



## 2015 CONSTITUTIONAL LAW CONFERENCE AND DINNER

Our Constitutional Law Conference and Dinner, held on 13 February 2015 at the Art Gallery of New South Wales and NSW Parliament House

Dear Friend,

Welcome to the latest newsletter from the Gilbert + Tobin Centre of Public Law detailing our activities over the second half of 2014. Inside you will find news of the major public law conference held at Cambridge in September that featured a strong Centre presence and for which Jason Varuhas was a chief organiser. Grant Hooper explains his PhD on the topic of natural justice and we hear from our Semester Two intern Christabel Richards-Neville. There is a variety of project reports and a Centre Comment on constitutional change affecting Aboriginal and Torres Strait Islander people.

A feature of this past six months has been the high-quality scholarship and public contribution in the area of counter-terrorism law. George Williams' ARC Laureate Fellowship built a platform for this work over the last five years, creating opportunities for collaboration, exchange and in-depth research. The report from the Terrorism Law Reform Project and our listings at the back of the newsletter show the value of this long-term investment in research by postgraduate students, post-doctoral fellows and Faculty colleagues. A variety of Centre people contributed to public understanding and debate through publications, media commentary and parliamentary submissions, as Australia experienced three fresh rounds of counter-terrorist law-making in the federal Parliament.

In December 2014 there was a wealth of comparative law perspectives, on Indonesia and on the common law world, with a trilogy of events from the Comparative Constitutional Law Project, under the leadership of Project Director Rosalind Dixon.

We have the good fortune to welcome two new members to the Centre. In late 2014 Dr Melissa Crouch joined the Faculty and the Centre, from the National University of Singapore. Melissa is a specialist in the field of Asian Legal Studies. Her current research focus is on constitutional change in Myanmar/Burma, and on Islamic law in Southeast Asia. Melissa will also join a number of Centre colleagues in teaching the Principles of Public Law course. And as we go to press we welcome a long-standing friend of the Centre, Associate Professor Gabrielle Appleby, who comes to us from the Adelaide Law School. She arrives with an ARC project underway on Law, Order and Federalism with James Stellios and John Williams. As well as that project, her research focus will be on integrity in government and government legal ethics and her teaching at UNSW will continue in the general area of public law. We will have more from Melissa and Gabrielle in our next edition.

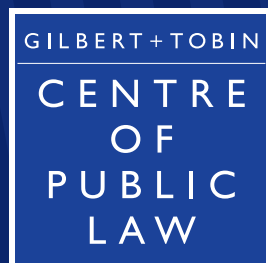
During 2012, we farewelled several colleagues whose careers are now flourishing in new places around Australia following the completion of the Laureate Fellowship, and we also wish Dr Kristen Rundle all the best on her move to Melbourne Law School.



Centre Director,  
Associate Professor Sean Brennan



Former West Australian Attorney-General, the Hon Cheryl Edwardes, Dr Tamara Tulich, University of Western Australia and Professor George Williams at the 'Recognition of Indigenous Peoples in the Constitution' event, University of Western Australia



Congratulations are due to a number of colleagues. Nicola McGarrity, Kelvin Widdows and Keiran Hardy all achieved the milestone of a PhD in late 2014, capping a great year for postgraduate completions. We will be covering their projects in detail in the next edition of the newsletter. Dr Fergal Davis, with his co-editor at Durham University Professor Fiona de Londras, published *Critical Debates on Counter-Terrorist Judicial Review* with Cambridge University Press. And George Williams and Centre Fellow David Hume won an award for the second edition of their book *Human Rights under the Constitution* at the Australian Educational Publishing Awards.

**FEBRUARY STOP PRESS:** Our flagship event, the 2015 Constitutional Law Conference was held on Friday 13 February at the Art Gallery of New South Wales and Parliament House. It was a great program covering the 2014 term in the Australian courts on constitutional law plus a final-session panel discussion about the idea of a federal ICAC or general anti-corruption commission. The day before, at UNSW, we had Public Law in the Classroom, a workshop for teachers of Australian public law co-hosted by the Centre with our colleagues at Adelaide Law School's Public Law and Policy Research Unit. We will have a full report on both events in our next newsletter.

Associate Professor Sean Brennan  
Centre Director

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For details of Centre events, publications, submissions and so on please go to our website: [www.gtcentre.unsw.edu.au](http://www.gtcentre.unsw.edu.au)

The Centre's Twitter account keeps you up to date between newsletters and e-bulletins: @GTCentre

Or if you prefer Facebook: [www.facebook.com/pages/Gilbert-Tobin-Centre-of-Public-Law/138063326284705](https://www.facebook.com/pages/Gilbert-Tobin-Centre-of-Public-Law/138063326284705)

You can follow a range of Centre members and postgraduate students on Twitter:

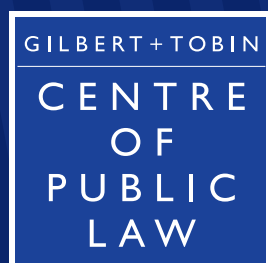
- |                      |                  |
|----------------------|------------------|
| • Gabrielle Appleby: | @Gabrielle_J_A   |
| • Sean Brennan:      | @_sbrennan       |
| • Fergal Davis:      | @Fergal_Davis    |
| • Rosalind Dixon     | @rosalinddixon15 |
| • Paul Kildea:       | @paulkildea      |
| • Andrew Lynch:      | @AndrewLynchUNSW |
| • Sangeetha Pillai:  | @sangpillai      |
| • George Williams:   | @ProfGWilliams   |
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Dr Jason Varuhas presenting at Public Law Conference in Cambridge



Professor Kent Roach, who presented at a Centre seminar in October on 'Comparative Perspectives on Remedies for Laws that Violate Human Rights'



## [CENTRE ACTIVITIES]

### UNSW PUBLIC LAWYERS CONTRIBUTE TO MAJOR INTERNATIONAL CONFERENCE

The inaugural Public Law Conference was held from 15 to 17 September 2014 at the University of Cambridge Faculty of Law. The theme was "Process and Substance in Public Law". The conference was a tremendous success and brought together over 200 delegates drawn from a wide variety of common law and other jurisdictions, including Australia, Canada, Hong Kong, Italy, Ireland, Japan, the Netherlands, New Zealand, Singapore, South Africa, the United Kingdom and the United States. Nearly 50 papers were delivered during the conference by leading public law scholars from across the common law world. The conference is the first in a series of biennial international conferences on public law. The second will be held in Cambridge in 2016, with the conference then moving among universities in the common law world, the intention being that the first conference to take place outside of Cambridge will be held in 2018.

