



GILBERT + TOBIN CENTRE OF PUBLIC LAW

ANNUAL REPORT

FOR THE YEAR ENDED 31 DECEMBER 2014

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1. THE CENTRE

The Gilbert + Tobin Centre of Public Law in the Faculty of Law was established in 2001 with the aim of providing a focus within UNSW for research and education (including teaching, research supervision, professional education and public conferences) on issues of law and policy concerning the sphere of Public Law.

The Centre's Members, Postgraduate Students and Visitors seek to actively engage with government, the legal profession and broader community through research, teaching, media and consultancy work, and events including conferences, workshops and seminars.

The Centre's operations may be generally equated with those expected of individual researchers in an academic faculty but enhanced through the possibilities of institutional collaboration and profile which are afforded by the Centre, as well as the administrative support which its members receive. In addition to the publication of traditional legal research in the areas with which the Centre is concerned, the Centre focuses strongly on the broader application and dissemination of its research efforts.

As its mission, the Centre is committed to the production of highest quality research as the basis from which we engage with government and the community on public law issues so as to deepen understanding, inform debate and influence change.

The Centre's strategic plan for 2010-15 identifies three key objectives:

1. To be the foremost independent academic research Centre nationally on public law issues of major contemporary importance.
2. To provide a central hub through which government, the legal profession, academia and the broader community meets to discuss and debate current developments and reform proposals in the field of public law.
3. To build public profile and actively engage with government, the legal profession, the media, NGOs and the broader community so as to impact on pressing issues of public law reform.

2. DIRECTOR'S REPORT: SEAN BRENNAN

In more formal terms, this annual report confirms the following progress in achieving key performance indicators under each of the three strategic objectives identified in section 1 above.

1. To be the foremost independent academic research Centre nationally on public law issues of major contemporary importance:

- a suite of research projects in which expertise has been fostered and developed over the longer term;
- The maintenance of a ‘critical mass’ of Faculty and directly-employed staff who pursue their research in these areas through the Centre as an institutional structure;
- A high number of postgraduate research students at various stages of progression through their candidature under the supervision of Centre members;
- Continued participation each year in internship programs of the UNSW Social Justice Project and School of Law, University of Chicago;
- The regular submission of applications to external funding bodies (as their rules may permit) and success in obtaining support for Centre projects;
- Evidence of joint authorship between Centre members of publications and submissions;
- Publication of peer-reviewed articles in A* journals and books with international or national publishers of high standing in the marketplace; and
- Invitations to contribute book chapters to edited collections and to present research papers at conferences in Australia and overseas.

3. CENTRE COMMITTEES

3.1 Advisory Committee

The composition of the Advisory Committee in 2014 was as follows:

Sir Anthony Mason AC KBE CBE, Former Chief Justice of the High Court (Chair)
 The Hon Justice John Basten, Court of Appeal Supreme Court of New South Wales
 Associate Professor Sean Brennan, Centre Director
 Professor Rosalind Croucher, President, Australian Law Reform Commission
 Professor David Dixon, Dean, Faculty of Law, UNSW
 The Hon Stephen Gageler, High Court of Australia
 Mr Danny Gilbert, Managing Partner, Gilbert + Tobin
 The Hon Justice Anna Katzmann, Federal Court of Australia
 The Hon Justice Melissa Perry, Federal Court of Australia

The Advisory Committee held its annual meeting on 23 June 2014.

3.2 Management Board

Professor David Dixon, Dean, Faculty of Law, UNSW (Chair)
 Associate Professor Sean Brennan, Centre Director
 Professor Andrea Durbach, Faculty of Law, UNSW
 Mr Steven Glass, Gilbert + Tobin
 Professor Peter Saunders, Faculty of Arts and Social Sciences, UNSW
 Dr Claudia Tazreiter, Faculty of Arts and Social Sciences, UNSW

The Management Board held meetings as follows:

26 March 2014

Attending: Professor David Dixon, Associate Professor Sean Brennan, Professor Andrea Durbach, Professor Peter Saunders

