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PANELS DURING PARALLEL STREAMS

Correcting Wrongs Worldwide Panel Session: Bridging Wrongful Conviction Research between Australia and the United States

Since 1980, over two thousand Americans have freed from prison following a wrongful conviction. In the wake of these wrongful convictions, states adopted new policies for testing DNA evidence earlier into the investigative process, established innocence commissions and panels, and have sought to address some of the systematic causes commonly associated with wrongful convictions. Comparably, while Australian legal scholars have acknowledged that “[...] we should expect about 350 convictions a year to be factually wrong or left uncorrected by appeal,” there has been little done in the way of formal or systemic policy changes (Hamer, 2014: 276). Yet, the burgeoning wrongful conviction research and policy reform happening in Australia and New Zealand present an opportunity for early collaboration. During this panel, legal researchers will discuss the state of wrongful conviction research in both countries, areas for potential improvement, and lessons. Topics will include establishing a national database on wrongful convictions and exonerations, moving towards empirical, quantitative research on the causes of wrongful convictions, and the cross-cultural comparisons and trends among exonerated cases. Finally, panellists will discuss divergent policy strategies for addressing wrongful convictions—and the unique legal structures—of both countries.

Panellists:

Rachel Dioso-Villa is a Senior Lecturer in the School of Criminology and Criminal Justice at Griffith University. Her research investigates the sociology of forensic science looking at the admissibility and evaluation of forensic sciences as expert testimony and the application of organisational theory in the study of wrongful convictions. Her work has appeared in the *Stanford Law Review*, *Law and Policy*, *Law Probability and Risk* and the *Journal of Empirical Legal Studies*. She has received grants and fellowships from the Social Science and Humanities Research Council of Canada, the American Society of Criminology and the Canadian Foundation of University Women.

Jon B. Gould is professor of public affairs and law at American University in Washington, D.C. The author of four books and more than 50 articles and reports, his work applies social science methods to law. He has written on erroneous convictions, indigent defense, prosecutorial innovation, and police conformance with the law, among other issues. He was one of the founders and executive director of the Innocence Commission for Virginia and served as a senior policy advisor in the U.S. Justice Department during the Obama Administration. He was also principal investigator for the Preventing Wrongful Convictions Project, a three-year

research project funded by the National Institute of Justice studying the causes of erroneous convictions in the United States.

Katie Hail-Jares is a post-doctoral researcher at Griffith Criminology Institute. Her research focuses on epidemiological criminology, or how criminalizing behaviour impacts personal and public health. Her work has appeared in *PLOS-ONE*, *Journal of Drug and Alcohol Dependency*, *Iowa Law Review*, and other journals. Her new book from Temple University Press, *Challenging Perspectives on Street-Based Sex Work*, was released in July 2017.

David Hamer is a professor at University of Sydney law school. He takes an interdisciplinary approach, interrogating evidence law, and the proof process more broadly, drawing on probability theory, psychology, and criminology. His interest in evidence law often flows over into areas of substantive law and broader issues, in particular law's continuing struggle with the notion of causation, criminal justice, and the causes of and solutions to wrongful convictions. He has published widely in leading Australian and international journals and is an academic advisor to the Criminal Law Committee of the NSW Bar Association.

Lynne Weathered is a co-founder and the Director of the Griffith University Innocence Project. Founded in 2001, it was the first innocence project established in and for Australia. Housed within Griffith Law School, it brings together lawyers, students and academics to undertake intensive investigative reviews of wrongful conviction claims with the aim of assisting wrongfully convicted people. From 2004 - 2014, Lynne was a Board Member of the (international) Innocence Network. She was the first Chair of Network's International Committee and remains a member of that committee. Lynne's research has had particular emphasis on identification and correction of wrongful convictions.

