



# Newsletter

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If you would like to join CALC, use our [online registration form](#).



Sir Thomas Erskine May, KCB, “Parliamentary Practice” (5 May 1871) *Vanity Fair* 176

## CALC President's Report—December 2017



President  
Commonwealth Association of Legislative Counsel



### Introduction

It has been an eventful few months since my last report to members in July.

Some of our colleagues in the Caribbean suffered greatly as a result of hurricanes Irma and Brian. I was able to contact some of our members on the affected islands directly after the hurricanes and our Council member for the Caribbean, Michelle Daley, was able to keep me updated on the continuing effects of the hurricanes as she fortunately had personal contact details for members of drafting offices when government sites were unavailable. I was able to hear more from members directly when I visited the Bahamas in October. It will take a considerable amount of time for the islands to recover and our good wishes go to all our members who were affected and their families.



### Conferences and other drafting related events

The Commonwealth Lawyers Association has not yet formally confirmed the venue for its next conference, so we cannot announce the venue for the CALC Conference in 2019. I understand that an announcement may be made by the CLA at the end of the month. I have been assured that the venue will be somewhere vibrant and exciting! The Council is currently considering themes for the CALC Conference and if members have any suggestions for themes these would, of course, be very welcome.

Council Members have been involved in the organisation of a range of drafting conferences and colloquia over the past few months.

Pacific Island drafters met in Tonga from 23 – 25th August to discuss drafting developments and priorities in the region. Nola Fassau (Council Member – Pacific Region) has provided a report on the meeting for members.

Dr Johnson Okoth Okello (Council Member – African Region) was involved in the organisation of the African Colloquium of Legal Counsel Serving in Parliaments which took place in Uganda from 30th October – 3rd November. 140 participants from 15 countries attended the colloquium which covered a range of topics including the separation of powers and the role of legislative counsel in pre-legislative scrutiny. Estelle Appiah presented a paper on pre-legislative scrutiny on behalf of CALC.

The Australasian Parliamentary Counsel’s Committee in association with CALC (Pacific Region) will be holding a drafting conference in Canberra from 4 to 6 April 2018. Pacific Region CALC members have been notified by email about the conference and about the closing date for proposals for papers (27 October 2017), and emailed about registrations and related information.

## Commonwealth Secretariat activities



The Commonwealth

Members' Area



CHOGM 2018

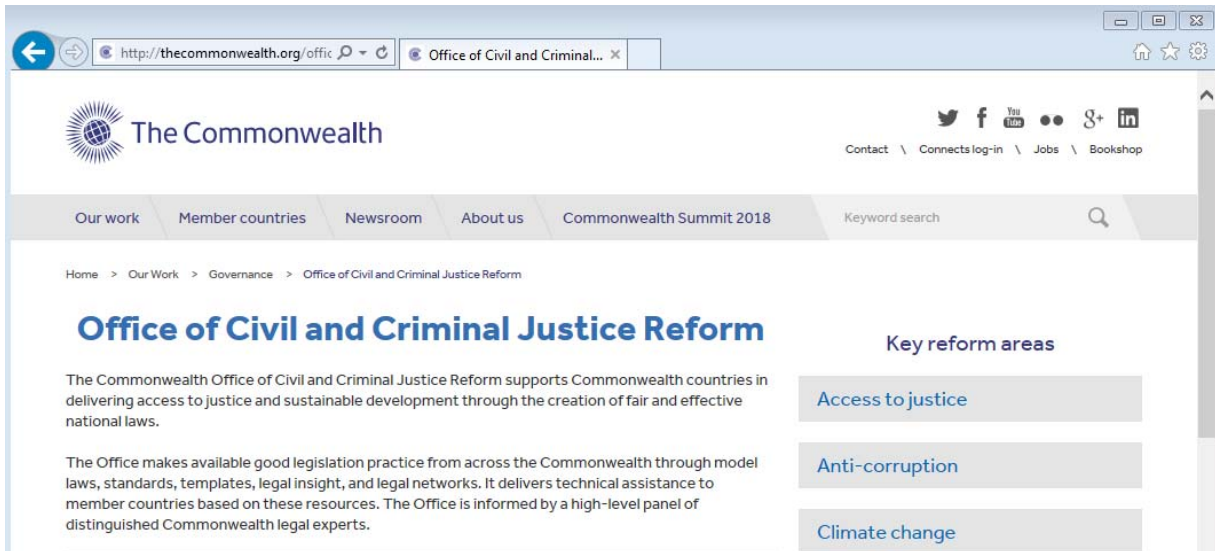
Adrian Hogarth (Council Member –Europe) and I liaise with the Secretariat on a regular basis and greatly appreciate the Secretariat’s support for CALC’s activities.

I attended (at my own expense, I hasten to add!) [the meeting of Commonwealth Law Ministers in Nassau](#) from 16th to 19th October as an accredited observer. I was very grateful for the opportunity the Secretariat gave me to attend on behalf of CALC and present a paper to Ministers and Law Officers on the work carried out by CALC and how that might help further the Secretariat’s aim of protecting and enhancing the rule of law.

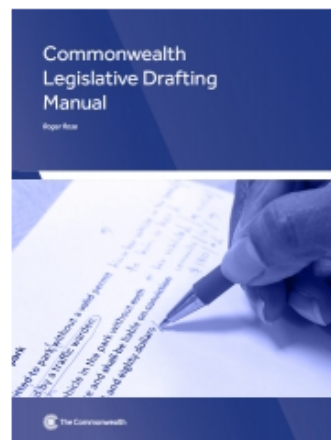


There were a number of items of particular interest to CALC members.