Members of UNSW Law and the Gilbert + Tobin Centre of Public Law made a significant contribution to the success of the conference. Dr Jason Varuhas is a co-founder of the series, and was one of the conference organisers, along with three academics at the University of Cambridge, Professor John Bell, Dr Mark Elliott and Dr Philip Murray. The same team will organise the 2016 conference. A number of UNSW Law Faculty members delivered papers, including Professor Mark Aronson, who gave a plenary address, and Centre members Professor George Williams, Dr Jason Varuhas, Dr Greg Weeks, and Dr Paul Kildea. Mark Aronson, George Williams, and Jason Varuhas also chaired panel sessions. George Williams was a member of the Advisory Board for the 2014 conference, and Mark Aronson will join the Advisory Board for 2016. Justice Melissa Perry (Federal Court of Australia), a member of Gilbert + Tobin Centre of Public Law Advisory Committee, delivered a paper, while fellow Advisory Committee member, Justice John Basten (NSW Court of Appeal), attended as a delegate. Other UNSW academics participated as delegates, including Professor Andrew Lynch and Gillian Moon, as well as UNSW doctoral candidate, Grant Hooper.

A book of selected papers delivered at the conference will be published with Hart Published Ltd, Oxford. Jason Varuhas is one of the book editors, and both he and Mark Aronson are contributing chapters. The conference was generously sponsored by Hart Publishing Ltd.

For more information please visit the conference website:  
[www.publiclawconference.law.cam.ac.uk](http://www.publiclawconference.law.cam.ac.uk)

### CENTRE SEMINARS

Professor Kent Roach from the Faculty of Law, University of Toronto gave a seminar at UNSW on 20 October titled 'Comparative Perspectives on Remedies for Laws that Violate Human Rights'. In the space between so-called strong-form and weak-form judicial review, he explored the potential for remedies that address individual rights infringement and provide systemic opportunities for legislatures and courts to contribute to comprehensive solutions.



Centre Social Justice Intern, Christabel Richards-Neville

## [CENTRE PEOPLE]

### SOCIAL JUSTICE INTERN REPORT Christabel Richards-Neville

One of the things that made me want to attend UNSW Law was the amazing range of centres available for students to spend part of their studies in. For this reason I was thrilled to be able to spend a semester in 2014 at the Gilbert + Tobin Centre for Public Law. For me it was an incredible chance to participate in a discussion about public law that has rarely been more vibrant in Australian life.

I arrived in a semester in which anti-terror legislation, freedom of the press, Indigenous constitutional recognition, federalism and control order schemes were not only at the centre of the Centre's mind but also Australia's as a whole. As a consequence I was giving amazing opportunities to work on projects that were relatable, beyond academia, to the broader Australian community. During my time at the Centre I prepared case briefs in anticipation of the High Court's decision on *Tajjour v New South Wales* and *Kuczborski v Queensland*. I waited eagerly for those decisions to be handed down. Thanks to the rapid turn around of judgments by the current High Court bench I got to read both judgments in my time at the Centre. I was invited to work on a range of projects by the Centre's staff, and each academic was more than happy to discuss my task in the context of their ongoing work. I chose the Gilbert + Tobin Centre because I wanted an insight into how the balancing act of practising, teaching and being involved in academia is achieved. Soon after I arrived the Centre announced the appointment of three inaugural Centre Fellows. It might be thought that the bridge between academia and practice in the law is axiomatic. However, as recent comments by the Chief Justice of the High Court indicate, the link is fragile, and requires constant work. My time at the Centre, working on issues that are at the heart of contemporary Australia, has convinced me that practising academia is just as important as legal practice.

### PHD REPORT Grant Hooper

I commenced my PhD candidature in 2012 and joined the Centre shortly thereafter. Before commencing my PhD I was a partner at DLA Piper, having practised for nearly 20 years as an administrative and general litigator.

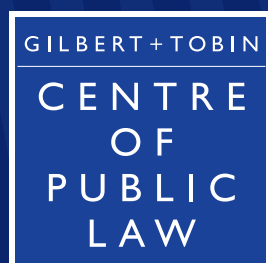
Emeritus Professor Mark Aronson and Senior Visiting Fellow Arthur Glass supervise my thesis, which I will complete in 2015.

The focus of my thesis is the use by the legislature of a code to exclude and replace the judicially created principle of natural justice. Consequently the general legal area within which my thesis sits is administrative law but it is replete with constitutional themes. The method of analysis I have adopted is substantially doctrinal and largely internally focused.

A number of broad themes underlie my thesis, three of which I mention for this report. Firstly, natural justice is a judicially created highly malleable concept that the judiciary has and will seek to protect from legislative interference (whether by way of a code or ordinary statute).



