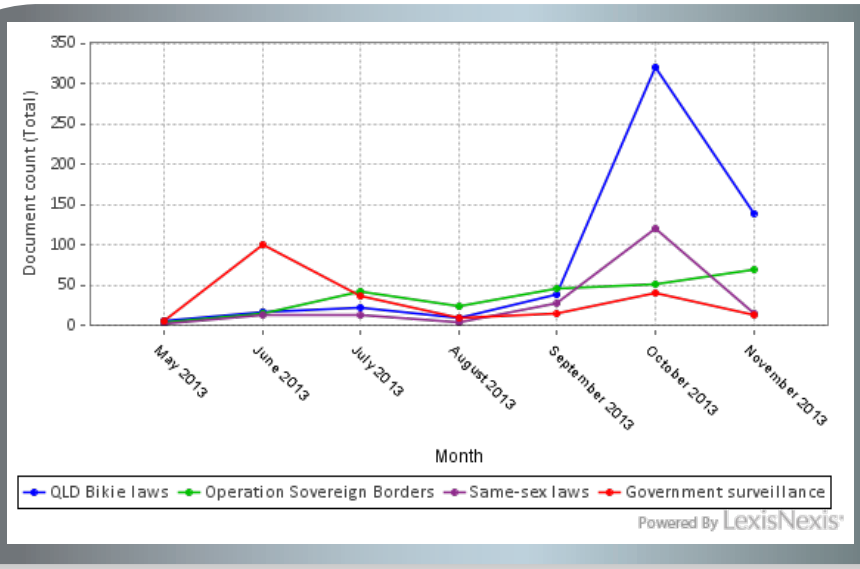
The Committee gives priority those laws and regulations that potentially have the most impact on human rights. For example, it has produced detailed reports on: legislation relating to the regional processing of the claims of asylum seekers who arrive by boat; the 'Stronger Futures' legislation that makes changes to some of the measures introduced as part of the Northern Territory 'intervention' in Aboriginal communities; and the legislation that makes changes to certain social security benefits.

Through these reports, other parliamentary committees, members of Parliament, and the community were able to identify aspects of new laws that removed legal safeguards against the use of executive power, or sought to make changes that would have particularly significant impacts on certain groups within the Australian community. The public debate surrounding these laws and policies had the benefit of a careful rights-based analysis, even if this does not always result in policy or legislative change.

In this way, robust legislative scrutiny ensures the best outcomes for all under the law.

Michael Colbran QC is President of the Law Council of Australia.

LexisNexis Media Coverage Analyser tracks the attention major newspapers have given to the issues that affect the Rule of Law in Australia. Queensland's new laws to tackle outlaw motorcycle gangs have attracted considerable attention from the Australian media in the second half of 2013.



Rule of Law in the News

Will international treaties protect human rights in Sri Lanka?

By Kishali Pinto-Jayawardena

Nick Cheesman, Kishali Pinto-Jayawardena, and Simon Rice at a workshop hosted by the Australian National University

Sri Lanka's ratifications of United Nations human rights conventions signal a certain willingness to adhere to the UN treaties and to be guided by international law. But the record of actual compliance with the international treaties tells a different story. The 1969 Vienna Convention on the Law of Treaties says individual states must comply in good faith with the treaties they have ratified, and that a state may not invoke the provisions of its internal law to justify failure to uphold international agreements. In other words, individual states are bound to comply with the treaties they have ratified, and it is a well-established principle of international law that states have a duty to bring internal law into conformity with obligations under international law.

The International Court of Justice has also established that it is 'the fundamental principle of international law that international law prevails over domestic law.'

Sri Lanka has signalled its willingness to uphold international human rights law by ratifying human rights conventions and by submitting periodic reports to the United Nations Committee Against Torture (CAT) and the United Nations Human Rights Committee (UNHRC). But both Committees have expressed serious concern over continued allegations of widespread torture and enforced disappearances. Sri Lanka has recognised the competence of the United Nations Human Rights Committee to consider individual communications lodged by Sri Lankans alleging violations of the ICCPR as a result of state action. From 1999, the UNHRC has declared that the communications of several individuals had been violated, but none of the Committee's views have been implemented to date.