The Commonwealth Secretariat has established a new unit, [The Commonwealth Office of Civil and Criminal Justice Reform](#), to support Commonwealth countries in delivering access to justice and sustainable development through the creation of fair and effective laws. The Office aims to make good legislative practice (among other things) more accessible across the Commonwealth. Though it is still being developed, the [website](#) for the Office looks impressive and should be a very useful resource for all our members. I hope to liaise with the Secretariat over the coming months to see if CALC can offer the Secretariat any support or assistance.



The Secretariat has also been examining the viability of producing a common drafting software tool for smaller jurisdictions. This was discussed at a side event and the Secretariat officials said they would keep us informed of developments. A new publication, [Changing the Law: A Practical Guide to Law Reform](#), was launched at the same event. This will be a very useful publication for anyone involved in law reform. CALC has assisted the Secretariat with the production of a [Commonwealth Legislative Drafting Manual](#). We hope that this will be finalised soon, and the OCCJR website currently gives details of it, and its contents, as it is to be formally published.





Baroness Scotland of Asthal PC QC, Secretary-General of the Commonwealth of Nations

While in Nassau, I was able to spend a productive morning with drafters in the Office of the Attorney General. Ms Tina Demeritte-Roye (Deputy Law Reform Commissioner) and Ms Danya Wallace (Deputy Director of Legal Affairs) kindly invited me to meet with them and the Attorney General for the Bahamas (Senator Carl Bethel QC) in their offices in downtown Nassau. I also visited the Parliament and the Supreme Court.



Senator Carl Bethel QC, Attorney General for the Bahamas

## Other news: Guidance on Instructing—Common Legislative Solutions

A team of legislative counsel from the four UK jurisdictions, led by Luke Norbury, produced a guide to help officials to develop policy and produce instructions for bills, and to assist legislative drafters. The guide is at the CALC website [Drafting manuals page](#), and the group would welcome feedback from CALC members. I am very pleased that the work done by the team was shortlisted for the 2017 UK Civil Service Awards (Collaboration Award) and was runner up in the final award ceremony held in London on 23rd November.



# A Brilliant Civil Service

## The Nominees



Common Legislative Solutions,  
The Office of the Parliamentary  
Counsel, The Parliamentary  
Counsel Office (Scotland)  
The Office for the Welsh Legislative  
Counsel  
The Office of the  
Legislative Counsel (Northern  
Ireland)

Justin Leslie (London), Luke Norbury (Belfast), James George (Cardiff), Gavin Sellar (Edinburgh)

A group of legislative drafters has developed an innovative system to help formulate policy for new legislation. Despite the effort that goes into Bill work, surprisingly little is done to apply lessons learned from previous projects. The group sought to change this by analysing data to identify the most commonly repeated provisions in legislation. They then produced tools to help policymakers and lawyers find common legislative solutions. Combining legislative expertise from the UK's four jurisdictions, these tools are a guide to developing policy for eight of the most commonly recurring problems solved by legislation, with more to follow. The aim is to make policy-making more efficient and law-making more consistent.



Nominees at the Awards ceremony: Luke Norbury (Belfast), Richard Heaton CB (Awards Judge, MoJ Permanent Secretary), Justin Leslie (London), and James George (Cardiff). (Gavin Sellar (Edinburgh), couldn't make it as his wife is about to give birth.)

### **Other news: CALC services for drafting advice and office organisation**

Eamonn Moran QC and Dr Duncan Berry prepared a paper for CALC proposing ways in which CALC could provide assistance to smaller jurisdictions. The CALC Council agreed to proceed with two recommendations: to establish a service to provide online drafting advice and a service to provide advice on the establishment and organisation of drafting offices. Council proceeded with both services for a trial period (28<sup>th</sup> March 2016 to 27<sup>th</sup> March 2017). We now wish to review these services and will send a questionnaire to all members seeking their views on the usefulness of these services and whether they should be continued. Members will be interested to know that

Eamonn Moran QC, a former President of CALC, has been appointed as Inspector, Victorian Inspectorate (under the Victorian Inspectorate Act 2011 (Vict)). Eamonn is only the second person to hold the post and we wish him well in his new and important oversight role.

Many thanks to Ross Carter for producing this *CALC Newsletter* and to all who contributed articles.

Happy reading!



**Brenda King**

CALC President, December 2017

## Pacific Legislative Drafters' Technical Forum, Tonga, 23–25 August 2017

The Government of Tonga, through the Attorney General's Office, with support from the Australian Attorney-General's Department and the Pacific Islands Forum Secretariat, convened a 2017 Meeting of the Pacific Legislative Drafters' Technical Forum in Nuku'alofa, Tonga, from 23 – 25 August 2017. A CALC Council member (and regional representative for the Pacific region) was involved in the arrangements for the Forum, namely Nola Faasau (Legal Drafting Officer, Pacific Islands Forum Secretariat, Fiji).

Speakers at the Drafters' Forum included Telei'ai Dr. Lalotoa Mulitalo of Samoa. Dr Mulitalo's new book [Legislative Drafting in the Pacific Context](#) was launched at the University of Queensland's TC Beirne School of Law, in Queensland, Australia, on 14 July 2017.



Nola Faasau (Council Member – Pacific Region) has provided, for CALC members, this report:

Pacific Island drafters from 15 Pacific Islands met in Tonga from 23 – 25 August to discuss drafting developments and priorities for advancing drafting capacities in the region. The event also provided a training opportunity for drafters to sharpen their skills on using model laws/provisions to draft national legislation (a common drafting practice in the region). Policy officials from the Tonga Government also attended the training and contributed to interactive discussions and awareness on policy and drafting issues relating to adoption of model legislative tools.

Drafting experts from the Australian Commonwealth OPC, Australian Capital Territory PCO, and New Zealand PCO were invaluable contributors to the meeting. The Commonwealth Secretariat also attended as an observer, having been the convener of this initiative 10 years ago in pursuance of a mandate by Commonwealth Law Ministers for the development of solutions to alleviate the



problem of legislative drafting capacity constraints within small island Commonwealth countries in the Pacific. The Commonwealth Secretariat continues to be a key supporter of the network.