Centre PhD Student Grant Hooper



*"It is clear that judicial appointment is an art, not a science. Merit is essential, but rarely will it be the exclusive consideration. Other factors will inevitably enter into the process of making a selection. In our system, these are issues for the government to weigh. But does this mean the judiciary and the broader profession have to put up and shut up when an appointment is made that rankles?" - 'Chief Justice Carmody and the "merit principle"'*

Andrew Lynch, Inside Story  
(18 August 2014).



Professor Rosalind Dixon, Professor Dr Denny Indrayana, former Deputy Minister for Justice and Human Rights in Indonesia and Centre Director Sean Brennan

The judiciary will ordinarily do so by utilising and adapting rules of statutory interpretation. In so doing the judiciary is not always enforcing legislative intent, it is at times imposing its own intent or its own understanding of what the legislation means. Secondly, the judiciary in extending the application of natural justice from the adjudicative to the administrative arena has transposed its hostility towards legislative attempts to reduce its independence onto legislative attempts to specify how the executive should conduct its decision making processes. This hostility has meant that the judiciary has tended to respond defensively and resort to constitutional and other legal values that traditionally have been used to entrench its independence, in particular the separation of powers. Thirdly, legislative attempts to limit the judiciary's ability to impose natural justice obligations have back-fired as, over time, the judicial reaction has been to focus more intently on the quality of the decision making process and in turn to require a greater degree of justification.

Being a member of the Centre has been an extremely valuable part of my PhD journey. It has provided an opportunity to meet many remarkable people and participate in events that have both enriched and broadened my understanding of not just constitutional law but the law more generally.

## [CENTRE COMMENT]

Sean Brennan

Any referendum proposal put to the people under the Australian Constitution must first pass by majority through the Parliament, which means that federal politicians play a central role. They can contribute political leadership in the community-wide development of a referendum proposal and then the successful promotion of a Yes vote to the electorate.

On the issue of constitutional change regarding Australia's First Peoples, they must also show the capacity to listen – in particular to a case for substantive constitutional change put over many years by various Indigenous organisations and individuals, a case recently echoed in the 2012 report of the Expert Panel. If the message behind those decades of advocacy is not heard, the risk is that Australians go to the poll on a question that has more to do with the interests and concerns of federal politicians than the Aboriginal and Torres Strait Islander people on whom the change is ostensibly centred.

This risk arises from a combination of two realities. First, at a philosophical level, there is the idea of political constitutionalism. The tradition of thought associated with 19th Century English constitutional theorist AV Dicey favours resolving controversies through political processes and ultimately majority votes in parliament. In truth, Australia has a hybrid constitutional democracy. That Diceyan tradition sits alongside one of legal constitutionalism, which draws inspiration from the United States in terms of a written, entrenched constitution and judicial review by the courts. Unquestionably, however, Dicey's ideas hold strong sway amongst Australian lawyers and politicians and those ideas do not favour judicially enforceable constitutional constraints on the exercise of power.

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George Williams presenting at 'Why it's Time to Recognise Aboriginal Peoples in the Constitution' at the Royal Australian and New Zealand College of Psychiatrists Annual Dinner, Sydney, 18 October 2014

The second factor is the self-interest of federal politicians. Those in power rarely look for new ways to constrain their own freedom of movement in office. The prospect that legislative or executive action will be brought undone through legal action in the courts is generally unattractive to the government of the day, and the government-in-waiting. This naturally diminishes the enthusiasm of federal politicians for proposals that aim to protect members of the community by introducing constitutional limits on government power.

Both these factors have been on display in recent times, as Australia debates changes to the Constitution that would address its silence on our First Peoples.

A key issue is whether the referendum proposal will confine itself to important words of symbolic recognition, or whether it will also incorporate substantive legal change. The Expert Panel appointed by the Gillard government was a diverse group of Indigenous and non-Indigenous Australians from various walks of life. More importantly, they clocked up thousands of kilometres and spent many months listening to people, in cities, regional towns and remote communities. The Panel members may have started with differing perspectives on how far constitutional change should go. By the end of their journey in January 2012 they arrived at a unanimous set of recommendations, persuaded that a referendum package must contain both symbolic and substantive legal change.

After listening to people talk about what was important to them in Australia's Constitution, thrashing through the issues internally and sampling wider public opinion using Newspoll, the Panel brought a message back to federal politicians that perhaps they preferred not to hear. That message was to change Australia's Constitution, not only to remove its silence on First Peoples but also to reduce the likelihood that government power would be used adversely against Aboriginal and Torres Strait Islander people in the future as it had been in the past.

Prominent amongst those recommendations was the proposal to prevent discrimination on the basis of race by any level of government. To depict that proposal as a dramatic departure is an exaggeration. The truth is a non-discrimination clause in the Constitution represents incremental reform against a background of strong continuity. Under our hybrid Constitution there have always been some legal safeguards for the community, enforceable by courts against the government, such as the just terms guarantee for the acquisition of property and the freedom from discrimination on the basis of residence in a particular State.

In fact the High Court has already used the Constitution several times to enforce the principle of racial non-discrimination against elected politicians. The Racial Discrimination Act 1975 (RDA) is a federal law that binds the States. If a State law is discriminatory, the RDA nullifies its effect. Section 109 of the Constitution means that racial non-discrimination has already trumped pure majoritarianism in the High Court, in cases such as *Koowarta*, *Mabo No 1* and the *Native Title Act case*. The biggest change with a non-discrimination clause being added to the Constitution is that federal politicians would agree to live with the constraint they have seen fit to apply to State politicians for the past 40 years.