The Special Rapporteur on Torture and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions have both visited Sri Lanka since 2005. Both concluded that torture is widely practiced in Sri Lanka. Their reports expressed concern regarding the long duration of investigations in torture cases and allegations of threats made against torture victims. Their recommendations also remain largely unaddressed.

The Constitution of Sri Lanka prohibits torture and cruel, inhuman or degrading treatment or punishment. Because Sri Lanka has a dualist legal system, an Act of Parliament is required to domestically implement international instruments that the State ratifies/accedes to.

Take, for example, the *Convention Against Torture and Other Inhuman and Degrading Punishment Act* of 1994 (the CAT Act), which was enacted to give specific effect to the UNCAT. The CAT Act falls short of satisfying Sri Lanka's international obligations because its definition of torture differs from the definition in the UNCAT: the Act does not establish universal jurisdiction for acts of torture, and makes no reference to the principle of *non-refoulement*. The Act further departs from the UNCAT by not directly providing that superior officers be held liable for acts of torture committed by their subordinates. There are similar lacunae in other statutes such as the Penal Code and the 'ICCPR Act.'

Apart from such particular statutes, the state is generally obliged to follow international standards.

A Problematic Judgement by the Domestic Court

Nallaratnam Singarasa v. Attorney General and Others, S.C. SpL (LA) No. 182/99, SCM15.09.2006. This judgment was delivered consequent to a petition being filed in the Court invoking its powers of revision and/or review concerning an earlier judgement of the Court regarding Singarasa's conviction of having unlawfully conspired to overthrow the Government. The conviction was made solely on the strength of a confession obtained under emergency law, the voluntary nature of which he was legally required to prove. After appeals in the domestic arena (up to the Supreme Court) resulted only in a reduced sentence, Singarasa filed an Individual Communication before the United Nations Human Rights Committee pleading, a violation of his rights under ICCPR article 14(1(g), in that it was impossible for him to prove that his confession was extracted under duress as he had been compelled to sign the confession in the presence of the very police officers by whom he had been tortured earlier. The Committee found a violation of his rights under ICCPR article 14(3)(g) as well as ICCPR, article 14, paragraphs 3(c), and 5 (Vide, Nallaratnam Singarasa v. Sri Lanka, CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004). The State was directed to provide Singarasa with an effective and appropriate remedy, including release or retrial and compensation, and was also cautioned to avoid similar violations in the future and to bring its domestic law in conformity with the ICCPR. Yet, as the said views were not being implemented even after two years had lapsed, a revision application was filed before Sri Lanka's Supreme Court urging that the Court reconsider its earlier order. The views of the Committee were cited in this instance as persuasive authority.

Article 27(15) of Sri Lanka's Constitution specifically requires the State to 'endeavour to foster respect for international law and treaty obligations in dealings among nations,' but as the example of the CAT Act shows, these constitutional directives are disregarded.

So what are the practical results when states refuse to comply with international obligations deriving from international treaties?

In 2007 a Divisional Bench of Sri Lanka's Supreme Court presided over by Chief Justice Sarath N. Silva ruled in the Singarasa Case, that the act of accession to the first ICCPR Protocol by the President was an unconstitutional exercise of legislative power as well as an unconstitutional conferment of judicial power on the UNHR Committee. This judgement rendered the views of the Committee to be of no force or effect within Sri Lanka.

This is a contentious ruling. The President of Sri Lanka had acceded to both the ICCPR and the First ICCPR Protocol by virtue of Article 33(f) of the Constitution, which allows the President to 'do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorised to do.' However, this was the very constitutional provision that the Court employed through a process of convoluted logic to determine that the accession to the First ICCPR Protocol was unconstitutional. The conclusion that judicial power has been conferred upon the UNHRC through the accession to the First ICCPR Protocol was interlinked with the reasoning that this act of accession was 'an act of legislative power,' which (as the Court ruled) ought to have been exercised by Parliament and not solely by the President.