To advance drafting capacities, the network is moving towards elevating the stature of the network as well as exploring opportunities for stand-alone legislative drafting offices (of the 15 Pacific Islands, only Papua New Guinea has a stand-alone statutory office). The latter issue alone reflects the unique challenges faced in professionalising legislative drafting in this developing region.

The Tonga Attorney General's Office did a marvellous job of hosting. Some photos from the event are [below]. The Cook Islands Crown Law Office and Vanuatu State Law Office have expressed interest in hosting the next meetings (2018 and 2019), but these are yet to be confirmed.



## Items of interest

### ***New Zealand: Declarations of inconsistency (of legislation with rights in NZBoRA 1990) – NZSC appeal in case of Taylor***



Arthur Taylor (left) during the prisoners' voting case in the High Court at Auckland Photo: RNZ / Kim Baker-Wilson

On 26 May 2017, a full court (5-Judge bench) of New Zealand's Court of Appeal dismissed the Attorney-General's appeal against the High Court's (Justice Heath's) 24 July 2015 decision to make the following declaration of inconsistency (DoI) about the prisoner voting ban law:

“Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s 5 of that Act.”

On 30 August 2017, the New Zealand Supreme Court (William Young, O'Regan and Ellen France JJ) granted the Attorney-General and Arthur William Taylor leave to appeal: [2017] NZSC 131. The approved questions are whether:

- (i) The Court of Appeal was correct to make a declaration of inconsistency (DoI); and
- (ii) Mr Taylor has standing (the NZCA held he did not).

The NZSC was scheduled to hear the appeal on 21 and 22 November 2017, and granted intervener status to the New Zealand Human Rights Commission. However, on 16 November 2017, the NZSC indicated the hearing of the appeal has been adjourned until 2018.

## **Correct approach to "context qualification" to a term's defined meaning**

In [\*Affco New Zealand Limited v New Zealand Meat Workers and Related Trades Union Inc and Others\* \[2017\] NZSC 135 \(7 September 2017\)](#) – the NZSC discussed when a term does not have the meaning given in an express legislative definition of that term because of an express qualification (that applies to the express definition) “unless the context otherwise requires” (which, for ease of reference, the NZSC calls the “context qualification”).

The case is about meat workers who work, seasonally, at meat works (meat slaughtering and processing plants). These meat workers are laid off between seasons and, in the interim between seasons, free to work for other employers (assuming other employment is available). If these meat workers are “employees” for the Employment Relations Act 2000 s 82(1)(b), the parties accepted that there was an unlawful lockout. (AFFCO had accepted that the lockout did not relate to bargaining for a collective agreement that would bind each of the workers and, in any event, AFFCO had not given the workers the required notice – these are requirements under the Employment Relations Act 2000 ss 83(b)(i) and 86B.)

Arnold J at [6] and [7] explained the matter as follows:

The Court of Appeal disagreed with the Employment Court’s primary reasoning that the workers were employees within the meaning of s 6, but nevertheless upheld the result it reached. The Court did so on the basis that the word “employees” was used in s 82(1)(b) in a broader sense than the definition in s 6, which is expressly subject to the qualification “unless the context otherwise requires” (for ease of reference, we will refer to these words as the “context qualification”).

We have concluded that the Court of Appeal’s analysis is correct. We do not agree with the Employment Court that the workers were “employees” in terms of s 6 at the relevant time. However, we consider that the term “employees” in s 82(1)(b) has a broader meaning than the definition in s 6 and covers the workers at issue. The result is that we agree with both Courts below that AFFCO locked the workers out unlawfully.

The NZSC concluded the meat workers did not fall within the Employment Relations Act 2000 s 6(1)(b) definition of “employee”.

This is because the relevant collective agreement contemplated discontinuous employment (as confirmed by earlier case law) and because the workers were not “persons intending to work” (as defined in the Employment Relations Act 2000 s 6(1)(b)(ii)) because it is “something of a stretch to describe a person who has left his or her name with AFFCO at the end of the season [as] ‘a person who has been offered, and accepted, work as an employee’.”

The NZSC rejected a challenge by Affco to the NZCA’s view that that the term “employees” in s 82(1)(b) has, because of the context qualification, a broader meaning than the definition in s 6 and covers the workers at issue.

Arnold J at [58] to [63] discusses the leading case on context qualifications – *Police v Thompson* [1966] NZLR 813 (CA). There the NZCA agreed with the NZHC in holding that a bottle store was not a “bar” as defined in s 259(7) of the Sale of Liquor Act 1962. Arnold J at [62] and [63] says:

To summarise, all members of the Court [of Appeal in *Police v Thompson*] agreed that, where a word or phrase is defined in a statute, there is a high threshold to be crossed before a court will conclude that the definition was not intended to apply to the word or phrase in a particular provision in the statute. However, it is not clear whether the members of the Court agreed on what constituted relevant context. North P seemed to focus on the language of the particular provision under consideration, as did McCarthy J, whereas Turner J was prepared to give “context” a broader meaning, so as to include legislative history and policy considerations (including the consequences of particular interpretations)... It may be that the different articulations of the test do not reflect significant differences in approach as a practical matter, however. Although North P referred to the language of s 259(7) as being the key contextual consideration, he also gave prominence to policy considerations as follows:<sup>70</sup>

Approaching the appeal in this way, in my opinion it is manifest that there is no difficulty in fitting the defined meaning of the word “bar” into s. 259(7) *and indeed, in my opinion, there are cogent reasons why the Legislature should be concerned to keep minors away from that part of premises where liquor is sold.*

Moreover, the approach to interpretation mandated by the Interpretation Act 1999 (s 5(1) in particular)<sup>71</sup> needs to be borne in mind in this context, as in others.