*"Many people have wondered why Pape took the extraordinary step of initiating a High Court challenge to the government's decision to grant him this one-off payment. Examined in light of his background and beliefs, his decision was not surprising, even if it reflected significant personal and professional courage. It takes a brave person to stand between the Commonwealth and an offer of cash to nearly 9 million taxpayers, let alone in the midst of a global economic recession."*

*George Williams, 'Bryan Pape and his Legacy to the Law' Commemorative Lecture, School of Law, University of New England, Armidale, 25 November 2014.*

The governmental response to the conscientious argument put by the Expert Panel and more broadly to the question of substantive constitutional change has been unsatisfactory. Since January 2012 when the Expert Panel delivered its recommendations, the relevant Joint Select Committee has focused its mind on these issues and acknowledged the case for substantive change. But no Prime Minister, from either side of politics, has shown sustained leadership. They have not been prepared to properly engage in public with that message of symbolism plus substance from the Panel, nor the strong community sentiment and the sometimes hard first-hand experience that lies behind it. Debate over a proposal has been stop-start at best. Even the timing of a referendum stays perennially up in the air, with Prime Ministers from both sides seeming to mark time as the debate slows or stagnates, before announcing a further, ill-defined postponement of the schedule.

Mainstream political debate has tended to steer away from proposals for substantive legal reform towards the apparently less challenging notion of symbolic recognition. Periodically the media reports comments unfavourable to proposals such as the non-discrimination clause – that are often no more than vaguely attributed to a party room or leader. Those interested in the proposal for a non-discrimination clause, and the many Australians who expressed positive sentiments about it during the Expert Panel's investigations, have not seen a live political debate about its merits from our leaders of government.

Majoritarian processes involve trust, that those in power will exercise authority fairly and with proper regard for the views and interests of those they are elected to represent. Aboriginal and Torres Strait Islander people, a small minority of the Australian people in electoral terms, have an arithmetic reason to be wary of investing all their trust in political constitutionalism of the traditional Diceyan variety. They can also point to a history of discriminatory, unilateral and frequently unsuccessful government action in Indigenous affairs, to back up that skepticism. If constitutional recognition is about paying respect to Australia's First Peoples then it should include respecting the strong case that has been made by many, including the Panel, that symbolic recognition alone will not be enough. Respecting that case means sincere and direct engagement with the case for substantive change, rather than murmuring negatively to journalists in the background.



Participants at the Comparative Constitutional Law Roundtable: Professor Mark Tushnet, Madhav Khosla, Associate Professor Gabrielle Appleby and George Williams

## [PROJECT REPORTS]

### COMPARATIVE CONSTITUTIONAL LAW PROJECT

Project Director: Rosalind Dixon

The Project had a very busy end to the year with three events in quick succession. The first was its annual 'Final Courts Roundup', where scholars from overseas jurisdictions provide an update for practitioners and other academics on key constitutional developments over the last year, in their jurisdiction. This year, the panellists for the event were: Professor Mark Tushnet, William Nelson Cromwell Professor of Law, Harvard Law School (US), Dr Thomas Poole, London School of Economics, Law (UK), and Mr Madhav Khosla, Department of Government, Harvard University (India). The event was held at the Federal Court on 9 December 2014 and co-hosted by the AACL. It is a key part of the project's attempt to connect comparative developments with a broader vision of the Centre: one that brings together scholars and practitioners in a dialogue about public law developments of immediate practical relevance.

The second event, which followed on from the Final Courts Roundup, was the academic roundtable on comparative constitutional law, held at UNSW on 10 December 2014. The roundtable featured work-in-progress by Professor Mark Tushnet (Harvard), Associate Professor Gabrielle Appleby (Adelaide), Assistant Professor Will Partlett (CUHK) and Professor Rosalind Dixon (UNSW), as well as commentary by Professor Adrienne Stone (Melbourne), Professor Martin Krygier (UNSW), Professor Tushnet, Mr Khosla, Dr Poole and Dr Joel Colon Rios (Victoria University of Wellington). The event was extremely successful and well attended, and delved into a range of topics of interest to the Centre including varieties of constitutionalism, the law and theory of constitutional amendment and replacement, and the role of former solicitors-general as judges and the circumstances in which they should recuse themselves.

The third and final event was a conference on 'The Constitutional Court & Democracy in Indonesia: Judging the First Decade', co-hosted with the University of Sydney Law School, and the UNSW Law Faculty Working Group on Constitutionalism in New Democracies. The conference featured an opening keynote panel at UNSW, with former Chief Justice of the Constitutional Court of Indonesia, Professor Dr Jimly Asshiddiqie, SH, and former Deputy Minister for Justice and Human Rights, Prof. Dr. Denny Indrayana, SH. The academic event the following day featured papers from leading scholars on Indonesian constitutionalism, including Professor Tim Lindsey (Melbourne), Dr Melissa Crouch (a new member of the Centre and UNSW Law Faculty), Dr Stefanus Hendrianto (Santa Clara), Dr Nadirsyah Hosen (Wollongong), Dr Arskal Salim (UWS), and Fritz Siregar (UNSW HDR student). It was held on 11-12 December 2014.



Participants at the Comparative Constitutional Law Roundtable

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Sean Brennan, Dr Denny Indrayana, Rosalind Dixon, Professor Dr Jimly Asshiddiqie, Professor Tim Lindsey and Associate Professor Simon Butt at the keynote panel on the Indonesian Constitutional Court in December 2014

## FEDERALISM PROJECT

Centre members have remained active on the issue of federalism in recent months. Andrew Lynch spoke on the second school chaplains decision from the High Court, *Williams v Commonwealth (No 2)* at a colloquium on current constitutional controversies in August 2014, organised by the University of Queensland and Supreme Court Library. George Williams talked about the future for the States at the Reimagining Australian Leadership Forum at Swinburne University in November. Paul Kildea contributed to discussion of COAG transparency in the online outlet *The Mandarin*.