Prosecuting Justice Panel

This panel brings together perspectives on the role of the public prosecutor in delivering justice. Panel presenters will examine how prosecutors shape justice outcomes; how, through the exercise of discretion, they determine who is and who is not subject to law; how their work influences perceptions of justice and understandings of the culpability of offences. The panel will explore these questions from historic and contemporary standpoints, and through the lens of law, history and the socio-legal. The panel is particularly interested to consider how these questions illuminate public prosecution as an institution of governance, how accountability is managed, and the legacies of historical processes and decision-making in the present day.

Panellists and Papers:

Tracing Accountabilities: Prosecution Rhetoric and Institutional Accountability

Robyn Holder

Is institutional accountability organic? The idea of accountability is central to public institutions but is both obvious and obscure when applied to justice system entities. This paper explores how the history behind and development of the institution of prosecution shapes contemporary perspectives on prosecution accountability. It considers the tensions inherent in the idea of prosecution accountability through a comparative analysis of interviews with ex-Directors of Public Prosecution and senior prosecutors in the UK and Australia.

Dr Robyn Holder is a Postdoctoral Research Fellow at the Griffith Criminology Institute. Her work examines explores the relationship between victims and the state, and the mediating effect of rights. Current projects include an examination of third party advocacy structures in international and domestic criminal justice systems, and innovative justice and service responses to violence against women. Her book, *Just interests: victims, citizens and the potential for justice*, is due for publication in July 2018.

Abandoned Prosecutions: Considering Patterns in Discontinued Prosecutions for Sexual Offences

Dr Andy Kaladelfos

Historically, sexual offences accounted for at least ten per cent of criminal matters heard in Australian higher courts. Using quantitative analysis of data from the longitudinal historical study, The Prosecution Project, I consider the role of prosecutorial discretion and how it changed over time. Drawing on hundreds of discontinued prosecutions in cases of sexual

offences, I ask whether there were discernible patterns in these discontinuations. Did they relate to case characteristics, for example, about the age and sex of the complainant, the number of witnesses presented, or the use of defence representation? And how did these patterns shift over time and place? In asking these questions, I consider whether decisions not to prosecute can be identified as having a structural basis or whether they are best understood as discretionary, individualised decision-making.

Dr Andy Kaladelfos is an historian and Senior Research Fellow with the ARC Laureate Fellowship 'The Prosecution Project' at the Griffith Criminology Institute. Andy's research combines quantitative and qualitative research methods to explain longitudinal trends in prosecutorial data. Andy is Chief Investigator on a collaborative ARC Discovery Project 'Sexual Offences, Legal Responses, and Public Perceptions: 1880s-1980s'.

Prosecutorial discretion and deaths on the road – shaping understandings of vehicular homicide

Kerry King

Prosecutorial discretion not only shapes justice outcomes, discretion shapes too the community's understandings about the very nomenclature of culpable conduct, should that conduct be subject to prosecution at all. Using Western Australia as a case study, this paper explores the charges laid against drivers for deaths on the road and examines how prosecutorial discretion transformed over time. It begins with a period of what might be considered Crown activism, through to a period of path-of-least resistance measures, rounded off by a flurry of amendments to driving-causing-death offences in the twentieth century, intended to swing the pendulum in the other direction. In conjunction with the legislature, the choices made by West Australian prosecutors have led to a widening of the scope of fault behind the wheel and paradoxically, in many instances, an attenuation and dilution of the characterisation of culpable driving conduct.

Dr Kerry King is a Research Fellow with the Griffith Criminology Institute. Her first monograph, *A lesser species of homicide*, a 70-year diachronic study of the prosecution of drivers for manslaughter and driving-causing-death offences, is due for publication in 2018. Kerry also works with the Prosecution Project, a national study documenting and examining criminal trials in Australian state and territory jurisdictions between the mid 19th and 20th centuries.

Author meets Reader Winner of the LSAANZ book prize – Carwyn Jones

Carwyn Jones, *New Treaty, New Tradition* (VUP, 2016) – described by the publisher as follows:

While Indigenous peoples face the challenges of self-determination in a postcolonial world, *New Treaty, New Tradition* provides a timely look at how the resolution of historical Treaty of Waitangi claims continues to shape the culture of all who are involved – Māori and government alike.

