# RESEARCH ROUND UP

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*This newsletter celebrates some of the research activity taking place in the School of Law, Northumbria University, focussing on published outputs, conference papers and other outward facing research related activities. This issue captures outputs from the start of October 2017 to end of January 2018.*

## Publications

**Ray Arthur** and Kathryn Hollingsworth
Book Chapter: '*R v JTB [2009] UKHL 20 [2009] 1 AC 1310'*
In Stalford, H., Hollingsworth, K., Gilmore, S. (eds.) *Children's Rights Judgments* (Hart, 2017) 420-430.

Abstract: This is a re-written judgment of the House of Lords decision in R v JTB. Funded by the AHRC, Children's Rights Judgments, is an exciting collaboration between over 60 experts from across the world in re-writing existing judgments adopting a children's rights approach**.** This re-written dissenting judgment is indicative of a specifically child's right approach. The re-written judgment contains a clear foregrounding of the child's experiences and the reality of daily life and an invitation to empathise with the child's feelings. The judgment reasons that the House of Lords judgments misrepresent the evidence we have regarding young people who offend and re-directs us towards a normative framework better equipped to accommodate the realities of childhood.

Yihdego, Zeray, **Rieu-Clarke, Alistair,** and Cascão, Ana Elisa, (eds),
Edited collection: The Grand Ethiopian Renaissance Dam and the Nile Basin – Implications for Transboundary Water Cooperation (Routledge 2018).

Abstract: The Grand Ethiopian Renaissance Dam (GERD) will not only be Africa's largest dam, but it is also considered essential for future cooperation and development in the Nile River Basin and East African region. This book, after setting out basin-level legal and policy successes and failures of managing and sharing Nile waters, articulates the opportunities and challenges surrounding the GERD through multiple disciplinary lenses. Besides his editorial role, Alistair contributed chapters entitled: 'A multi-disciplinary Analysis of the Risks and Opportunities of the Grand Ethiopian Renaissance Dam for Wider Cooperation in the Nile', and 'International Law Developments on the Sharing of Blue Nile Waters: a fairness perspective'.

**Natalie Wortley**
Article: 'Merely naughty or seriously wrong? 'Childish sexual experimentation' and the presumption of *doli incapax*' [2017] 81(5) J Crim L 346-349

Abstract: Discusses the case of *R v PF* [2017] EWCA Crim 983, in which the Court of Appeal reiterated that, where a defendant is prosecuted for offences arising out of conduct that took place before 30th September 1998 and the defendant was (or may have been) aged 10-13 at the time of that conduct, the prosecutor must prove that the defendant was *doli capax* at the relevant time. To prove that a child had the capacity to commit a criminal offence, the prosecution must adduce independent evidence that the child knew their conduct was seriously wrong. *R v PF* was a case involving what the defendant contended was 'childish sexual experimentation', and this case note advocates that consideration be given to how the law regulates young people's sexuality and sexual experimentation.

**Carol McCartney** and **Aaron Amankwaa**
Article: 'The UK National DNA Database: Implementation of the Protection of Freedoms Act 2012' with A. Amankwaa, (2018) *Forensic Science International* https://doi.org/10.1016/j.forsciint.2017.12.041

Abstract: In 2008, the European Court of Human Rights, in *S and Marper v the United Kingdom*, ruled that a retention regime that permits the indefinite retention of DNA records of both convicted and non-convicted ("innocent") individuals is disproportionate. The court noted that there was inadequate evidence to justify the retention of DNA records of the innocent. Since the *Marper* ruling, the laws governing the taking, use, and retention of forensic DNA in England and Wales have changed with the enactment of the Protection of Freedoms Act 2012 (PoFA). This Act, put briefly, permits the indefinite retention of DNA profiles of most convicted individuals and temporal retention for some first-time convicted minors and innocent individuals on the National DNA Database (NDNAD). The PoFA regime was implemented in October 2013. This paper examines ten post-implementation reports of the NDNAD Strategy Board (3), the NDNAD Ethics Group (3) and the Office of the Biometrics Commissioner (OBC) (4). Overall, the reports highlight a considerable improvement in the performance of the database, with a current match rate of 63.3%. Further, the new regime has strengthened the genetic privacy protection of UK citizens. The OBC reports detail implementation challenges ranging from technical, legal and procedural issues to sufficient understanding of the requirements of PoFA by police forces. Risks highlighted in these reports include the deletion of some "retainable" profiles, which could potentially lead to future crimes going undetected. A further risk is the illegal retention of some profiles from innocent individuals, which may lead to privacy issues and legal challenges. In conclusion, the PoFA regime appears to be working well, however, critical research is still needed to evaluate its overall efficacy compared to other retention regimes.