On the publication front, Centre Fellow Dr Brendan Lim wrote for the *Federal Law Review* on 'laboratory federalism' and the Kable principle. Our PhD student Shipra Chordia continued her interest in federalism, publishing with Andrew in the *University of Queensland Law Journal* on signs of reinvigoration in the use of federalism in constitutional interpretation. Centre Director Sean Brennan published a retrospective piece about the *Koowarta v Bjelke-Petersen* decision, co-authored with Indigenous Law Centre Director Professor Megan Davis in the *Griffith Law Review*, looking at a crucial period when the High Court was sharply divided in its approach to federal power and the States.

## INDIGENOUS LEGAL ISSUES PROJECT

Project Director: Sean Brennan

As Paul Kildea's report for the Referendums Project shows, various Centre members including Paul, George Williams and Ros Dixon have been active on the issue of constitutional change and Aboriginal and Torres Strait Islander peoples, through presentations, media commentary, academic articles and submissions. In August in Parramatta Sean Brennan also presented on the topic at a session of Building Bridges, a community education and discussion series organised by Reconciliation for Western Sydney.

Sean has also been working with Law Faculty colleagues Megan Davis, Brendan Edgeworth and Leon Terrill and other chapter authors on a book arising from a native title workshop co-sponsored by the Centre. More details on that publication from The Federation Press in the next newsletter.

## JUDICIARY PROJECT

Project Director: Andrew Lynch

Recent controversies in Queensland and the Northern Territory have increased public interest in judicial appointment models that limit executive discretion. This contrasts with the Commonwealth government's abandonment of the modest reforms made in 2008 by Attorney-General Robert McClelland to federal judicial appointments, as discussed in the last newsletter. The project's focus on appointment models has, as a result, broadened to consider the lessons that might flow from these recent episodes at the sub-national level. More generally, the Director has continued research on the intersection of 'merit' and diversity considerations in the selection of judicial officers. In doing so, Andrew has benefitted greatly from spending two months in the United Kingdom on sabbatical in September-October. During this visit, he met with members of the judiciary, staff at the Judicial Appointments Commission, and a number of leading

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Rebecca Ananian-Welsh at her PhD graduation in November, following completion of her thesis on Chapter III and the separation of judicial power

law and political science academics so as to gain a deeper, more sophisticated appreciation of the changes to appointments made by the Constitutional Reform Act 2005 (UK). Those conversations have illuminated the strengths of the United Kingdom model and also those features of it which have been criticised in some quarters. Andrew gave a paper comparing the different approaches of government to increasing judicial diversity in Australia and the United Kingdom at the Society of Legal Scholars conference at the University of Nottingham, which had as its theme 'Judging in the 21st Century'. He also presented work in progress on diversity and judicial dissent in the Faculty seminar series at the University College London, to which he was attached as a visiting academic during his stay in the United Kingdom.

The Project is hosting a research workshop on 'Great Australian Dissents' in June 2015, and a call for abstracts was issued in mid-November and closed on 15 December. The full program will be finalised shortly. The idea behind the workshop is to have participants nominate a single dissenting opinion for inclusion in the pantheon of 'Great Australian Dissents' – and then explain the basis for their choice. This, of course, necessarily invites reflection on what quality or circumstance it is that makes a dissent 'great'. This may be any number of factors in isolation or combination, including the rhetorical and logical force of the opinion as a piece of legal reasoning; subsequent recognition (judicial or political) of its correctness; its emotive power as a judicial lament for the 'error' into which the majority has fallen; and the general importance of the issue at stake. The workshop will provide an opportunity for participants to engage in debate about the selections made by individuals towards the list which it will collectively produce, as well as the criteria by which a dissenting opinion is judged as worthy of inclusion. This is not an open event but the plan is to subsequently have the collected papers made available as a publication.

#### PUBLIC LAW AND LEGAL THEORY PROJECT Project Directors: Ben Golder and Daniel McLoughlin

The key event in this Project for the second half of the year was the 2-day symposium convened by the two Project Directors, Dr Ben Golder and Dr Daniel McLoughlin, entitled The Politics of Legality in a Neoliberal Age. The event took place at the Law School on 1-2 August and the 80 attendees across the 2 days were treated to a range of diverse perspectives on the question of what occurs to the classical ideals of the rule of law, constitutionalism and, latterly, human rights, under the rise of neoliberalism. The event engaged this question from the disciplinary perspectives of law and legal theory, political theory, philosophy, history and sociology, and featured speakers from local and national institutions, from Europe, Asia, North and South America. The event was a great success, with stimulating discussions across both days. Daniel and Ben are currently working towards the production of an edited volume arising from the papers given at the event.

*'At some point more political leadership is needed if the push for constitutional recognition is to emerge from its prolonged committee stage and become a "barbecue stopper".'*

*'Constitutional recognition alive, but it's still no "barbecue stopper"'*

*Paul Kildea, The Conversation, 22 July 2014.*

## REFERENDUMS PROJECT

Project Director: Paul Kildea

The federal government remains committed to holding a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples, but has not committed to a timetable. According to media reports the referendum will most likely be held in 2017. This would leave ample time to develop the reform model but would risk losing the momentum that has been built to date.

Recent months have seen the release of three significant reports on constitutional recognition. The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples – chaired by Liberal MP, Ken Wyatt – published interim and progress reports in which it outlined the main options for reform. These options include the repeal of section 25, the repeal or amendment of section 51(xxvi) (the so-called 'race power') and the introduction of some protection against racial discrimination. In *The Conversation*, Project Director Paul Kildea observed that the Committee's interim report signalled that multi-party support for substantive (as opposed to symbolic) reform remained a real possibility – but cautioned that technical drafting challenges had to be confronted. Paul also noted that levels of public engagement remained low and that the issue was a long way from being a 'barbecue stopper'.