<sup>70</sup> At 818 (emphasis added).

<sup>71</sup> Section 5(1) of the Interpretation Act 1999 provides: “[t]he meaning of an enactment must be ascertained from its text and in light of its purpose”.

Arnold J at [64] and [65] also refers to *Barr v Police* [2009] NZSC 109, [2010] 2 NZLR 1 at [11] (where Wilson J held the relevant context not compelling enough to displace the Land Transport Act 1998 s 2(1) “stipulative” (narrowing) statutory definition of “blood test”), and summarises the approach that the NZSC considers to be correct:

[64] In *Barr v Police*, Wilson J, delivering the judgment of this Court, cited with approval the following statement from the then current version of *Burrows and Carter Statute Law in New Zealand* (citing *Thompson*):<sup>72</sup>

A statutory definition is only displaced where there are strong indications to the contrary in the context. That is particularly so where the definition is the stipulative kind that extends the meaning of the word.

Wilson J went on to say:<sup>73</sup>

Such indications as there are in the present context, however widely the context is understood, cannot be said to point strongly to giving the plain words other than their ordinary meaning. The definition is, in a sense, “stipulative” in nature because it restricts the meaning of the word “test” to a meaning that is not its usual meaning of subjecting blood to examination.

[65] Summarising what we consider to be the correct approach, where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court’s consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing interpretations against the statute’s purpose, against any other policy considerations reflected in the legislation and against the legislative history, where they are capable of providing assistance. While we accept Mr Jagose’s point that the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained.

72 *Barr v Police* [2009] NZSC 109, [2010] 2 NZLR 1 at [11]. The quoted extract appears in the current version of Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 439. See also the discussion at 438–441.

73 At [11].



## ***European Union (Withdrawal) Bill***

The [European Union \(Withdrawal\) Bill \(Bill 005, 2017–19\)](#) was introduced (presented and read a first time) in the House of Commons on 13 July 2017.

The Bill would repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU.

The Bill's contents are, in outline, as follows:

- provisions on retention (savings and incorporation) of existing EU law; and
- provisions on main (instrument-making) powers in connection with withdrawal; and
- provisions on devolution; and
- provisions on financial and other matters (eg, publication and rules of evidence); and
- general and final provisions; and
- 9 Schedules (Further provision about exceptions to savings and incorporation, Corresponding powers involving devolved authorities, Further amendments of devolution legislation, Powers in connection with fees and charges, Publication and rules of evidence, Instruments which are exempt EU instruments, Regulations, Consequential, transitional, transitory and saving provision, and Additional repeals).

The Bill passed Second Reading in the House of Commons on 11 September 2017.

MPs considered the Bill in a Committee of the whole House on Tuesday 21 November 2017 (Day 3) and progress was reported. MPs considered the Bill in a Committee of the whole House on Wednesday 13 December 2017 (Day 7) and further progress was reported. A number of Government MPs backed an amendment by the former Attorney General, Dominic Grieve QC, to enshrine in law Parliament's right to a meaningful vote on the Brexit deal. The amendment was agreed by a narrow margin: 309 votes to 305 votes. The conclusion of consideration in Committee will take place on Wednesday 20 December (Day 8).

## ***Lords Select Committee on Constitution: Report on Legislative Process***

This report, published 25 October 2017, includes discussion of policy development, consultation and pre-legislative scrutiny, and the quality of legislation (including clear drafting, UK OPC and external counsel, and legislative standards).

Related website link:

<https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/2702.htm>

## ***New Zealand: change of Executive Government after party negotiations***

A general parliamentary election was held in September (polling day was 23 September) 2017. Later negotiations between parties culminated in announcements on 19 October 2017 of a new Executive Government. The new Government involves a coalition between the New Zealand Labour Party and the New Zealand First Party, plus a confidence and supply arrangement with the Green Party. All 3 parties have Ministers in or outside the Cabinet. Details of the Ministerial List announced by the Prime Minister-elect, Rt Hon Jacinda Ardern, on 25 October 2017 are at <https://www.dPMC.govt.nz/our-business-units/cabinet-office/ministers-and-their-portfolios/ministerial-list>.

During the election campaign, the New Zealand Labour Party proposed, if elected to Government, “taking action in our first 100 days”: <http://www.labour.org.nz/100days>. Policy change commitments can be seen in the Coalition Agreement at <https://assets.documentcloud.org/documents/4116110/Labour-and-New-Zealand-First-Coalition-Agreement.pdf> and in the Confidence and Supply Agreement at <https://assets.documentcloud.org/documents/4116111/Labour-and-Green-Party-Confidence-and-Supply.pdf>.

New Zealand’s 52<sup>nd</sup> Parliament had its commission opening on 7 November 2017 and its State Opening on 8 November 2017. The new Government’s first 100 days end in February 2018. Government business expected in the sitting week starting on 28 November 2017 included the third readings of the Parental Leave and Employment Protection Amendment Bill, and the Healthy Homes Guarantee Bill (No 2). [December Postscript: a Families Package (Income Tax and Benefits) Bill was, under urgency, passed through all stages on 14 (calendar 14 and 15) December 2017.]



**OPENING OF THE 52ND PARLIAMENT**

**Commission Opening**  
Tuesday 7 November  
11.00 am

▶ Tune in to Parliament TV  
📻 Listen on Radio New Zealand

**State Opening**  
Wednesday 8 November  
10.30 am

▶ Watch in person at Parliament  
▶ Tune in to Parliament TV  
📻 Listen on Radio New Zealand

## ***New Zealand: Plain English award winning revision Act***

Congratulations to the NZ PCO team who on 23 November 2017 won "Best Plain English Legal Document" at the New Zealand Plain English Awards – for the first revision Act under the Legislation Act 2012: the [Contract and Commercial Law Act 2017](#).