**Ann Creaby-Attwood** and C.S. Allely
Article: 'A psycho-legal perspective on sexual offending in individuals with autistic spectrum disorder' (2017) *International Journal of Law and Psychiatry*
Available online
https://authors.elsevier.com/a/1W1TdaR~~Ei1z

Abstract: It is important to consider whether there are innate vulnerabilities that increase the risk of an individual with an autistic spectrum disorder (ASD), predominantly those defendants with a diagnosis of Asperger's Syndrome, being charged and convicted of a sexual offence. The significance of such can be readily seen in recent English case law, with judgments on appeal finding convictions unsafe where there have been a number of failings in the Judge's summing up. In this article, we will consider the gravity of Judges omitting to highlight a defendant's diagnosis of autism spectrum disorder and the necessity of detailed explanations to jury members regarding the condition and its effect upon thoughts and behaviour. Consideration will be specifically given to the necessity to prove sexual motivation in such offences and the judicial direction required in relation to whether the appellant's actions had been sexually motivated. Recognition of the social impairments inherent in ASDs are vital to this work and we shall consider whether the difficulty with the capacity to develop appropriate, consenting sexual relationships as a result of impaired social cognition may be one of the factors which increases the risk of sexual offending in individuals with ASD (Higgs & Carter, 2015).

**Carol McCartney** and **Natalie Wortley**
Article: 'Under the Covers: Covert Policing and Intimate Relationships' [2018] 2 *Criminal Law Review*, 137.

Abstract: The operations of undercover police in England and Wales during the 1980s and 1990s in particular, are now subject to an official inquiry. Reports of police officers committing crimes and taking on the identities of dead children have been controversial, but so too the engagement of

officers in intimate (sexual) relations while undercover. This raises difficult moral and ethical questions but, we argue, also questions of the legality of such behaviour. In spite of the inclusion of a definition of “consent” in the Sexual Offences Act 2003, the courts in England and Wales are still regularly required to deal with questions of interpretation, as might be expected when there are diverse social understandings of the parameters of “acceptable” sexual conduct. In this paper, we look at a possible legal approach to sexual relationships that police officers have embarked on while undercover. Could sexual intercourse while undercover be considered rape? In order to answer this question, we examine the 2003 Act and the preceding 1956 Sexual Offences Act, which was in force during much of the time of the undercover relationships that are now under scrutiny. We consider recent interpretations of the legal definition of consent and deliberate whether undercover officers could be liable for rape, on the basis that the consent of their partners was vitiated by their deceit. We conclude that developments surrounding consent and deception make it possible to charge undercover officers with sexual offences.

**Guido Noto La Diega**
Article: ‘Internet of Things and Patents: Towards the IoT Patent Wars?’ (2017) 3(2) TFM Ticaret ve Fikri Mülkiyet Hukuku Dergisi - *Journal of Commercial and Intellectual Property Law* 47-66

Abstract: Intellectual property is a key, albeit overlooked, issue when it comes to the Internet of Things (IoT). It is still unclear, for instance, to what extent trade secrets can be used to prevent the user from controlling their own device (the so-called right to hack) and to hinder interoperability. Likewise, it is still to be fully explored to what extent intellectual property (database rights) can be used to prevent data portability. This paper focuses on patent law and, namely, on computer-implemented inventions by giving account of the approaches followed in Europe, United States, and India. With the IoT patenting activity being over eight times larger than the general worldwide increase in patenting, research on this field appears critical. The occasion of this study is the adoption in 2016 of the final version of the Indian guidelines on the examination of computer-related inventions, which have been surprisingly overlooked in the legal literature. The main idea is that the Internet of Things will lead to a dramatic increase of applications for software patents and if examiners, courts, and legislators will not be careful, there is the concrete risk of a surreptitious generalised grant of patents for computer programs as such (in Europe) and for abstract ideas (in the United States). The clarity provided by the Indian guidelines, following a lively public debate, can constitute good practices that Europe, the United States, as well as the Republic of Turkey, should take into account. With the increase of IoT patents, it is foreseeable the shift from the smartphone wars to the IoT wars, as evidenced by some recent litigation between Fitbit and Jawbone. The (perhaps cold) war seems impending, due to a number of reasons, such as the complexity of the supply chain, the several domains in which the IoT is divided and the composite nature of the IoT device.