This theme was addressed by the third major report, authored by a Review Panel that was established under the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013. The Panel found that, as of August 2014, public awareness of the referendum was only 34 per cent, down from 42 per cent a year earlier. Of those aware of the referendum, very few (17 per cent) felt that they had a good understanding of the issues. The Review Panel concluded that there is 'clear evidence of drift' on the issue of constitutional recognition, that the Australian public is not ready for a referendum, and that a "circuit-breaker" is needed to cut through the debates on the model and settle a final proposition'. It recommended that a Referendum Council of trusted national figures be established to take the issue forward.

It is expected that the federal government will make an announcement about referendum timing soon, and this may prove to be a 'circuit-breaker' of sorts. As George Williams wrote in the *Sydney Morning Herald* in September, 'setting a timeline will finally bring a focus, and ultimately a sense of purpose, to the debate'.

Centre members have been active on constitutional recognition in other ways. George has given several presentations, including a public lecture at the University of Western Australia. Research published by George and Rosalind Dixon on amending the race power was cited extensively by the Joint Select Committee and Review Panel in their respective reports. And Paul presented a paper at Cambridge University in which he compared the work of the Expert Panel on Indigenous constitutional recognition with the experience of other constitutional advisory bodies around the world.

*"October 2014 will go down as the month in which the federal Parliament made some of its greatest ever inroads into freedom of speech and freedom of the press ... It reveals a shallow adherence to freedom of speech, and an unwelcome, authoritarian streak on behalf of the government and the opposition when it comes to restricting democratic freedoms."*

*George Williams, 'Anti-Terror Laws undermine Democracy' Sydney Morning Herald (3 November 2014).*

## TERRORISM LAW REFORM PROJECT

Project Directors: Keiran Hardy and Nicola McGarrity

The rise of the Islamic State organisation and the threat of foreign fighters returning from Iraq and Syria led to a flurry of anti-terror lawmaking by the Abbott government in 2014. Three tranches of national security reforms were introduced in mid- to late- 2014: the first strengthened intelligence gathering powers and anti-whistleblower measures, the second contained new offences directed at the threat of returning foreign fighters, and a third (to be finalised in early 2015) introduces a mandatory data retention regime.

The Terrorism Law Reform Project has been active in responding to these new laws. Keiran Hardy, George Williams and Nicola McGarrity made submissions and gave evidence to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for inquiries into each of the three tranches. Keiran and George wrote a series of articles for the Law Society Journal. Along with Nicola, they have also written several opinion pieces and been interviewed on ABC radio and television about the new laws. Drawing on her doctoral research into citizenship in constitutional law, Sangeetha Pillai wrote two articles on the laws targeting foreign fighters for The Conversation.

George Williams gave two major presentations on anti-terror laws and human rights during this period: the 26th Annual McDonald Lecture in Constitutional Studies at the University of Alberta, and the Lionel Murphy Memorial Lecture in Canberra. George and Rebecca Ananian-Welsh gave a presentation in Oslo earlier in the year, on the normalisation of anti-terror laws, for a conference hosted by the International Association of Constitutional Law (IACL). Fergal Davis, another Centre member, was also active in the counter-terrorism area, contributing a chapter and editing a collection with Fiona De Londras on counter-terrorism judicial review, which was published by Cambridge University Press. Keiran and George also contributed a chapter to a multidisciplinary collection on cyber-terrorism, and they contributed to ongoing debates about intelligence whistleblowing by publishing an article in a special issue of the UNSW Law Journal.

Andrew Lynch, Nicola McGarrity and George Williams have also written a book entitled *Inside Australia's Anti-Terrorism Laws and Trials* which will be published by NewSouth Press in March 2015. This book examines the impact of Australia's anti-terrorism laws (including those enacted in 2014). It asks, amongst other things, whether these laws needed to be enacted in the first place and whether we need to keep adding to them so regularly.

## [PUBLICATIONS AND PRESENTATIONS]

### PUBLICATIONS

#### Joint Publications

Rebecca Ananian-Welsh and George Williams, 'Judges in Vice-Regal Roles' Report prepared for the Judicial Conference of Australia (September 2014), 1-51;

Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive' Report prepared for the Judicial Conference of Australia (June 2014), 1-58;

Sean Brennan and Megan Davis, 'Koowarta: Constitutional Landmark, Transition Point or Missed Opportunity?' (2014) 23 Griffith Law Review 79-91;

Shipra Chordia and Andrew Lynch, 'Federalism in Australian Constitutional Interpretation: Signs of Reinvigoration?' (2014) 33 University of Queensland Law Journal 83-107;

Fergal Davis and Fiona de Londras (eds), Critical Debates on Counter-Terrorist Judicial Review (CUP, 2014);

Rosalind Dixon and Tom Ginsburg, 'Comparative Constitutional Law in Asia: An Introduction' in R Dixon and T Ginsburg (eds), Comparative Constitutional Law in Asia (Edward Elgar Publishing, 2014) 1-20;

Ben Golder and Christopher Michaelsen, 'Political Criminals, Terrorists, and Extra-Criminal Regimes of Punishment', in F Jenkins, M Nolan and K Rubenstein (eds), Allegiance and Identity in a Globalised World (Cambridge University Press, 2014), 267-290;

Keiran Hardy and George Williams, 'National Security Reforms Stage One: Intelligence Gathering and Secrecy', Law Society Journal, November 2014, 68-69;

Keiran Hardy and George Williams, 'Terrorist, Traitor or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information' (2014) 37(2) University of New South Wales Law Journal 784-81;

Keiran Hardy and George Williams, 'What is "Cyberterrorism"? Computer and Internet Technology in Legal Definitions of Terrorism' in TM Chen, L Jarvis and S MacDonald (eds), Cyberterrorism: Understanding, Assessment, and Response (Springer, 2014) 1-23;

Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2013 Statistics' (2014) 37 University of New South Wales Law Journal 544-564.