Apologies: Mr Steven Glass, Dr Claudia Tazreiter

29 September 2014

Attending: Professor David Dixon, Associate Professor Sean Brennan, Mr Steven Glass

Apologies: Professor Andrea Durbach, Professor Peter Saunders, Dr Claudia Tazreiter

5 November 2014.

Attending: Professor David Dixon, Associate Professor Sean Brennan, Mr Steven Glass, Professor Peter Saunders

Apologies: Professor Andrea Durbach, Dr Claudia Tazreiter

4. STAFF

4.1 Centre Staff

Centre Staff as at 31 December 2014 consisted of the following:

Associate Professor Sean Brennan, (Director, Indigenous Legal Issues Project)

Email: s.brennan@unsw.edu.au

Phone: (02) 9385 2334

Interests: Public Law, Indigenous Legal Issues, Native Title.

Dr Fergal Davis

Email: f.davis@unsw.edu.au

Phone: (02) 9385 9656

Interests: Public Law, Trial by Jury, Human Rights Law and Judicial Review
Skepticism, Counter-Terrorism Law.

Professor Rosalind Dixon (Director, Comparative Constitutional Law Project)

Email: rosalind.dixon@unsw.edu.au

Phone: (02) 9385 6964

Interests: Constitutional Law, Comparative Constitutional Law, Constitutional Design,
Constitutional Amendment, Socio-Economic Rights, Law and Gender.

Dr Ben Golder (Director, Public Law and Legal Theory Project)

Email: b.golder@unsw.edu.au

Phone: (02) 9385 1843

Interests: Legal and Social Theory (particularly critical, feminist and post-structuralist approaches to law), Legal Philosophy, Criminal Law and Public Law (particularly critical approaches to counter-terrorist law and capital punishment).

Dr Paul Kildea (Director, Referendums Project)

Email: p.kildea@unsw.edu.au

Phone: 902) 9385 9655

Interests: Public Law, the Process of Constitutional Reform, Political Participation, Deliberative Democracy, Federalism.

Professor Andrew Lynch (Director, Judiciary Project)

Email: a.lynch@unsw.edu.au

Phone: (02) 9385 9654

Interests: Constitutional Law, Federalism, Terrorism Law, Judicial Dissent, Judicial Appointment.

Ms Belinda McDonald (Administrator)

Email: gtcentre@unsw.edu.au

Phone: (02) 9385 2257

Ms Nicola McGarrity

Email: n.mcgarrity@unsw.edu.au

Phone: (02) 9385 3445

Interests: Constitutional Law, Legal Responses to Terrorism, Human Rights, Constitutional Reform.

Dr Daniel McLoughlin

Email: Daniel.McLoughlin@unsw.edu.au

Phone: (02) 9385 7621

Interests: Legal Theory, Sovereignty, Politics and Theory of Human Rights.

Dr Kristen Rundle

Email: k.rundle@unsw.edu.au

Phone: (02) 9385 9562

Interests: Administrative Law, Legal Theory and Law and the Holocaust

Dr Svetlana Tyulkina

Email: s.tyulkina@unsw.edu.au

Phone: (02) 9385 6676

Interests: Comparative Constitutional Law, Anti-Terrorism Legislation, International Human Rights Law, Political Participation Rights.

Dr Jason Varuhas

Email: j.varuhas@unsw.edu.au

Phone: (02) 9385 2255

Interests: Constitutional Law, Administrative Law, Human Rights Law, Remedies, Public Law Theory, Public-Private Distinction, Economic Analysis of Law, Legal Methodology.

Dr Greg Weeks

Email: greg.weeks@unsw.edu.au

Phone: (02) 9385 8242

Interests: Judicial Review, State Liability, Public Law and Private Law Remedies against Public Authorities.

Professor George Williams (Foundation Director and Director, Anti-Terror Laws and the Democratic Challenge)

Email: george.williams@unsw.edu.au

Interests: Constitutional Law, Human Rights, High Court of Australia, Electoral Law, Federalism and Anti-Terror Law.