**Sue Farran** and Rhona Smith
Book Chapter: ‘The trial of John Hudson 1783’
In Stalford, H., Hollingsworth, K., Gilmore, S. (eds.) *Children’s Rights Judgments* (Hart, 2017) 477-492

Abstract: As with other chapters in this collection this co-authored work consisted of a rewritten case and a commentary. This was the shortest case in the collection and the earliest. It concerned the trial and sentence to transportation of an eight year old ophan, who arrived in Australia on the First Fleet. Rewriting it from a children’s rights perspective required very broad interdisciplinary research because at the time of the trial children were barely recognised as legal subjects let alone having rights. At the same time and despite the historical distance of this case there were clearly links to the present day and in particular to the plight of children arriving in Australia either as refugees or as part of re-settle the programmes. The case of John Hudson reminds us that not all children enjoy a childhood and certainly many were, and still are, denied basic human rights.

**Elaine Campbell**

Article: ‘Should I Share My Journal Entry With You? A Critical Exploration of Relational Ethics in Autoethnography’ (2017) *Departures in Critical Qualitative Research*, 6(4), 4-22. http://dcqr.ucpress.edu/content/6/4/4

Abstract: Journal entries documenting hidden emotions about my dual role as law teacher and practicing lawyer provide powerful insight into an aspect of academic practice not yet considered by autoethnography. Yet my journal entries are a consequence of my interactions with students. How do I negotiate the desire to give voice to a hidden world, yet protect the bonds of trust? This essay critically explores relational ethics in autoethnography from the unique perspective of a law clinic supervisor. Drawing on lessons from memoirists, personal reflections, and an unexpected dialogue with Carolyn Ellis, I raise important questions about my own ethical dilemma.

**Tony Storey**
Case-note: 'Vulnerable' Adults in the Domestic Violence, Crimes and Victims Act 2004 (2017) 81 *Journal of Criminal Law* 444 – 447

Abstract: This case note discusses the case of *R v Uddin* [2017] EWCA Crim 1072, in which the Court of Appeal was required to clarify the meaning of the word ‘vulnerable’ in the context of section 5 of the Domestic Violence, Crimes and Victims Act 2004. The Court gave the word a broad interpretation, holding that it encompassed cases in which there was a ‘cause (other than physical or mental disability or illness or old age) which has the effect on the victim of significantly impairing his ability to protect himself from violence, abuse or neglect’.

**Frances Hamilton**
Article: ‘The Case for Same-Sex Marriage Before the European Court of Human Rights’ (2017) *Journal of Homosexuality* 1-25

Abstract: For proponents of same-sex marriage, this essay sets forward a critical analysis of relevant arguments before the European Court of Human Rights. The privacy aspect of Article 8 European Convention of Human Rights will never be a successful argument with reference to marriage, which involves a public status. The equality argument (Article 14) is useful in addressing this issue with its close connections with citizenship, symbolic value, and proven record internationally. Difficulties remain with the equality argument; its conditional status, the width of the margin of appreciation allocated, and the need for an equality comparator. The equality argument needs reinforcement by use alongside a developing family law argument under Article 8 and a dynamically interpreted Article 12 (right to marry) argument. Ultimately, the success of any argument depends on convincingly influencing the European Court to consider that sufficient consensus has developed among Member States of the Council of Europe.

**Tony Ward**
Book Chapter: ‘Ethics and the Role of the Expert Witness’ in S Lucina Hackman, Fiona Raitt and Sue Black (eds) *The Expert Witness, Forensic Science, and the Criminal Justice Systems of the UK* (CRC Press 2018).

Abstract: This chapter considers the ethical duties of the expert witness, duties in which England and Wales (and to a lesser extent and Scotland) are largely codified in law. It argues that as well as being truthful, experts have an obligation to express *justified* opinions and to make the facts, assumptions and methods on which those opinions are based as *transparent* as possible. It discusses the four ethical virtues set out in the Forensic Science Regulator’s Code of Practice: ‘honesty, integrity, objectivity and impartiality’.