This is very well-deserved recognition for all the hard work and skills of the NZ PCO team (including Scott Murray, Amy Orr, Cassie Nicholson, Juliet Price, Julia Agar, Reuben Holcroft, Marion Edmond) in collaboration of the MBIE team (of Susan Hall and Erika Rawlings-Black).

Feedback from the judging panel was—

"PCO did a great job of combining multiple Acts that were a confusing hodgepodge of legislation into a single intelligible Act.

"A clear understanding of the audience and consultation with these groups made the project stronger. The explanations in the legislation were particularly helpful.

"The revised Act is a great step forward in New Zealand for plain English legislation. And the intended audience has a much clearer picture of contractual law in New Zealand."



Here they are, our 2017 winners and finalists.

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## **Best Plain English Legal Document**

*Winner: Parliamentary Counsel Office — Contract and Commercial Law Act 2017*

*Finalist: Cavell Leitch — Property Sharing Agreement*

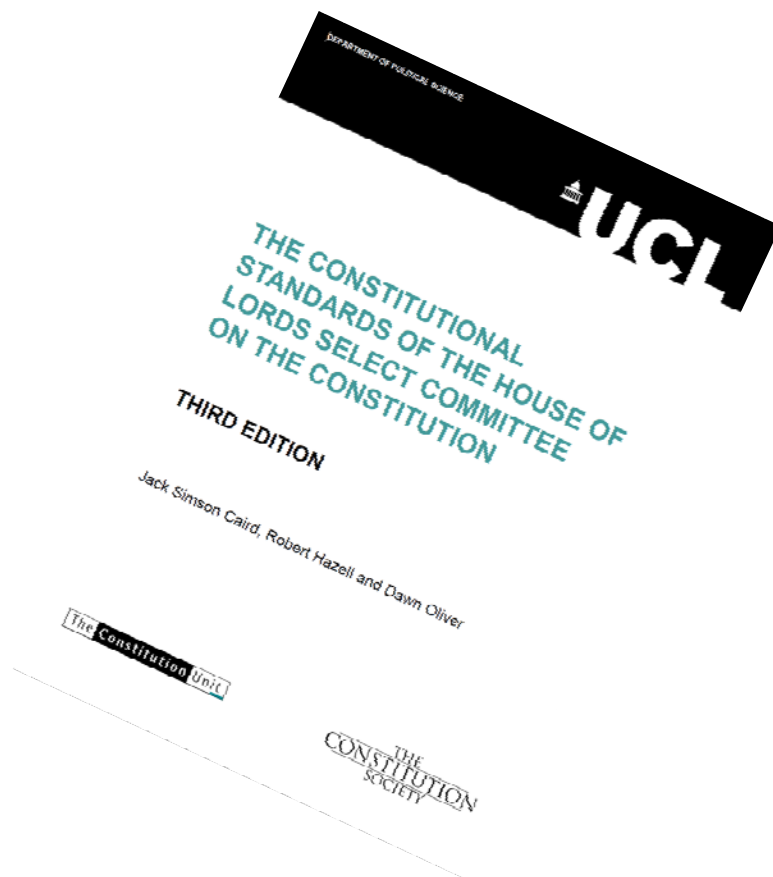


## **UK: Constitutional Standards of HL Constitution Committee**

The Constitution Unit (School of Public Policy, University College London) published in November 2017 a third edition of its report on [The Constitutional Standards of the House of Lords Select Committee on the Constitution](#).

The report contains a code of constitutional standards based on almost 200 reports from the HL Constitution Committee, published between its creation in 2001 and the end of the last (2016–17) parliamentary session.

The standards provide detailed guidance on the application of constitutional principles to legislative proposals, and cover a range of subjects, including the rule of law, delegated legislation, the separation of powers and individual rights.



See also R. Hazell and D. Oliver, 'The Constitutional Standards of the Constitution Committee: How a Code of Constitutional Standards Can Help Strengthen Parliamentary Scrutiny', U.K. Const. L. Blog (22nd Nov. 2017) (available at <https://ukconstitutionallaw.org/>)

## ***Australia: Historic euthanasia laws pass Victorian upper house***



“Voluntary euthanasia is set to become legal in the state of Victoria in Australia after historic laws passed the upper house, despite ferocious opposition from conservative MPs.

The bill passed the upper house with 22 votes to 18, after a marathon 28-hour sitting that began on Tuesday afternoon and ended on Wednesday afternoon.

There were emotional scenes in the upper house as MPs, who had debated the bill all night, wept in their seats or got up to embrace their colleagues. . .

Although the bill has already passed the lower house with a strong majority, it must go back in its amended form for a final vote.

The bill will give terminally-ill Victorians in intolerable pain and with less than six months to live the right to ask to end their lives. That timeframe will be extended to 12 months for people with neurodegenerative diseases such as Motor Neurone Disease.

It will take 18 months for voluntary euthanasia to be introduced in Victoria.

Both government and opposition MPs were granted a conscience vote on the bill, freeing them from being bound by party lines.

The bill was debated by both houses of Parliament for about 100 hours. . . .

This week's sitting began on Tuesday afternoon and ran almost continuously through to Parliament's adjournment on Wednesday.

Victoria will become the first state in Australia to allow people to end their lives through the voluntary euthanasia scheme.

The Australian Medical Association said the passing of the legislation marked a significant shift in medical practice in Victoria."

Extract from Benjamin Preiss, state politics reporter, "Historic euthanasia laws pass Victorian upper house", *The Age*, Victoria, November 22, 2017:

<http://www.theage.com.au/victoria/historic-euthanasia-laws-pass-victorian-upper-house-20171121-gzqc8n.html>



Postscript: New Zealand Parliament: A member's Bill in the name of David Seymour, the End of Life Choice Bill, was on 13 December 2017 read a first time, and referred to the Justice Committee, to be reported back to the House of Representatives by 13 September 2018.