The judicial reasoning behind the Singarasa Case was fundamentally flawed because the UNHRC had never claimed judicial power within a domestic legal system. This is made very clear in its General Comment No 33, where the Committee reiterates that the function of the Committee in considering individual communications is not that of a judicial body, though it was conceded that the views exhibit some important characteristics of a judicial decision. Instead, the Committee's authority has always been based on the principle that the rights in the ICCPR should be given effect to as part of the international human rights regime, and that the Committee is the appropriate mechanism in terms of the ICCPR, which is vested with that authority.

The Singarasa decision highlights the difficulties of sustaining 'judicial power' on a jurisprudential basis so as to determine that the very act of executive accession to the First ICCPR Protocol was unconstitutional. Yet this remains the law in Sri Lanka. The opinions of the UNHRC have been deemed to be of no force or value whatsoever. So while in theory the country has not denounced or withdrawn from the international treaty regime, these obligations are practically rendered of no consequence where the domestic implementation of rights is concerned.

So can states both ratify and reject the international treaty regime at one and the same time? This trend appears to go fundamentally against the norm of the international legal order. Yet this is the paradoxical reality that Sri Lankan lawyers have to grapple with. The attention of the international legal community is most imperatively needed in that regard.

Kishali Pinto-Jayawardena is a senior Sri Lankan lawyer currently on a fellowship with the Australian National University.

Can states both ratify and reject treaties at the same time?

The constitutional articles found to be violated by the President's accession to the first ICCPR Protocol were respectively Article 3 read with Article 4(c) read with Article 75 and Article 3 read with Article 4(c) and Article 105(1) of the Constitution. The Petitioner's application was found to be misconceived and without legal basis. As the Court declared that accession to the Protocol violated Article 3 (read with Article 4 of Sri Lanka's Constitution), any law passed seeking to give domestic effect to the views of the United Nations Human Rights Committee would therefore have to be approved by a two thirds majority in Parliament, as well as by the people at a Referendum as mandated by Article 83(a) of the Constitution.

Disembodied justice: spinning false fear

By Bill Rowlings

Justice is figuratively a blind, impartial woman, left hand outstretched holding scales, right hand upraised wielding a sword. Governments in this picture are the arms of the Justice figure, which support and fund the practical pillars of a fair society: the police, prosecution and prison systems on one hand, and the independent courts on the other.

Combined, the various elements comprise the Rule of Law in society, under which no branch of government is above the law, and no public official may act arbitrarily or unilaterally outside the law. Players perform their roles according to rules, most contained in Acts of Parliament, created usually to be fair and balanced, and applying to all citizens equally.

In Australia, justice and the Rule of Law have traditionally worked tolerably well, though miscarriages of justice in the courts are far more frequent than people think. Yet the system has been under siege since 2001, when the 9/11 terrorist aircraft hit the USA. As fear usurped the Rule of Law, panicked politicians from around the world rushed to enact 'anti-terror' laws.

Frightened Ministers and MPs have become the norm in Australia: as a class, they have far less courage than their constituents.

By invoking a terror model against bikies, Queensland's ruling politicians have caused Justice to tremble on her foundations. Inevitably, the High Court construction team will have to re-cement the Rule of Law figure back in place next year. Meanwhile, Queensland officials formally 'name' bikies as baddies, and their new non-judicial status will produce mandatory extended jail sentences of 10 or more years for quite minor crimes in some cases. There may be a separate prison and even 'look at me' pink clothes while in jail.

Governments would find it more difficult to get away with such over-the-top provisions without the work of the police and the media.