**Tony Storey**
Case-case: ‘Whether ‘obvious and serious’ risk of death in cases of gross negligence manslaughter to be determined both objectively and prospectively’ (2017) 81 *Journal of Criminal Law* 343-346

Abstract: This case note discusses the case of *R v Rose* [2017] EWCA Crim 1168. Here, the Court of Appeal held that in cases of gross negligence manslaughter, the jury is required to determine whether or not there was an "obvious and serious" risk of death at the time of the accused's breach of duty to the deceased both *objectively* and *prospectively*. This requires the jury to determine what a reasonable person in the accused's position (i.e. objectively) would or should have realised at the time of the accused's breach (i.e. prospectively), not what they would or should have realised with the benefit of hindsight.

**Guido Noto La Diega**
Article : 'The European strategy on robotics and artificial intelligence: Too much ethics, too little security' (2017) 3(2) *European Cybersecurity Journal* 6-10.

Abstract: There is an increasing interest in the ethical design of robots. As evidence of this fact, one may refer to some recent reports and the European Parliament's resolution on civil law rules on robotics. The latter will be the primary focus of this analysis since the EU Parliament is the first legal institution in the world to have initiated work of a law on robots and artificial intelligence. The European strategy on robotics seems affected by two main problems: an excessive emphasis on ethics at the expense of security, and more generally, a lack of awareness of the critical role played by the operation of striking a balance between competing interests. Balancing is pivotal to the interpretation and application of the law. And the current development of AI technologies does not enable the delegation of the operation to robots. Certainly, the most controversial point regards the status of robots as electronic persons. Even though the suggestion may seem extreme, it may prove to be successful, for at least three reasons. First, robots are becoming more and more similar to humans (anthropomorfisation and AI). Second, humans are becoming increasingly akin to robots (artificial enhancement). Third, the robot's legal personality would be profitable for the robotic industry.

**Russell Hewitson**
Book: *Residential Conveyancing Practice*, 2017, The Law Society

Abstract: This new book gives support staff and paralegals a deeper understanding of the legal principles, regulations and good practice underlying residential conveyancing procedures and a sound grasp of the risks associated with their work. Aligned to the requirements of the Law Society's Conveyancing Protocol, this book provides law firms and their staff with an invaluable aid to training, risk management and improving standards of competency and compliance.

Noelle Higgins and **Mohamed Badar**
Article: 'The Destruction of Cultural Property in Timbuktu: Challenging the ICC War Crime Paradigm' (2017) 74 *Europa Ethnica* 99-105

Abstract: Cultural property has been destroyed, looted and trafficked throughout history, particularly during conflict situations. The destruction of cultural property is now a strategy of war, with the objective being to eliminate cultural diversity and pluralism, 'erase all sources of belonging and identity, and destroy the fabric of society.' The ICC has jurisdiction over war crimes, crimes against humanity, genocide and aggression. However, destruction of cultural property falls only within the remit of war crimes under the Statute. A question that arises from the recent spate of destruction of cultural property is, does the war crime of directing attacks against cultural property adequately represent the impugned behaviour?
This article submits that a better characterisation of such behaviour would be a crime against humanity, as this would encompass the motivations of the attacks, as an act of persecution against the civilian population, and the impact on the victims. Section 2 of the article sets out the history of the legal framework on the protection of cultural property, prior to the adoption of the Rome Statute. Section 3 then focuses on the legal framework concerning the destruction of cultural property at the ICC and analyses the case of Al Mahdi, and Section 4 looks at the cultural renaissance currently occurring in Mali.

# Conferences

**Ray Arthur** "Educating policymakers in children's rights and agency: responding to consensual teenage sexting in England without creating permanent youth criminal records", Children's Rights European Academic Network (CREAN)
At the impact of children's rights education and research on policy development , Uni Bastions, Geneva, Switzerland, 18-19th January 2018.

Abstract: Currently the law in England and Wales means that young people who engage in consensual teenage sexting are at risk of being charged with child pornography and indecency offences. Even where no formal action is taken, any investigation of such behaviour will be recorded on the young person's criminal record where it may be disclosed in a way which impacts upon the young person's future access to education, employment, travel, insurance and housing. This paper argues that it is critical to find a balance between children's protection rights and their rights to exercise bodily autonomy, self-determination and to develop their sexual identity.

**Claire Bessant** 'Sharenting: Balancing the Conflicting Rights of Parents and Children'.
At the Institute for Advanced Legal Studies Information Law and Policy Centre's Annual Conference 'Children and Digital Rights: Regulating Freedoms and Safeguards' on Friday 17 November 2017.