In the 51<sup>st</sup> Parliament, the Health Committee inquired into public attitudes to new legislation that would permit medically-assisted dying in the event of a terminal illness or an irreversible condition that makes life unbearable. The Committee's report was presented on 2 August 2017.

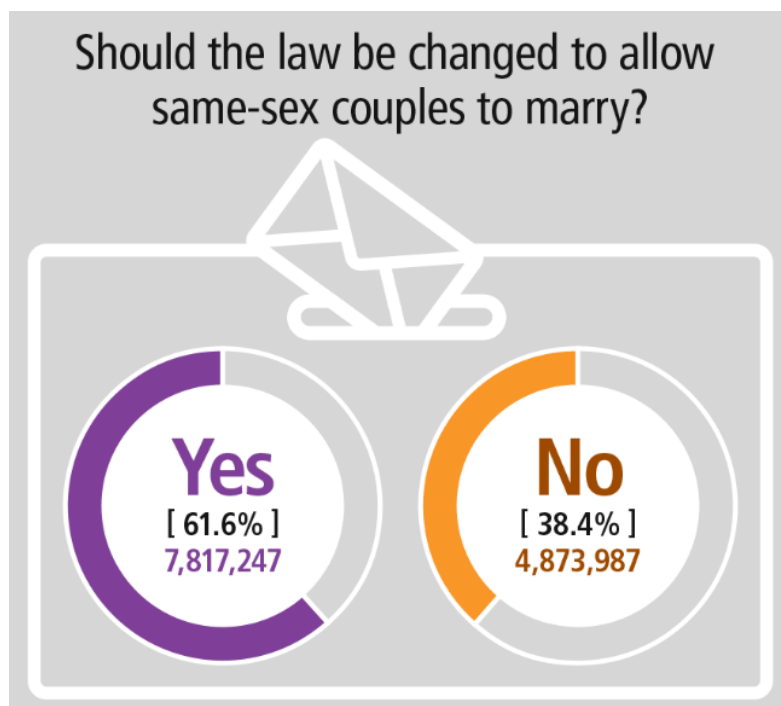
## **Australia: Australian Marriage Law Postal Survey**

On 9 August 2017, the Treasurer, under the Census and Statistics Act 1905 (Aust), directed the Australian Statistician to collect and publish statistical information from all eligible Australians on the Commonwealth Electoral Roll, about their views on whether or not the law should be changed to allow same-sex couples to marry.

The voluntary survey asked one question: should the law be changed to allow same-sex couples to marry? Respondents were asked to mark one box – Yes or No – on the survey form.

A special law was passed to apply electoral law safeguards to the survey, such as authorisation requirements for campaign materials. The campaign also featured 2 unsuccessful High Court challenges against the expenditure of \$122m for the survey.

Survey materials were mailed to eligible Australians on the Commonwealth Electoral Roll as at 24 August 2017. A range of strategies were implemented to assist all eligible Australians who wished to complete the survey to do so. A survey response was received from 12,727,920 (79.5%) eligible Australians. The full results are at <https://marriagesurvey.abs.gov.au/results/>.



For further discussion, see David Marr in *The Guardian*: <https://www.theguardian.com/australia-news/2017/nov/15/australia-says-yes-to-same-sex-marriage-in-historic-postal-survey>

The republic of Ireland held referendums on 22 May 2015 on 2 proposed amendments to the Constitution of Ireland. One related to same-sex marriage. 60.52% of registered voters voted. 62.07% of votes cast approved adding to the Constitution of Ireland that "marriage may be contracted in accordance with law by two persons without distinction as to their sex".

## Postscript: Australia: Same-sex marriage legislation

Legislation to allow same-sex marriage, the Marriage Amendment (Definition and Religious Freedoms) Act 2017, passed the Australian Parliament on 7 December 2017. The Act received Royal assent, from the Governor-General, on 8 December 2017.

The new law came into effect on 9 December, immediately recognising overseas same-sex marriages. The first weddings under Australian law were held on 16 December 2017.



### Marriage Amendment (Definition and Religious Freedoms) Act 2017

No. 129, 2017

An Act to amend the law relating to the definition of marriage and protect religious freedoms, and for related purposes



Australian Marriage Equality

8 July

BREAKING TODAY: Liberal Senator Dean Smith has been drafting a private members' bill to allow any two people to marry. Here is some of what he had to say...

#### Marriage equality

### Australia's first same-sex marriages take place under special dispensation

Wedding bells have rung for some same-sex couples this weekend, after they were allowed to get married without the 30-day waiting period



Amy Laker and Lauren Price, the first gay couple to be legally married in Australia, at their wedding in Sydney on Saturday. Photograph: Caroline McCredie/Getty Images



## ***New Zealand: Prospective overruling overruled***

In *Chief Executive of The Department of Corrections v Shane Aaron Gardiner* [2017] NZCA 608, the Court of Appeal dismissed an appeal by the Attorney-General against 2 decisions of the High Court about liability for false imprisonment, and the quantum of damages for that tort.

The appeal against liability was based on an argument that the New Zealand Supreme Court decision which made clear the detention was unlawful was a decision that court intended to have only prospective effect. (The full background is set out in “New Zealand: Prospective overruling – more on *Marino v R* – Sentence calculation – deductions for pre-sentence detention” in the February 2017 edition of the *CALC Newsletter* at pages 30–33.)

Reviewing 2 leading authorities on “overruling without retrospective effect” at [11]–[19], Miller J for the Court of Appeal said (at [19]) that “the position in New Zealand is that prospective-only overruling remains an open question that will require an answer only if a court has reason to think that retrospective overruling will change settled expectations and cause hardship to such an unusual extent that departure from normal practice might be justified”.