4.2 Centre Fellows

During 2014 the Centre welcomed three professionals engaged as ‘Centre Fellows’ an initiative to broaden the Centre’s academic community. They are: David Hume, Brendan Lim and Joanna Davidson, all Sydney barristers who work predominantly outside the university and who share our interest in top-quality public law scholarship and external engagement. The Centre values their professional skills, expertise and experience, knowing that, for us, they enhance and enrich our activities and events. We welcome them in maintaining their scholarly interests in the law, through engagement with the Centre community on a regular and ongoing basis.

4.3 Centre Associates

Tony Blackshield AO, Adjunct Professor, LL.M Syd

Dominique Dalla-Pozza, Lecturer, ANU College of Law, BA (Hons) LLB (Hons) Syd
PhD UNSW

Megan Davis, Professor, BA LLB UQ, LL.M PhD ANU

Arthur Glass, Senior Visiting Fellow, BA LLB PhD Syd

Cassandra Goldie, CEO, ACOSS, B Juris LLB (Hons) UWA, LL.M Dist UCL, PhD
UNSW

Janice Gray, Senior Lecturer, BA LLB Dip Ed MA UNSW

Devika Hovell, Assistant Professor, Department of Law, London School of Economics,
BA LLB (Hons) UWA, LL.M NYU, DPhil Oxon

Jill Hunter, Professor, BA LLB UNSW, PhD Lond

Jane McAdam, Professor, BA (Hons) Syd, LLB (Hons) Syd, DPhil Oxon

Garth Nettheim, Emeritus Professor, LLB Syd, AM Tufts

Rosemary Rayfuse, Professor, LLB Queens, LLM Cantab, PhD Utrecht

Alex Reilly, Associate Professor, University of Adelaide, BA (Juris) LLB (Hons) Adel, GDLP SA, LLM British Columbia

Ben Saul, Professor, University of Sydney, BA (Hons) LLB (Hons) Syd, DPhil Oxon

Svetlana Tyulkina, Postdoctoral Fellow, LLB (Hons) LLM CEU, MLitt Monash, PhD CEU

Jeremy Webber, Visiting Professor, BA British Columbia, LLB, BCL McGill, LLM Osgoode

4.4 Social Justice Internship Program

The Centre continues to take part in the Social Justice Internship Program, an elective course designed to give later year undergraduate and Juris Doctor students experience in various aspects of social justice advocacy. The students working with the Centre during 2014 were Agnieszka Deegan (Semester I, 2014) and Christabel Richards-Neville (Semester II, 2014).

4.5 Postgraduate Research Students

The following postgraduate students were affiliated with and supported by the Centre during 2014:

Andrew Dahdal

Supervised by Theunis Roux

Topic: Section 51(xiii) - The Commonwealth Banking Power

Keiran Hardy

Supervised by Ben Golder and George Williams

Topic: Developing a Counter-Insurgency Model of Anti-Terrorism Law

Jackie Hartley

Supervised by Sean Brennan

Topic: Free, Prior and Informed Consent and the Rights of Indigenous Peoples to Lands, Territories and Resources

Grant Hooper

Supervised by Mark Aronson

Topic: Through the *Migration Act* Looking Glass: Can Natural Justice be Extinguished by a Legislative Code: Towards the Waterfall of Invalidity

Mitchell Landrigan

Supervised by George Williams

Topic: The Interface of Political and Religious Discourse Under the Commonwealth Constitution

Nicola McGarrity

Supervised by Andrew Lynch

Topic: Terrorism Laws and the Criminal Trial

Jennifer Norberry

Supervised by Andrew Lynch and George Williams

Topic: Law and National Security Crises - Contemporary Australian Experience

Soula Papadopoulos

Supervised by Andrew Lynch and George Williams

Topic: Co-operative Federalism is Not a Constitutional Term

Sangeetha Pillai

Supervised by Fergal Davis and George Williams

Topic: Citizenship and Anti-Terror Laws

Tamara Tulich

Supervised by Fergal Davis and George Williams

Topic: The Judiciary as a Check on Anti-Terror Laws

Rebecca Ananian-Welsh

Supervised by Andrew Lynch and George Williams

Topic: The Power to Restrain Liberty under Chapter III of the Australian Constitution: Control Orders and Preventative Detention Orders

Kelvin Widdows

Supervised by Andrew Lynch and George Williams

Topic: Sir John Latham: Judicial Reasoning in Defence of the Commonwealth

Tamara Wood

Supervised by Jane McAdam

Topic: Who is a refugee under Article I(2) of the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa?