Legal cultures change in response to social and economic environments. Inevitably, the settlement of historical claims has affected issues of identity, rights, and resource management. Interweaving thoughtful analysis with Māori storytelling on legal themes, Carwyn Jones shows how the process for the settlement of historical claims can place limits on Indigenous law and authority. At the same time, the author reveals the enduring vitality of Māori legal traditions, making the case that genuine reconciliation can occur only when we recognize the importance of Indigenous traditions in the settlement process.

Drawing on examples from Canada and New Zealand, Jones illustrates how Western legal thought has shaped the claims process, deepening our understanding of the Treaty of Waitangi claims settlement process. As Indigenous self-determination plays out on the world stage, this nuanced reflection brings into focus prospects for the long-term success of reconciliation projects around the globe.

SPEAKERS DURING PARALLEL STREAMS

Text and Voice: The Embodiment of the Legal Subject in Aotearoa; A Case Study under s 27 Sentencing Act 2002 – Police v Harris [2017] NZDC 19502

Seonaid Abernethy

Using a case study of a young Maori man, X, whose assault with intent to injure was referred for a s. 27 Sentencing Act Cultural Report, this paper aims to identify a unique sense of embodiment of a legal subject under the aegis of the cultural report in s. 27 of the Sentencing Act together with Te Tiriti o Waitangi. With reference to the work of Halewood, Naffine and Gear on Laws Bodies, the paper sets out the nature of disembodiment in law, in formulaic rules on sentencing and in many litigation challenges by Maori self-represented litigants as to their status as “legal persons”.

In X’s case, the cultural report began with the voices in the pepeha (identity speech). This relieves a paucity of explanation of what is embodiment in law. The singular constitutional architecture of Aotearoa in s. 27 sentencing, is based on this voiced relationship of an individual to the living personalities of Lake, Mountain, River, Sea, Whanau, Iwi (tribe), Waka (boat), incorporated in the pepeha. The place of the living voice is now embedded in the text of statute (s. 27) and the constitutional character of Art 2 of the Maori text of Te Tiriti. It is important to eliminate the Orwellian keyword ‘values’ in conceptualising s,27 and the ‘Taonga’ in Te Tiriti.

Many commentators have masked the sense of aliveness (embodiment) by the quasi-mathematical assessment /ranking effect of ‘values’ whereby economic ‘values’ will usually outrank ‘cultural values’. The “close, empathetic, communal identification with the known” in oral cultures, as Ong puts it, is set out in the historical beliefs, subsistence livelihood practices of, in this case, the Maori culture which is now historically altered by the socio-economic deprivations of colonialism and disembodiment of a written rule of law.

The case study outlines the difficulty Harris Court (along with other Courts) had in finding the relevance of the cultural history of the Defendant, to the offending. The case study concludes that specialist courts and Marae locations may be the best locations for the hearing of the embodied voice.

Seonaid Abernethy LLM (Hons) Auckland, Barrister Sole. Abernethy practices in the areas of Criminal Law, Mental Health Law and Child Adoption Law. His publications include *Intercountry Kinship Adoptions : Limits to The Hague Convention on Protection of Children and Intercountry Adoption*, 2010 Kotuitui NZ Journal Social Sciences Online 5:1,26-40 and

Folly, Mental Health and Disembodiment, Universal Journal of Psychology 5(1) :17-21, 2017. He was also awarded with a Community Service Lawyer Award Nomination in 2000.

Grand Designs: Courthouses and judicial architecture in New Zealand's modern history

Jane Adams

In this paper, I will examine the development of courthouse design in New Zealand's history. Judges are now at the forefront of courthouse design in twenty-first century New Zealand. As the customary Chair of the Standing Committee on Courthouse Design (established 1992), judges lead the design projects for all new court buildings, working alongside government officials and New Zealand Law Society representatives. The Committee's decision-making processes are largely kept secret and their individual design standards are not available to the public.