Police (particularly police associations) want crime to appear to be out of control, so that police staff numbers may rise. But crime is down dramatically in Australia since 2001: for crimes recorded by police, vehicle theft is down by 60 per cent, robbery and burglary by 50 per cent, homicide about 20 per cent, fraud and arson about 10 per cent. Only assault and shop theft are up (about 10 per cent each) and sexual assault by about 1 per cent.[1]

And yet the cost of 'servicing' crime is continuing to rise: prison costs have soared 141 per cent, police costs are up 134 per cent, and the cost of

1 *Australian Institute of Criminology unpublished research 2013, disclosed at a World Crime Forum, Canberra, October 2013 by Dr Russell G Smith, principal criminologist, AIC.*

federal agencies is up by 119 per cent. Since 2001 taxpayers have funded extra prisons, many more police and mushrooming federal security and spook agencies.[2]

Despite crime (mostly) falling faster than newspaper readerships, the media creates the impression that crime is out of control by concentrating on one-off incidents and spurning analysis. The media, often time poor, is easily fed news by deceptive 'informants' who more often than not end up controlling the flow of public information. The authorities also have an image to protect.

Individual media workers can scarcely be blamed for their awful collective performance. The workload of print journalists and radio and TV reporters has gone through the roof at the same time as staffing has dwindled. Where they once might have filed one or two stories a day, they now must feed text, voice and video hourly to the insatiable online news beast.

So what the home watcher, listener or internet reader absorbs is hastily regurgitated police propaganda tailored to make police look good and to invoke a public reaction that presses the buttons of politicians to keep police numbers and budgets up.

Pollies have an agenda. After all, their main focus is on getting elected, and on staying elected. They react to what the public thinks, even if the public is hopelessly misinformed. For example, the 2009 instalment of the Australian Survey of Social Attitudes showed that 68.4 per cent of people believed crime had gone up a little more or a lot more over 2008 and 2009, when the level was actually declining rapidly.

Beating 'law and order' drums fabricated by police PR and boosted by an uncritical, reverberating media, the politicians create laws like those targeting bikies in Queensland. Over the coming months, similar laws will ripple around Australia.

We get the governments we deserve, and vote for. 'Law and order' governments produce big increases in prison and police numbers. Taxes and charges must rise to pay for them. So, vote 'law and order' if you want to pay increasingly more tax, and watch as the Rule of Law trembles on her foundations as the forces gaming the political system follow their course.

Bill Rowlings OAM is CEO of Civil Liberties Australia.

2 *As above.*

LexisNexis sponsors RoLIA's *Sports, Drugs and the Rule of Law* conference

LexisNexis Australia sponsored the Rule of Law Institute of Australia's (RoLIA) annual conference titled *Sports, Drugs and the Rule of Law*. Held on Friday 15 November at the Mint in Sydney, the conference attracted a large crowd and covered a range of aspects in the area, including legal powers, drug testing and penalties to combat drugs in sport.

Opened by Phillip Boulten SC, President of the NSW Bar Association, the conference program lined up speakers and panellists including former head of ASADA Richard Ings, Deakin University academic and practising sports lawyer Martin Hardie; University of Queensland and Griffith University lecturer and sports lawyer Tim Fuller; University of Western Sydney associate professor Patsy Tremayne, with each one picking a different aspect to cover.

The first speaker on the bill, Richard Ings, looked at ASADA's role in dealing with the controversial issue of drugs in sport, and the new powers given to ASADA to interrogate athletes over suspected drug use.

Martin Hardie, still passionate about cycling, touched on the need for preserving the rights of athletes against excessive powers granted to government agencies in the so-called 'war on drugs in sport'. Former NRL player Tim Fuller discussed the role of the Rule of Law in the practical context, looking at sporting tribunals and how sporting contracts are used to penalise and sanction athletes.

RoLIA is an independent, politically non-partisan, not-for-profit body formed to uphold the Rule of Law in Australia.

Photographs: Richard Lie

Trust, privacy and the Australian Privacy Principles

By John Pane

An increasing body of research from Australia and beyond shows that individuals worry about loss of control over their personal information, whether they are dealing with government agencies or the private sector. These concerns are typically driven by whether individuals can trust the entities to whom they give personal information (or that have control over it) to keep it safe and not to use it in unexpected ways.