The above list does not generally include the names of supervisors outside the Centre.

5. KEY CENTRE ACTIVITIES

5.1 Research Funding

As at 31 December 2014, the Centre had the following external research grants supporting its research activities:

- 2012-14 ARC Discovery grant for \$215,000 to fund research into ‘Co-operative Federalism in Australian: Constitutional Principles and Practice’ (Lynch & Williams)

In addition, Professor George Williams continued to hold (until 30 June 2014) a 2009-14 ARC Laureate Fellowship of \$2,211,430 to fund research into ‘Anti-Terror Laws and the Democratic Challenge’.

5.2 Research Projects

The ARC Laureate Fellowship: Anti-Terror Laws and Democratic Challenge Project (Project Director: George Williams) aimed to answer the question of how democratic nations (especially Australia, Canada, India, New Zealand, the United Kingdom and the United States) can best reconcile traditional democratic processes, institutions, principles and individual freedoms with the likelihood that anti-terror laws granting war-time powers will remain in place for the foreseeable future.

The Fellowship enabled the project director to lead a team of researchers to conduct a five-year research from July 2009 – June 2014 and represented the next phase in public law research in anti-terror laws enacted after 11 September 2011. The project provided detailed comparative legal analysis of the scope and operation of anti-terrorism laws and answered specific questions of public law theory and institutional design central to the democratic challenge posed by anti-terror laws. A large team of academics and students took part in this research and the project produced a large volume of publications: 13 books, 24 book chapters, 54 refereed articles and 41 un-refereed articles. A theme across much of this work is how anti-terror laws are becoming seen as less exceptional, and more normal incidents of legal systems. In this form, anti-terror laws are being used as a template for enactment of law and order regimes in other contexts.

The research was also presented at conferences and workshops across Australia and around the World. The project hosted a number of national and international visitors and organised events such as the 2012 Annual Conference of the International Association of Constitutional Law’s Research Group on Constitutional Responses to Terrorism. Papers at this conference were published as an edited collection by a leading international publisher.

The project was also actively engaged in media debates about anti-terror laws and 18 submissions were made to parliamentary inquiries, independent reviewers and law reform bodies. These submissions have regularly formed the basis of recommendations and have impacted upon the form in which laws have been enacted.

The **Charter of Human Rights Project** (Project Director: Andrew Lynch) was one of the Centre's longest-running projects, contributing to the debate about a national Charter of Human Rights and maintaining a watching brief on the intersection of human rights with other public law issues in Australia. Although Australia has a long tradition of protecting human rights it is now the only major constitutional democracy with a national Charter of Human Rights. The debate over whether to adopt a national Charter of Human Rights, and equivalent State charters, remains ongoing. The aim of the Charter of Human Rights Project was to inform this ongoing debate by providing relevant information on different possible Charter of Human Rights models, and links to the latest media, recent reports and academic commentary on the issue.

The **Comparative Constitutional Law Project** (Project Director: Rosalind Dixon), established in 2013, aims to contribute to increased interest in and knowledge about comparative constitutional developments among constitutional scholars, and particularly, lawyers and legal policy-makers in Australia. The project builds on the comparative work of the Project Director and on links with a broader Faculty Working Group on Constitutionalism in New Democracies. The project had a busy 2014 with 4 events, the first being an academic workshop held in March. The project's annual 'Final Courts Roundup' (co-hosted by the AACL) brought together scholars from overseas jurisdictions to provide an update on key constitutional developments over the previous year, in their jurisdiction. This event was followed by an academic roundtable on comparative constitutional law, which delved into a range of topics 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 final event in 2014 was a conference on 'The Constitutional Court and Democracy in Indonesia: Judging the First Decade' co-hosted with the University of Sydney and the UNSW Law Faculty Working Group on Constitutionalism in New Democracies. The conference featured an opening keynote panel at UNSW, with a former Chief Justice of the Constitutional Court of Indonesia Professor Dr Jimly Asshiddiqie, SH and former Deputy Minister for Justice and Human Rights Professor Dr Denny Indrayana, SH. The academic event the following day featured papers from leading scholars on Indonesian Constitutionalism.