Abstract: Parents are often considered 'gatekeepers' of their children's personal information, the best people to decide whether a child's information is shared (Weller v Associated Newspapers, AAA v Associated Newspapers). However, in the sharenting context a conflict of interests exists between parents, and their rights to freedom of expression and respect for family life, and their child's right to privacy.
This conflict was clearly highlighted in 2016 when media reports suggested an eighteen-year-old Austrian girl, founding her claim on her right to privacy, was suing her parents for posting embarrassing childhood photos on Facebook. Whilst that story has since been denounced as untrue it nonetheless raises two interesting questions: Could a child sue their parents for sharenting? Should the courts intervene in what might be considered a family dispute?
In attempting to answer these questions this paper analyses how a claim brought by a child against their parents for unauthorised online disclosure of their information might be decided under English law. It identifies several problems a child might encounter when seeking to remove their information from the online sphere through the courts, and suggests various alternatives to court action which might more effectively protect the rights of both parents and children.

**Victoria Roper**
"Academic Legal Clinics in the UK: Achievements, Challenges and Opportunities",
At the XXVIII Conference of Academic Legal Clinics - 20 years of Academic Legal Clinics in Poland - Achievements, Future Goals and Development Opportunities, November 2017, Krakow

Abstract: At least 70% of UK law schools now offer some form of clinical activity. This paper will explore the historical development of legal clinics in the UK and will provide a picture of the current state of affairs including the common models of delivery and type of legal assistance offered. Following cuts to legal aid there is an increased demand for pro bono legal advice in some areas, and clinics face the challenge of balancing the educational needs of their students with a wider social justice agenda. Further, proposed changes to legal education including the introduction of the Solicitors Qualifying Examination (SQE) and a reconceptualization of qualifying work experience brings additional challenge, but also the potential for clinic to assume an even more significant role in UK legal education in the future.

**Carol McCartney**
'The Forensic Science Paradox'
At the 'Counter-Terrorism & Miscarriages of Justice' Symposium, Leeds University. 30th November – 1st December.

Abstract: This paper examined the 'paradox' that forensic science causes miscarriages of justice, at the same time as being instrumental in preventing miscarriages, overturning them, and also acting as an agent of criminal process reforms. This was MLR Seminar, funded by the MLR, Inner Temple and University of Leeds and organized by Carol, Dr Colin King of Sussex University and Dr Genevieve Lennon of Strathclyde University. The 2 day symposium was in honour of the work of Prof Clive Walker.

**Jill Alexander, Elisabeth Griffiths,** Rachel Nir and Tina McKee
'Brown Shoes?' Interrogating hidden inequality and diversity barriers in the graduate labour market'
At the Society of Research in Higher Education, International Conference on Research in Higher Education, 7 December, Newport, Wales.

**Jonathan Nash**
'Navigating Psychedelic Medicines Through National And International Regulation'
At 'Breaking Convention', Greenwich University, July 2017.

Abstract: Clinical trials using psychedelic substances to combat mental and physical illnesses can only commence after years of regulatory and ethical hurdle-leaping and face many more before those medicines may be licensed. The impact of the classification of psychedelic substances as having no accepted medical use on the regulatory systems governing clinical research and licensing in the US, Europe and the UK will be considered and possible solutions to the current legal impasse will be offered.

**Tim J Wilson and Chrisje Brants**
'Critical trust in the policing of the TOR-network'
At a seminar organised by the Cyber Science Centre (the Netherlands Open University, NHL and Dutch Police Academy), Leeuwarden, 23rd November 2013.

Abstract: this paper explained the concept of critical trust and how, by building on earlier work by Northumbria academics, it might be developed to analyse and offer proposals for improving the management of risks arising from the policing of cyber-enabled or cyber– enhanced crimes on the TOR-network (part of the Dark Web). It was suggested that the nature of the potential harm to individuals and society arising from such criminal activity and options for dealing with them needed to be understood so that judgements/judgments could be made about the proportionality of national and international criminal justice responses. Critical trust could prove to be an effective tool for elucidating whether and, if so, how the risks traditionally encountered in criminal justice could mutate in such a technologically driven context. The range of risks to be examined in forthcoming research would include those relating to due process, the probative validity of the evidence obtained, the balancing of repressive actions against fundamental rights and cultural blind spots in international criminal justice cooperation.