Ninety per cent of the world's digital information was created in the past two years, with global digital data stores estimated to have become 44 times the size of 2009 levels. Because data processing and storage costs are getting cheaper by the year and data analytics are becoming ever more powerful, organisations want to collect more and more personal data from their 'customers.' At the same time, those providing information often consider requests for data to be unnecessary, intrusive or excessive relative to the underlying activity or transaction. And so consumers feel increasingly powerless and unsafe when dealing with organisations in an online environment. Though an organisation may perceive itself and its brand as 'trusted', the reality as seen through the eyes of its customers may differ sharply.

The commencement of the Australian Privacy Principles (also known as APPs) on 12 March 2014 has led many in the legal profession to focus on the mechanical features and activities for which a lawyer's advice is usually sought, such as drafting and reviewing contracts, advising upon privacy notices or access requirements.[1]

But there is a lot to be said for approaching the subject of privacy through a functional lens. This article's focus on 'practical privacy' provides readers with a template to organise and implement an APP Compliance Implementation Program and identify the key internal business partners either a company or its client will need to collaborate with to ensure success.

By approaching privacy as simply another law with which to proffer compliance advice and to give a 'legal sign off', we are all potentially missing the opportunity to build in privacy from the start of an initiative or project, as opposed to bolting it on at the end. By designing privacy in and setting it as the default value, organisations can create value by being 'trustworthy' – as opposed to simply being 'trusted.'

On the issue of data breaches

Though the Privacy Amendment (Privacy Alerts) Bill 2013 (Cth) was not passed, designing a privacy compliance framework as if it were enacted allows organisations to eliminate any unnecessary re-work and attendant future costs once the Bill is passed.

Before putting in place a breach/incident management processes, organisations need to firstly validate their information security and data protection posture and capabilities. By designing a compliance framework and incident response mechanism that takes into account trends in reporting breach notification, companies can show their clients that, more than trusted, they are trustworthy.

The Office of the Privacy Commissioner has issued comprehensive guidance on both voluntary data breach notification and information security requirements. Companies and professionals working in this area will profit from adopting and implementing these sensible and functional guidelines.

1 http://www.oaic.gov.au/privacy/privacy-resources/all/

Phase 1 of 5: Identify

Besides appointing a Chief Privacy Officer or equivalent, organisations need to start with the 'big picture' by setting a vision, strategy and program charter. This will help frame the 'future state' and help inform the design of a privacy blueprint for the future.

But compliance is not just about doing what the law says: it is also about organisational culture and behaviour. This means companies need to secure a clear and strong privacy mandate from the highest executive levels. Without such a mandate, their odds of success decrease and the probability of internal roadblocks increase.

Once the 'tone at the top' has been established, the next step is to identify the key internal business partners with whom to collaborate and invite to form the project team or governance committee.

Functional groups that may need to collaborate with the privacy compliance project group can include:

- Law and/or Compliance departments
- Audit
- Risk Management
- Call Centres
- Shared Services
- IT Security
- IT Architecture
- Marketing/Sales
- Records Management
- Procurement
- Supply Chain
- Human Resources

Phase 2 of 5: Diagnose

At this time assessment/diagnostic tools or surveys should be deployed to determine the current against the future state of privacy compliance. The data generated in this way will allow organisations to conduct a high-level gaps analysis. This analysis will provide a series of recommendations that will, in turn, feed in into the program of work and a roadmap of next steps that takes into account various risk factors.

Phase 3 of 5: Design

Right now there will be sufficient information with which to prepare a detailed implementation roadmap including key activities, stakeholders, deadlines, sub-projects/deliverables, operational metrics and, of course, resourcing needs and costs estimates. Organisations also need to gain any necessary formal approvals to commit to implementing their future state solution. The best advice is: 'Build privacy in: make it the default setting for your customer interactions!'