The **Federalism Project** (Project Director: Shipra Chordia) received a new body of external funds in 2012 through an ARC Discovery grant of \$215,000 supplemented by \$100,000 from UNSW. This money is funding further research into the effect of intergovernmental co-operation on Australia's system of constitutional democracy and

the relationship between, on the one hand, harmonisation and ‘co-operative’ federal-state relations and, on the other hand, constitutional principles such as responsible government and public accountability. During 2014 the project was engaged in a broad range of activities including work on the High Court’s decisions in *William v Commonwealth (Nos 1 & 2)* and an analysis considering the implications of the decision *William (No 1)* for Australian constitutional interpretation. Centre members have considered the federal significance of the recent decisions of the Court, and Andrew Lynch’s analysis of the Court’s treatment of the Mineral Rent Resource Tax in *Fortesque v Commonwealth* was published in the Australian Bar Review. Shipra Chordia’s investigation of the federal aspects of the Same Sex Marriage case was published in the Alternative Law Journal. Further research included the federal issues arising in the context of constitutional reform to recognise Indigenous people; parliamentary sovereignty and co-operative federalism; and the legal hurdles facing the new Attorney-General George Brandis in his first term.

During the second half of the year Centre members have remained active on the issue of Federalism including COAG’s transparency in the online outlet The Mandarin, the second School Chaplains decision from the High Court, *William v Commonwealth (No 2)* and the future for the states.

The project has produced a number of publications including Centre Fellow Brendan Lim who wrote for the Federal Law Review on ‘Laboratory Federalism’ and the Kable principle; PhD student Shipra Chordia and Andrew Lynch published in the University of Queensland Law Journal on signs of reinvigoration in the use of Federalism in constitutional interpretation and Centre Director Sean Brennan published a retrospective piece about the *Koowarta v Bjelke-Petersen* decision, co-authored with Megan Davis (Indigenous Law Centre Director) 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.

The **Indigenous Legal Issues Project** (Project Director: Sean Brennan) in 2014 continued its focus on two particular issues, native title and constitutional reform, in particular the question of constitutional reform in the High Court in the area of native title extinguishment. The project director was involved in drawing public attention to the preference for co-existence over extinguishment in the Australian newspapers and the Public Law Review.

Centre members have also been active on the issue of constitutional change and Aboriginal Torres Strait Islander peoples through media commentary, articles and submissions. Sean Brennan presented on this topic at a session of Building Bridges, a community education and discussion series organised by Reconciliation for Western Sydney.

The **Judiciary Project** (Project Director: Andrew Lynch) continues to house the work done by Centre members on the High Court and other courts as institutions. The main focus during 2014 was on judicial appointment. The Commonwealth Government abandoned reforms made by Rob McClelland in 2008 on the process by which federal judges are appointed. Advertising judicial vacancies and calling for nominations and

expression of interested ceased in the selection process. The Commonwealth no longer provides a statement of criteria upon which the selection of individuals is based and has reverted to the traditional opaque approach by which it appoints judges to the Courts. This raises concerns about the consequence for efforts to improve judicial diversity. Andrew Lynch continued research on the intersection of ‘merit’ and diversity considerations in the selection of judicial officers.

Research on judicial dissent also continues with a planned workshop in 2015: Great Australian Dissents which aims to discuss dissenting opinions and to foster debate on what makes a dissent great.

The **Public Law and Legal Theory Project** (Project Director: Ben Golder) examines many of the foundational concerns of the Centre (public law, sovereignty, democracy, human rights and counter-terrorism) through the lens of contemporary political theory, legal philosophy and critical legal theory. Work on this project focused on a two day symposium held in August 2014: ‘Politics of Legality in a Neoliberal Age’. This event discussed the question of what occurs to the classical idea of the rule of law, constitutionalism and 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, Asian and North and South America. Organisers Dr Ben Golder and Dr Daniel McLoughlin are working towards the production of an edited volume arising from the papers given at the symposium.