**Mohamed Badar**
'Killing in the Name of Islam: A Call for Criminalising the Practice of *Takfir* in Muslim Majority States in Africa'
At The African Union Law Research Network Workshop II: 'The Implications of African Union Law: Conceptual analysis, Peace & Security, Citizenship', 8th December, 2017, London School of Economics

Abstract:The rise of different trends of political Islam in Africa and the Middle East since 1970s and the lack of political platform and visions during the Arab Spring have paved the way for the issuance of infedilizing (*takfiri*) fatwas by Islamist movements. This presentation demonstrates

among other issues that *takfiri* practices do not merely classify people or excommunicate them from particular society but it also allows for their killing. The study argues that to enact such legislations by Muslim majority States in Africa is not merely a recommendation but an imperative under the right to life provision in the African Charter and the corresponding duty of States to protect the lives of their citizens. Such criminalisation should go in line with the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa adopted by the African Commission on Human and Peoples' Rights in Banjul, The Gambia, May 2015.

**Tim Wilson**
'Implementation and practical application of the EIO in the United Kingdom: an academic perspective'
At II Reunión Anual ReDPE (an association of Spanish lawyers and prosecutors specialising in the practice or study of European criminal law), Madrid, 1st December 2017

Abstract: The UK was the tenth country to transpose Directive 2014/41/EU into its national law. This and an analysis of implementation in the UK might reasonably be seen as evidence of both the directive's importance and, irrespective of Brexit, the value attached in the UK to participation in EU criminal justice cooperation arrangements. This view is supported not only by statements expressed by the UK Government and specialist legal bodies, but also from deliberations in or statements by Parliament and the principal UK devolved administration and parliament in Scotland. Implementation of the new instrument, however, is likely to prove challenging because of the way in which safeguards for defendants operate so differently (well beyond an adversarial and inquisitorial distinction) in national legal systems. In the UK there are also questions over resources and organisation, including a refusal to extend legal aid to EIO proceedings and the range of specialist prosecuting bodies (for example, DWP) that can submit orders to the courts alongside the CPS and procurators fiscal.

## Other

**Carol McCartney** and **Aaron Amankwaa**
'DNA databases: it is still far from clear how effective they are in fighting crime' in The Conversation, 10th October, 2017. https://theconversation.com/dna-databases-its-still-far-from-clear-how-effective-they-are-in-fighting-crime-85137
Short article questioning the effectiveness of the National DNA Database, and research of PhD student Aaron Amankwaa.

**Guido Noto La Diega**
'Non-conventional marks: the EU reform of trade marks, Brexit, and the Internet of Things' (Diritto Mercato Tecnologia, 16 January 2018) <https://www.dimt.it/index.php/it/notizie/16608-non-conventional-marks-the-eu-reform-of-trade-marks-brexit-and-the-internet-of-things>
This paper deals with the registrability of non-conventional marks after the EU reform of trade marks and some technological developments, including the Internet of Things (IoT). Even if olfactory marks (scents or smells) are the chosen prism, most considerations apply also to other non-conventional marks, such as holograms, movements, and tastes. In the UK, whereas in theory olfactory trade marks can be registered, there have not been successful applications since the EU Court of Justice's decision in Ralf Sieckmann v Deutsches Patent- und Markenamt. This paper suggests that scents may be more easily registered in the near future as a consequence of the EU reform of trade marks and of technological innovation. The impact of Brexit is critically assessed and the implementation of the EU reform is foreseen.