Phase 4 of 5: Deliver

From here, it's all about the execution and the vigorous management of the project plan designed in earlier phases. Milestones must be met on time, project scope must be maintained and any deviation from scope must go through rigorous vetting.

Phase 5 of 5: Sustain

Committing to a scheduled, programmatic approach to testing and assurance is the most important thing during this phase. Operational metrics should be used to ensure the compliance framework operates as intended. Partnering with the audit and assurance areas to develop a cross-functional audit strategy is also a good idea, as is ensuring that non-compliance issues identified from both the audit testing and real-life operations loop back into the compliance framework to continuously improve it or make necessary operational changes.

Click here to download a template for the design of APP compliance programs

John Pane has written this article on behalf of the Australian Corporate Lawyers Association (ACLA), the peak national association representing the interests of in-house lawyers. Mr Pane is a privacy, compliance and risk management professional employed by Johnson and Johnson, where he is Regional Lead – Privacy and Data Protection AsPAC. He is a founding and current Board Director and Past President of International Association of Privacy Professionals – ANZ.

UPDATE

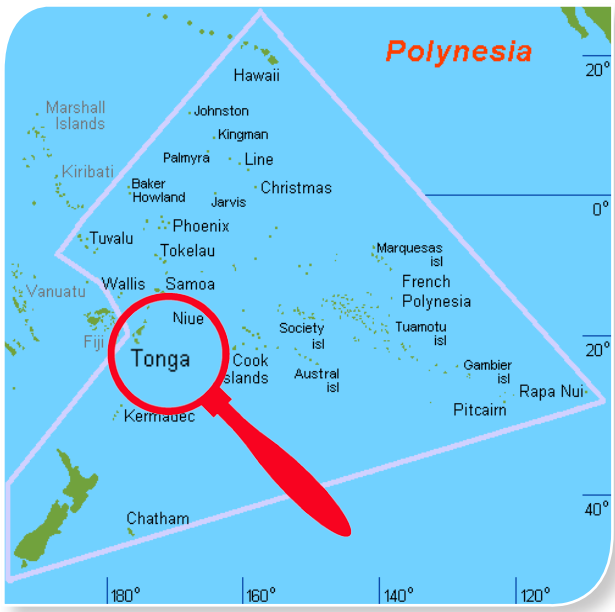
LexisNexis Pacific Rule of Law Project

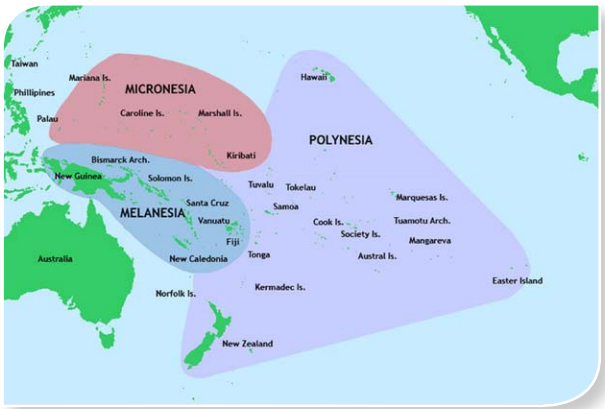
The June issue of *Advancing Together* introduced the LexisNexis Pacific Rule of Law Project, which aims to foster the Rule of Law throughout the Pacific Islands by providing primarily legal materials to legal agencies, free of charge.

Since then, the Ministry of Justice in Tonga (which encompasses the judiciary and staff of the Tongan Supreme Court) has signed up for one year's gratis online access to case law and legislation from the UK, New Zealand and Australian jurisdictions provided by LexisNexis.

'Securing the involvement of the Tongan Ministry of Justice is an important milestone in the life of our project,' said Brett Watson, LexisNexis Rule of Law Staff Ambassador. 'We hope that the Ministry will be the first of many other legal agencies across the Pacific to become involved.'

The Project Team will be continuing to seek the involvement of Pacific legal agencies throughout 2014.





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