The **Referendums Project** (Project Director: Paul Kildea) was created to explore the holding of referendums in Australia. Referendums have long been important to the work of the Centre in areas like federalism and Indigenous legal issues, but have not themselves been the subject of direct attention.

One of the main focuses of the project was to the proposed referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples, most likely to be held in 2017. The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples published interim and progress reports in which it outlined the main option 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. Project Director Paul Kildea reported that the Committee’s interim report signalled that multi-party support for substantive reform remained a real possibility.

A review panel, established under the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 found that public awareness of the referendum was low (34%) concluding that the Australian public were not ready for a referendum. Hopefully the Federal Government’s announcement about a referendum may prove to be a ‘circuit breaker’ and may bring a focus and sense of purpose to the debate.

The **Terrorism and Law Project** (Project Directors: Keiran Hardy and Nicola McGarrity-White) has been busy with the flurry of anti-terror lawmaking due to the rise of the Islamic State organisation and the threat of foreign fighters return from Iraq and Syria. Three national security reforms were introduced in 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 2015) will introduce a mandatory data retention regime.

The project has been active responding to these new laws. Submissions and evidence to the Parliamentary Joint Committee on Intelligence and Security by Keiran Hardy, George Williams and Nicola McGarrity-White have addressed these three reforms. Opinion pieces, interviews and presentations by Centre members have also contributed to responding to the new anti-terror laws. Andrew Lynch, Nicola McGarrity and George Williams have written a book 'Inside Australia's Anti-Terrorism Law and Trials' forthcoming in 2015. This book examines the impact of Australia's anti-terrorism laws and asks whether these laws needed to be enacted in the first place and whether we need to keep adding to them so regularly.

5.3 Events

The Centre held several successful events during 2014:

- 2014 Constitutional Law Conference and Dinner

On 14 February, the Centre again hosted its annual constitutional law conference at the Art Gallery of New South Wales. The conference, the thirteenth in this series, gathered together practitioners, judges, scholars and members of the general public to discuss recent events and future trends in Australian constitutional law. Participants were updated on recent important developments in the High Court, Federal Court and States and gained an understanding of the issues that will emerge in the future. The event attracted over 225 people and participants at the conference also enjoyed the dinner that night at New South Wales Parliament House. The guest dinner speaker was the Commonwealth Attorney-General, Senator George Brandis who spoke on 'The Constitution in 2030'.

- Workshop on Party Discipline and the Parliamentary Process

On 23 June Centre Director Sean Brennan launched the Centre's new Parliaments Project at its inaugural event, a workshop on *Party Discipline and the Parliamentary Process*. The aim of the workshop was to explore the impact of strong political party discipline in Australia on a variety of parliamentary processes, in particular those providing for political rights review. The workshop presentations prompted a lively discussion from those who attended and the event opened up a number of debates with which the Project will engage over the coming years.

- Constitution Day Speakers Forum

Each year the National Archives of Australia organizes a speakers forum on Constitution Day. It is an opportunity for public engagement with contemporary issues and on 7 July it was co-hosted by the Centre. The topic of discussion was ‘Say what you like: a constitutional right?’ moderated by the ABC’s Paul Barclay and a panel tackled the issues of freedom of speech and the unlawfulness to offend, insult, humiliate or intimidate someone on the basis of race.

- Postgraduate Workshop in Public Law

This event has become a biennial two-day workshop for higher degree research students in public law to gain experience presenting their work to the peers and the wider academic public law community. This workshop, held on 17/18 August, offered an invaluable opportunity for emerging students to establish networks with colleagues in their field. Students from the United States, New Zealand and five Australian jurisdictions presented their work on a range of public law topics.