Miller J continued as follows at [20]–[25]: the Chief Executive . . . submitted that this Court may find the Supreme Court’s judgment non-retrospective because that Court was itself silent on the matter. It would be just to so decide, for *Taylor* settled the law, this Court and the High Court having followed it unquestioningly on a number of occasions since 2003. It was plainly reasonable for the Chief Executive to rely upon *Taylor* and he did so in good faith when calculating pre-sentence detention for hundreds of thousands of sentences. Great harm would be done by giving the judgment retrospective effect, because it might expose the Chief Executive to liability to thousands of prisoners whose pre-sentence detention was calculated following *Taylor*. Counsel was prepared to accept that it would be proper to give the judgment partial retrospective effect by applying it to Messrs Booth and Marino, since they succeeded in getting the law changed. . . .

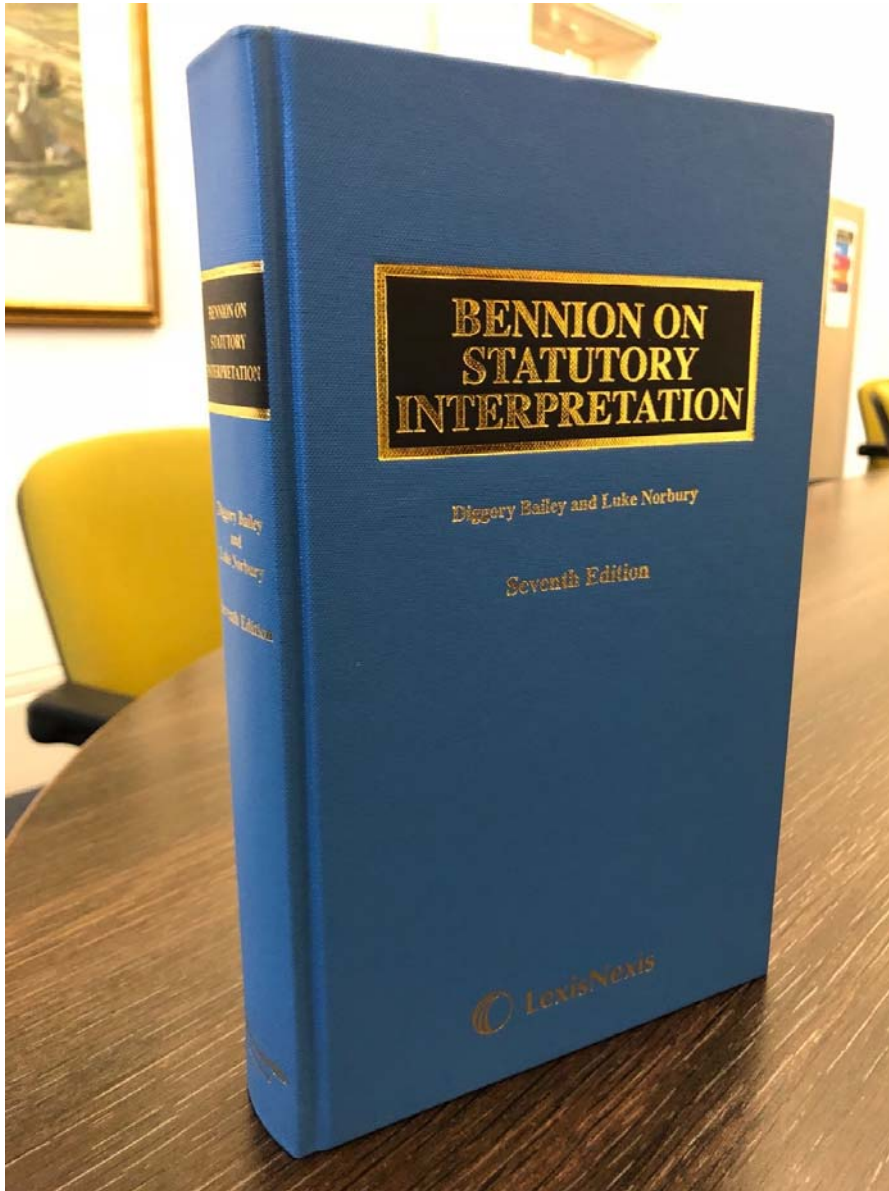
Simon France J rejected these arguments . . . . We respectfully adopt Simon France J’s reasoning. We find the judgment unmistakably retrospective in effect. . . . We find untenable [the] alternative argument that the judgment was partially retrospective, applying to Messrs Booth and Marino alone. Had the Court meant to limit the retrospective effect of its judgment in that way it must have said so. It could not remain silent on so particular a distinction or fail to discuss the policy considerations that must inform it. . . .

The Chief Executive’s sense of grievance is understandable. He had to follow *Taylor*. But good faith is no defence to the tort, he is liable not personally but in his capacity as an agent of the State, unlawful detention is prima facie unfair to the individual detainee, and these propositions would seem to hold however many few or many affected prisoners there may be. . . .

We conclude that the Supreme Court judgment is retrospective in effect and no question arises of giving it effect for the future only. Nor is this one of those exceptional cases in which that course of action might deserve serious consideration.”

***Postscript: new edition of Bennion on Statutory Interpretation***

Congratulations to CALC members Diggery Bailey (UK OPC, London) and Luke Norbury (OLC of NI, Belfast) on completing the Seventh Edition, published December 2017, of this famous work:



(Reading and reviewing this new edition is a possible New Year's resolution for 2018!)