**Guido Noto La Diega**

‘Same-sex adoptions in private international law: Good news from Italy’ (Inherently Human, 10 December 2017) <https://inherentlyhuman.wordpress.com/2017/12/10/same-sex-adoptions-in-private-international-law-good-news-from-italy/>
While same-sex marriage is visibly gaining momentum (see Australia, Austria, Germany and Malta this year), many countries have not fully recognised the rights of same-sex couples. This usually takes the form of civil unions (e.g. Italy and Greece) or of no recognition (e.g. Poland and Lithuania). However, other solutions are also possible. For instance, some countries recognise only same-sex marriages celebrated abroad (e.g. Armenia and Estonia). In Northern Ireland, adoption has been available to same-sex couples since 2013, even though the Northern Ireland Assembly voted against same-sex marriage (Northern Ireland Human Rights Commission, Re Judicial Review [2013] NICA 37). However, in many countries where there is no same-sex marriage, these couples cannot access adoption. This is the case in Italy, even though the case that is commented here brings some good news. In Italy, the Adoptions Act (Legge No 183/1984) allows only married couples to adopt a minor. Since only heterosexual couples can get married, same-sex couples are de facto excluded from the adoption. However, this regime applies only to internal situations (e.g. two women domiciled in Italy adopting a minor in Italy). Different rules apply to the adoption by same-sex couples in other countries, once the couple asks the Italian authorities (ufficiale di stato civile) the recognition of the effects of the adoption. This is the topic recently clarified by the Court of Appeals of Genoa, with ordinanza No 1319 of 1 September 2017. The Court of Appeal rejects all the defenses put forward by the civil servant and holds that same-sex adoptions celebrated abroad should be automatically regognised in Italy by the competent civil servants, without any need for a judicial scrutiny. The main reason is that even though Italian unmarried couples cannot adopt in Italy, there is no public policy or ordre public (ordine pubblico) consideration preventing the full recognition of the effects of foreign same-sex adoptions.

See also longer Italian version of the entry above
‘Corte d’appello di Genova: riconoscimento automatico di adozione omogenitoriale nazionale straniera’ (Articolo29, 4 December 2017) <http://www.articolo29.it/2017/corte-dappello-genova-riconoscimento-automatico-adozione-omogenitoriale-nazionale-straniera/> (Court of Appeals of Genoa: automatic effects of the foreign same-sex adoption in private international law)

**Siobhan McConnell**
Contributed two pieces for the CompanySecretary’s Review:
‘Consumer Law – what happens after Brexit? October 2017’ which focused on the Brexit process and consumer law, considering the consumer law landscape immediately post-Brexit. It also considered the potential for divergence between the EU and the UK following Brexit, with particular focus on two proposed Directives on distance selling and digital content. The article also considered possible models for cross-border consumer law enforcement following Brexit.

And ‘Empowering Small Businesses – the new Small Business Commissioner December 2017’, which examined the role of the Small Business Commissioner. The Commissioner will provide advice to small businesses on dealing with larger businesses, provide information on dispute resolution services and consider complaints made by small businesses about payment issues when dealing with larger businesses. This article considered why the Commissioner was needed, the practicalities of the complaints scheme and provided practical advice on how businesses can try to avoid complaints e.g. by reviewing contract terms and conditions.

**Guido Noto La Diega**
‘Scents and trade marks - The EU reform of olfactory marks and advances in odour recognition techniques’ (IPKat, 15 January 2018) <ipkitten.blogspot.co.uk/2018/01/scents-and-trade-marks-eu-reform-of.html>
The yet-to-be-transposed Trade Marks Directive introduces a new definition of trade marks where the graphic representation of the mark is no longer required. Under the new regime, those who want to register a smell will only need to represent it ‘in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor’ (art 3(b)). Some difficulties may remain because the Trade Marks

Directive incorporated the so-called Sieckmann criteria, that the (then graphical) representation must be ‘clear, precise, self-contained, easily accessible, intelligible, durable and objective’ (recital 13). However, even not going as far as arguing that ‘the amendments will abolish the Sieckmann judgement’ (Sahin 2016, 513), it is not excluded that the seven criteria may be interpreted differently in the future, for example as meaning that a combination of description, chemical formula and sample may meet the new requirements for registration. Indeed, with the new definition of trade marks there is a shift from the ‘how’ to the ‘who’. It is immaterial how the trade mark is represented (whether graphically or otherwise), as long as the competent authorities and the public can determine the subject matter of the protection. Arguably, the said combination of description, chemical formula, and sample may suffice from the authorities’ perspective. When it comes to the public, it is likely that this requirement will be absorbed by the distinctiveness. An unusual scent used consistently on a range of products or services of a single undertaking and accompanied by heavy advertising would easily put the public in the position to determine the subject matter of the protection, especially if distinctiveness is acquired through use; thus, the requirement could be easily made out. One could foresee a return to the case law ante Sieckmann that valued the customers’ viewpoint and stated, for instance, that an olfactory mark described as freshly cut grass will be recognised immediately by anyone, reminding ‘of spring, or summer, manicured lawns or playing fields, or other such pleasant experiences’ (Senta Aromatic [14]). The customers’ scent-related power of imagination cannot be underestimated. A number of scents can evoke clear memories and feelings.