- Symposium: The Politics of Legality in a Neoliberal Age

On 1-2 August the Public Law and Legal Theory Project hosted a two day symposium on a range of perspectives on the question of what occurs to the classical ideals of the rule of law, constitutionalism and human rights under the rise of neoliberalism. National and international speakers addressed a range of different dimensions of the workshop’s themes and raised issues of disciplinary perspectives of law and legal theory political theory, philosophy, history and sociology.

- 2014 Final Courts Roundup

This end of year event, held on 9 December, co-hosted by the Centre’s Comparative Constitutional Law Project and the AACL, provided an opportunity for scholars from overseas jurisdictions to update practitioners and other academics on key constitutional developments over the last year, in their jurisdiction. Last year, the panellists for the event represented the United States, the UK and India. This event 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.

- Comparative Constitutional Law Roundtable

Following on from the Final Courts Roundup, the Centre hosted an academic roundtable on comparative constitutional law, held on 10 December. This roundtable featured work-in-progress of a number of international academics and prompted discussion on a range of topics of constitutionalism.

- The Constitutional Court and Democracy in Indonesia: Judging the First Decade

This conference, co-hosted with the University of Sydney Law School and the UNSW Law Faculty Working Group on Constitutionalism in New Democracies, featured an opening keynote panel at UNSW with the former chief Justice of the Constitutional Court of Indonesia and former Deputy Minister for Justice and Human Rights. The academic event the following day was a discussion from leading scholars on Indonesian constitutionalism.

In addition, during 2014 several seminars were given by Centre visitors:

- Dr Melissa Crouch from the National University of Singapore spoke on ‘Constitutionalism in Transition: The Writs as a Litmus Test of Law Reform in Myanmar’;
- Professor Dwight Newman, University of Saskatchewan, in a seminar co-hosted with the Indigenous Law Centre, analysed *Tsilhqot’in v British Columbia*, the recent landmark Aboriginal title decision delivery by the Canadian Supreme Court;
- Professor Kent Roach from the University of Toronto gave a seminar on ‘Comparative Perspectives on Remedies for Laws that Violate Human Rights’.

6. PUBLICATIONS

Publications for the year ending 2014 are set out below.

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 Michaelson, '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;

Alysia Blackham and George Williams, 'Social Media and the Courts' (2014) 88(3) *Law Institute Journal* 30-33;

Fergal Davis and David Mead, 'Declarations of Incompatibility and the Criminal Law' (2014) 43(1) *Common Law World Review* 62-84;

Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Asia* (ed.), Edward Elgar Publishing, 2014;

Rosalind Dixon and Mark Tushnet 'Weak-Form and its Constitutional Relatives: an Asian Perspective' in *Comparative Constitutional Law in Asia* (ed.), Edward Elgar Publishing, (2014);

Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution' (2014) 25 *Public Law Review* 83-88;

Peter Turner and Jason Varuhas, 'Injunctions, Undertakings in Damages, and the Public-Private Divide' (2014) 130 *Law Quarterly Review* 32-37;

George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams' Australian Constitutional Law and Theory – Commentary & Materials*, 6th edition, The Federation Press, 2014, 1-1429.

Joint Media Publications

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

Jessie Blackbourn and Nicola McGarrity, 'The Independent Security Monitor's unfinished work', *Inside Story* (3 April 2014);

Shipra Chordia and Andrew Lynch, 'The many dilemmas of George Brandis', *The Canberra Times* and *The Age* (4 February 2014).

Rebecca Ananian-Welsh

Media

'Native title and co-existence', *The Australian* (14 March 2014).

Jessie Blackbourne

'Anti-Terrorism Law Reform: Now or Never?' (2014) 25(1) *Public Law Review* 3-7.

Sean Brennan

'Native Title Extinguishment Law in the High Court' (2014) 25(1) *Public Law Review* 8-12.

Media

'Native title and co-existence', *The Australian* (14 March 2014).

Shipra Chordia

Media

'Federation frozen in time fails as a model of accountable government', *The Conversation* (4 June 2014).

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);

'Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK' (2014) 67 (1) *Parliamentary Affairs* 137–150.