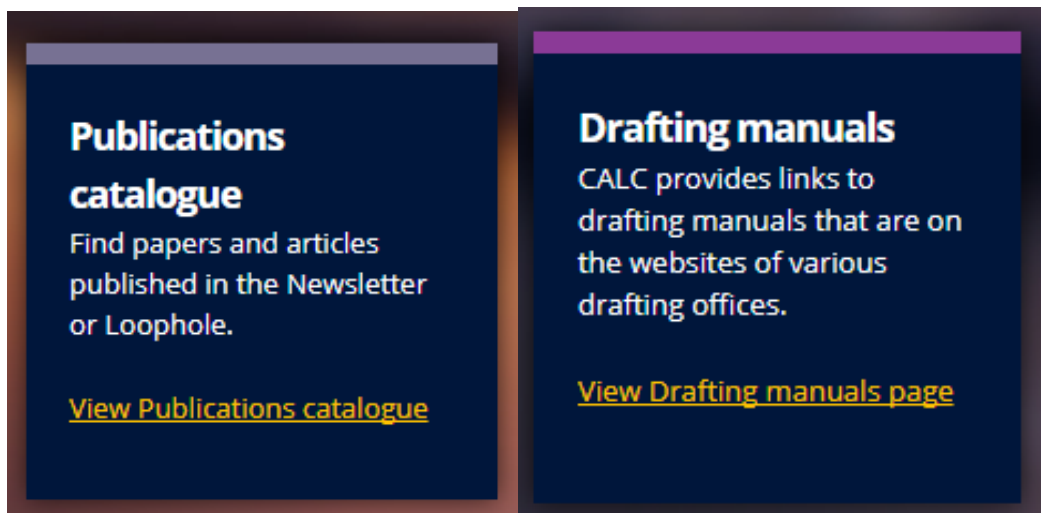
## **CALC website: Publications catalogue and Drafting manuals pages**

Recent changes to CALC's website include the following:

- removal of a duplicate list of some published articles and papers from, and renaming of, the [Publications catalogue page](#):
- adding of links to the [Drafting manuals page](#).

The [Drafting manuals page](#) now includes the guide document *Guidance on instructing: common legislative solutions* that is mentioned in the CALC President's report in this edition.

If you have information about other drafting manuals, links to which could be added to the Drafting Manuals page, please send details to [webmaster@calc.ngo](mailto:webmaster@calc.ngo) or [ross.carter@pco.govt.nz](mailto:ross.carter@pco.govt.nz).





## New CALC members

### New members since July 2017

The following have been recorded as members of CALC (a) since the publication of the last edition of the *CALC Newsletter* (in July 2017), and (b) as at 19 December 2017.

Name	Country
<b>Tagivakatini, Mele Latu Lemaki</b>	Nauru
<b>Dew, David</b>	New Zealand
<b>Stoll-Davey, Camille</b>	Cayman Islands
<b>Bangarraju, B N S V S K</b>	India
<b>Humphreys, Richard</b>	Ireland
<b>Olu-Silas, rahila</b>	Nigeria
<b>Erwin, Sara</b>	United Kingdom
<b>Thompson, Laura</b>	United Kingdom
<b>Li, Heyang</b>	Australia
<b>Thomas, Amanda</b>	Australia
<b>Ali, Amena</b>	Canada
<b>McCarthy, Lisa</b>	Ireland
<b>Brockett, Annette</b>	Jamaica
<b>Kwan, Kerry</b>	Nauru
<b>Ikin, Frances</b>	New Zealand
<b>Hadaway, Shernell Shantel Subrina</b>	Saint Vincent and The Grenadines
<b>Baird, Daniel</b>	Australia
<b>Cox, Lamysa</b>	Bahamas
<b>Beniata, Raweita</b>	Kiribati
<b>Hashim, Noor Azlina</b>	Malaysia
<b>NGENI, SIPHIWO</b>	South Africa
<b>Kelly, Danielle</b>	New Zealand
<b>Fraser, Ben</b>	Australia
<b>Bwire Otoro, Mitchell</b>	Kenya
<b>Nyagetari, Moses</b>	Kenya
<b>Omoregie, Edoba</b>	Nigeria
<b>Sabo-Kelis, Lucy Minnie</b>	Papua New Guinea
<b>Joseph, Aneil</b>	Trinidad and Tobago
<b>Hamilton, Cathy</b>	Ireland
<b>Hunter, Anna</b>	Australia
<b>Kettle, Paul Jonathan</b>	Australia
<b>Nguyen, Thao Hoang Thao</b>	Australia

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Name	Country
Symmonett, Cherita A	Bahamas
Kelly, Jacqueline	Ireland
Komu, Samuel Kenya	Kenya
Muthugumi Chabari, Jeremy	Kenya
Toona, Sombe	Kenya
Rohamally, Arun	Mauritius
Burrows, Edward	United Kingdom
Connah, Jack	United Kingdom
Shah, Shuchi	United Kingdom
Wolchover, Joel	United Kingdom
Surage, Shellone	Saint Lucia
Cook, Emily	Australia
Dharmananda, Jacinta	Australia
Knights, Stefan	Belize
Emberson-Bain, 'Atu	Fiji
Ho, Wai Kwan Celia	Hong Kong
O'Reilly, Derek C	Ireland
Farajalla, Zachariah Paul Enoke	Sudan
Munday, Jenny	United Kingdom
Chevanev, Charles	Saint Vincent and The Grenadines
Omar, Barkhad Ali	Somalia
Dwyer, Rhiannon	Australia
Edwards, Elizabeth	Australia
Macleane, Howard	Australia
Pope, Lewis	Australia
Hauw, Gillian	Singapore
Kok, Stanley	Singapore
Nagpal, Parveen Kaur	Singapore

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## Secretary Contact Details

To contact CALC's Secretary, Ross Carter, about membership or any other CALC matters (for example, to suggest or send items for this *CALC Newsletter*), email: [ross.carter@pco.govt.nz](mailto:ross.carter@pco.govt.nz)



**REFORMATIVE LEGISLATION. NEW LEGISLATION.  
Much Needed Legislation. ADVANCED LEGISLATION.**

(Old New Zealand newspaper headlines — courtesy of [Papers Past](#))