#### Fergal Davis

'The Politics of Counterterrorism Judicial Review: Creating Effective Parliamentary Scrutiny' in F Davis and F de Londras (eds), Critical Debates on Counter-Terrorist Judicial Review (CUP, 2014).

David Hume

'The Rule of Law in Reading Down: Good Law for the "Bad Man"' (2014) 37(3) Melbourne University Law Review 620-661.

Brendan Lim

'Laboratory Federalism and the Kable Principle' (2014) 42 Federal Law Review 519.

Daniel McLoughlin

'Rethinking Agamben: Ontology and the Coming Politics' (2014) 25 Law and Critique 319-329.

Sangeetha Pillai

'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37(3) Melbourne University Law Review 736-785.

Greg Weeks

'The Public Law of Restitution' (2014) 38 Melbourne University Law Review 198-239.

George Williams

'Section 53 of the Constitution' NSW Society of Labor Lawyers, Legal Tweaks that Would Change NSW and the Nation (2014), 30;

'Very Few Limits in Tough Australian Anti-Terror laws', East Asia Forum, (21 October 2014).

PRESENTATIONS

Joint Presentations

Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia', World Congress of Constitutional Law 2014, International Association of Constitutional Law, 18 June 2014;

Penny Crofts and Andrew Lynch, 'Ends and Means: The New Ruthless Doctor', Politics and Law of Doctor Who Symposium, Centre for Law, Society and Popular Culture, Westminster Law School, University of Westminster, London, 5 September 2014.

Sean Brennan

'Constitutional Change and Aboriginal and Torres Strait Islander Peoples', Building Bridges, Reconciliation for Western Sydney, Parramatta, 27 August 2014.

Joanna Davidson

'Legal recognition of differences in sex and gender', NSW Bar Association CPD seminar, Sydney, 18 November 2014;

'Procedural fairness: recent developments', Crown Solicitor's Office Administrative Law Seminar, Sydney 20 August 2014.

Rosalind Dixon

'Constitutional Redundancy', Melbourne Law School, 15 October 2014;

'Australian Courts and Transnational Anchoring: The Kable Doctrine', Australian Institute of Judicial Administration Annual Judges' Conference, 24 September 2014.

Ben Golder

'The Late Foucault on Rights: Tactics, Strategy and the Rights of Life and Death', Politics After the Digital Revolution, American Political Science Association Conference, Washington, DC, 28-31 August 2011;

'The Neoliberal Question: Human Rights, Legal Form, and Political Strategy', The Politics of Legality in a Neoliberal Age, UNSW Law School, Sydney, 1-2 August 2014;

'Foucault contra Biopolitics: Tactics, the Right to Die, and the Critique of the Death Penalty', 2014 meeting of the Foucault Circle, University of Malmö, Malmö, 5-8 June, 2014.

Paul Kildea

'Public Engagement in Constitutional Reform: A Comparative Analysis', Australian Political Studies Association Conference, University of Sydney, Sydney, 29 September 2014;

Constitutional Reform Without a Convention: Reflections on Recent Experience in the UK, Ireland and Australia', Public Law Conference, University of Cambridge, UK, 15 September 2014.

Brendan Lim

'The Principle of Legality', Australian Association of Constitutional Law Seminar Series, Federal Court, Sydney, 5 November 2014.

Andrew Lynch

'Nothing to be Frightened of: Judicial Diversity and Disagreement', Faculty of Law, University College London, 14 October 2014;

'Judicial Diversity in Australia and the United Kingdom – A Common Objective; Distinct Approaches', Society of Legal Scholars' Conference, University of Nottingham, 11 September 2014;

'Williams Mark II: Commonwealth Spending, Benefits to Students and School Chaplaincy', Current Constitutional Controversies Occasional Colloquium Series, University of Queensland and Supreme Court Library Queensland, Brisbane, 19 August 2014;

'All Things Being Equal: Merit and Diversity in Judicial Appointments', College of Law, Australian National University, Canberra, 31 July 2014.

Jason Varuhas

'Reflections on the Damages Principle in Lumba', The Law of Civil Wrongs, Conference, University of Melbourne, Melbourne, December 2014;

'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications', Public Law Conference: Process and Substance in Public Law, University of Cambridge, UK, September 2014.

George Williams

'Judicial Independence from the Executive', Seminar, District Court NSW, Sydney, 3 December 2014;

'Bryan Pape and his Legacy to the Law', Commemorative Lecture, School of Law, University of New England, Armidale, 25 November 2014;

'What Future for the States?', Reimagining Australian Leadership Forum, Swinburne University, Melbourne, 21 November 2014;

'Aboriginal and Torres Strait Islander Peoples in Australia's Constitution', Australian Catholic Social Justice Council, Sydney, 20 November 2014;

'How Should Indigenous People be Recognised in the Constitution', ALP Central Policy Branch, Sydney, 27 October 2014;

'Does Australia Need New Anti-Terror Laws?', Lionel Murphy Memorial Lecture, Canberra, 22 October 2014;

'Why it's Time to Recognise Aboriginal Peoples in the Constitution', Royal Australian and New Zealand College of Psychiatrists Annual Dinner, Sydney, 18 October 2014;

'New Terror Laws', Public Forum, New South Wales Society of Labor Lawyers, Sydney, 16 October 2014;

'The High Court and Family Law', 16th National Family Law Conference, Sydney, 9 October 2014;

'Legislating for Same-Sex Marriage in Western Australia', Public Lecture, Murdoch University, Perth, 7 October 2014;

'Is it Time to Recognise Aboriginal Peoples in the Constitution?', Public Lecture, Faculty of Law, University of Western Australia, Perth, 7 October 2014;

'Achieving the Impossible: Winning the Referendum to Recognise Aboriginal Peoples in the Australian Constitution', 2014 Australian Political Studies Association Conference, Sydney, 29 September 2014;