Media

‘I used to believe I had the right to be a bigot. But reason prevailed’, *The Guardian* (31 March 2014);

‘Could a secret ballot ensure the election of unbiased Speakers of the House?’, *The Guardian* (5 February 2014);

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7. 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;

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;

Fergal Davis and Clive Walker, ‘Manifestations of Extremism,’ *Routledge Handbook of Law and Terrorism Workshops*, Glasgow, 29-30 May 2014.

Jessie Blackbourn

‘Secret Material and Anti-Terrorism Review in Australia and Canada’, *Secrecy, Law and Society Workshop*, University of Sydney, 6-7 February 2014.

Sean Brennan

‘Constitutional Change and Aboriginal and Torres Strait Islander Peoples’, *Building Bridges*, Reconciliation for Western Sydney, Parramatta, 27 August 2014;

‘Native Title, Land Rights and Constitutional Arrangements’, *Social Policy Research Centre Cultural Awareness Workshop*, UNSW, 13 May 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;

Discussant at *Encountering the Author* session on Joseph Slaughter, *Human Rights, Inc.* (New York: Fordham University Press, 2007), Philosophy@ UWS and the Writing and Society Research Centre, University of Western Sydney, Sydney, 15 April 2014;

‘Human Rights and the Exhaustion of Critique’, *Human Rights Tertiary Teachers’ Workshop*, University of Melbourne, Melbourne, 21 February 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;

‘Constitutional Recognition: Recent Developments and Future Challenges’, *Gadens Lawyers*, Sydney, 28 May 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;

‘Local Government in the Federation’, Australian Local Government Association, *2014 National General Assembly of Local Government*, Canberra, 16 June 2014;

‘Parliamentary Sovereignty and Co-operative Federalism’, *Attorney-General’s Department Constitutional Law Symposium*, Rydges Capital Hill, Canberra, 15 April 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;

‘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;

‘Constitutional Reform’ Forum, St George Leagues Club, Sydney, 28 May 2014;

‘Reflections on Measuring the Impact, Legitimacy and Effectiveness of European Counter-Terrorism Laws’, *Securing Europe through Counter-Terrorism Workshop*, Durham University, United Kingdom, 15 May 2014;

‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples’ *Public Forum*, Marrickville Residents for Reconciliation, Ashfield Town Hall, 26 March 2014;

‘Drafting Options for the Aboriginal Recognition Referendum’, *Constitutional Law Symposium*, Commonwealth Attorney General’s Department, Canberra, 15 April 2014;

‘Human Rights Reform under an Abbott Government’, *Politics in the Pub*, The Australia Institute, 26 February 2014;

‘The Five Pillars of Referendum Success’, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, National Centre of Indigenous Excellence, Sydney, 21 February 2014;

‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples’, *Public Forum*, Recognise and University of Tasmania, Hobart Town Hall, Tasmania, 19 February 2014;

‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples’, *Public Forum*, Recognise and University of Tasmania, Devonport Council Chambers, Tasmania, 18 February 2014;

‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples’, *Public Forum*, Recognise and University of Tasmania, Launceston Town Hall, Tasmania, 17 February 2014;

‘The High Court on Constitutional Law: The 2013 Statistics’, 2014 *Constitutional Law Conference*, Gilbert + Tobin Centre of Public Law, Sydney, 14 February 2014;

‘Australian Law and the War on Terror’, Harvard Alumni Luncheon, Sydney, 3 February 2014.

8. SUBMISSIONS TO INQUIRIES

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);

Jessie Blackbourn, Andrew Lynch, Nicola McGarrity and George Williams, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Independent National Security Legislation Monitor Repeal Bill 2014 (29 April 2014);

Rebecca Ananian-Welsh, Nicola McGarrity, Fergal Davis, Sangeetha Pillai, Tamara Tulich and George Williams, Submission on 2014 Review of National Security Legislation to Independent National Security Legislation Monitor (10 February 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);

Submission to ACT Legislative Assembly Select Committee on Amendments to the Electoral Act 1992 Inquiry into Amendments to the Electoral Act 1992 (24 April 2014);

Submission to Joint Standing Committee on Electoral Matters Inquiry into the 2013 Federal Election (5 February 2014).