'Social Media and Court Communication', Public Law Conference: Process and Substance in Public Law, Faculty of Law, Cambridge University, 17 September 2014;

'Anti-Terrorism Laws and Human Rights', 26th Annual McDonald Lecture in Constitutional Studies, Centre for Constitutional Studies, University of Alberta, 11 September 2014;

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*"The Carmody affair demonstrates that despite the limits of the so-called "merit principle" and the legitimacy of supplementing that with broader considerations to guide the government's discretion, there is a need to develop an appointments process that unreservedly establishes that an individual possesses the essential judicial qualities to the satisfaction of both the government and the legal community." - 'Chief Justice Carmody and the "merit principle"'*

*Andrew Lynch Inside Story  
(18 August 2014).*

'New Threats to Security, Old Threats to Liberty', Public Forum, The Centre for Independent Studies, Sydney, 4 September 2014;

'How Should we Protect Free Speech?', Free Speech 2014, Australian Human Rights Commission, Sydney, 7 August 2014;

'The High Court: the Constitution and Human Rights', 2014 Castan Centre Human Rights Conference, Melbourne, 25 July 2014;

'Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples', DLA Piper, Sydney, 23 July 2014;

'The High Court and the Asylum Case', Public Forum, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Sydney, 22 July 2014;

'What Should you do with your Public Law Thesis?', 2014 Postgraduate Workshop in Public Law, Gilbert + Tobin Centre of Public Law, UNSW, 18 July 2014;

'Constitutional Recognition and a Treaty', Manning Clark House Forum, Canberra, 14 July 2014;

'Say What You Like: A Constitutional Right?', 2014 Constitution Day Forum, National Archives of Australia, UNSW, Sydney, 7 July 2013.

## MEDIA PUBLICATIONS

### Joint Media Publications

Jessie Blackbourn and Nicola McGarrrity, 'How Reactive Law-Making will Limit the Accountability of ASIO', Inside Story (24 July 2014).

### Keiran Hardy

'Sweeping Security Law Would Have Computer Users Surrender Privacy', The Conversation (16 September 2014);

'National Security Bills Compound Existing Threats to Media Freedom', The Conversation (28 August 2014).

### Paul Kildea

'A people's convention can make Indigenous recognition a reality', The Conversation (11 December 2014).

'Constitutional recognition alive, but it's still no "barbecue stopper"', The Conversation (22 July 2014).

### Andrew Lynch

'Diversity among judges is matter of legitimacy and equality, but also a help in decision-making', The Australian (19 December 2014);

'Chief Justice Carmody and the "merit principle"', Inside Story (18 August 2014).

Sangeetha Pillai

'Bill targets foreign fighters before departure and after return', The Conversation (24 September 2014);

'Foreign fighter passports and prosecutions in government's sights', The Conversation (7 August 2014).

George Williams

'Don't Expect Senate Defectors to Take the Honourable Course', Sydney Morning Herald (1 December 2014);

'Retiring Judges Force Abbott Government's Hand on High Court', Sydney Morning Herald (17 November 2014);

'Anti-Terror Laws Undermine Democracy', Sydney Morning Herald (3 November 2014);

'Driven Out: Hostile Senate Sealed Gough Whitlam's Fate', The Australian (22 October 2014);

'A Law unto Himself, Whitlam's Reforms Stood the Test of Time', The Age (22 October 2014);

'McCloy's Challenge may Derail Changes to Donations Laws', Sydney Morning Herald (20 October 2014);

'We Shouldn't Introduce More Anti-Terror Legislation When We Have the Laws Already', Sydney Morning Herald (6 October 2014);

'How a Vote Could Change Racist Laws', Sydney Morning Herald (22 September 2014);

'We Need Privacy Rights Reform that Cracks Down on this Cynical Snooping', Sydney Morning Herald (8 September 2014);

'It's Lip Service to Free Speech', Canberra Times (25 August 2014);

'Free Speech Must be Liberated from Political Captors', Sydney Morning Herald (25 August 2014);

'Anti-Terrorism Reforms Put Democracy at Risk', Sydney Morning Herald (11 August 2014);

'Fix the Racism at the Heart of the Constitution', The Age (18 July 2014);

'Time to Fix a Stain in the Constitution', Sydney Morning Herald (18 July 2014);

'How PM Can Play Double-Dissolution Card', The Age (15 July 2014);

'How Abbott Can Play his Double Dissolution Card', Sydney Morning Herald (15 July 2014);

'Brandis Need Only Refer to Brandis to See Error', Canberra Times (1 July 2014);

'George Brandis Ignores His Own Insights into Chaplains Ruling', Sydney Morning Herald (1 July 2014);

‘Palmer Saga Set to Play Out in Senate’, The Examiner (23 June 2014);

‘Palmer the Ballast in Canberra Balancing Act’, Canberra Times (19 June 2014);

‘The Clive Factor: Palmer Crucial for Government as it Tries to Woo Senate’, Sydney Morning Herald (19 June 2014).

## SUBMISSIONS

### Joint Submissions

Keiran Hardy and George Williams, Submission to Parliamentary Joint Committee on Intelligence and Security Inquiry into Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (9 December 2014);

Keiran Hardy and George Williams, Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth), 7 November 2014;

Keiran Hardy, Nicola McGarrity and George Williams, Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) (1 October 2014);

Keiran Hardy, Nicola McGarrity and George Williams, Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into National Security Legislation Amendment Bill (No. 1) 2014 (Cth) (31 July 2014 and 25 August 2014).

### George Williams

Submission to WA Select Committee on Aboriginal Constitutional Recognition Inquiry (23 December 2014);

Submission to NSW Expert Panel on Political Donations Inquiry into Political Donations (26 August 2014).



Celebrating the end of a busy year at the Centre Christmas Party in December

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