This emergence of judge-led architecture is a relatively recent development. Throughout the late nineteenth and well into the twentieth century, courthouse design was instead considered the exclusive domain of the Government Architect. Commentators critiqued the architectural merits of the Government Architect's courthouses alongside their designs of other public buildings, such as post offices and police stations – but their assessments always focused on the courthouses' exterior features. Courthouse interiors – and their relative success in facilitating or impeding access to justice for courthouse users (through courtroom layout, acoustics and new technologies, for example) – has rarely attracted the same level of critical scrutiny.

I will trace how, from the latter part of the twentieth century, New Zealand's judges have assumed control of designing their workspaces – despite their lack of formal education in architecture. I will consider the broader implications of this shift, particularly from an access to justice perspective. Using the historic Dunedin Law Courts (1902) as a case study, I will discuss the problems contemporary courthouse designers face in balancing these accessibility ideals with competing concerns about ensuring courtroom security and the use of new technologies.

Dr Jane Adams is a Postdoctoral Fellow in the Legal Issues Centre, University of Otago. She is a legal historian whose research focuses on law and society in its historical context. Before undertaking her PhD (awarded in May 2017), Jane was a practising lawyer in Dunedin and Melbourne.

Achieving substantive justice in mediation through procedural justice: An illusory or realisable goal?

Dorcas Quek Anderson

Mediation has been continually plagued by a “problem of legitimacy” (Crowe and Field, 2007). The oft-cited criticisms of Fiss and Genn have portrayed mediation as settlement endeavours devoid of any consideration of justice. Mediation appears to be all about procedural justice (principles governing the fairness of the process), and procedural justice does not seem to have any discernible link with substantive justice (fairness of the outcome).

This article addresses the legitimacy deficit facing mediation. It explores the meaning of substantive justice within mediation, arguing that there is a complex interaction between subjective norms and external norms that guide and constrain parties’ negotiations. It also proposes that the nexus between procedural practices and substantive justice is a valuable one that should not be readily jettisoned because of criticisms levelled against mediation. There should instead be greater effort to articulate and develop these practices in mediation training and practice standards.

The article also discusses the inadequacies within the current procedural justice principles, particularly when the parties lack genuine autonomy. Many mediation principles fail to give credence to the reality of overarching norms that naturally constrain the parties’ negotiations. Furthermore, the need for a mediation outcome to be sustainable often necessitates the discussion of external norms, especially as mediation usually takes place in the shadow of the law and other societal standards. Additionally, power differentials substantially diminish the potential of the self-determination principle in advancing substantive justice. It is proposed that managing power be acknowledged as part and parcel of what mediators are obliged to do in order to fulfil the principle of party autonomy. The article concludes that it is imperative to crystallize the principles underlying the mediator’s interventions, and make them visible within the justice system and the public eye.

Dorcas Quek Anderson is an Assistant Professor of Law in Singapore Management University’s School of Law. She graduated from the National University of Singapore and obtained her LL.M from Harvard University School of Law. Prior to joining academia, Dorcas was a Justices’ Law Clerk and subsequently an Assistant Registrar in the Singapore Supreme Court. Dorcas has also been District Judge in the State Courts for almost seven years, where she conducted mediation and early neutral evaluation for civil and criminal cases. Dorcas’ primary research interest is in Alternative Dispute Resolution (ADR), particularly the interface between ADR and the administration of justice.

Looking for justice in all the wrong places:

Māori engagement in the Crown Minerals Act 1991 Block Offer process

Maria Bargh and Estair Van Wagner

This paper will examine opportunities for Māori consultation and engagement within New Zealand's block offer process for mineral exploration under the Crown Minerals Act 1991. Through a case study of the 2013 Epithermal Gold Block Offer in the Central North Island, it will explore how Maori are involved in mineral exploration decision-making from both environmental and cultural justice perspectives.

We will argue that despite an abundance of participation by Māori during the Block Offer process, existing procedural opportunities fall short of providing either environmental or cultural justice for iwi and hapu with interests or concerns within the block offer area. Our research considers whether and how the legal and policy structure and practice under the Crown Minerals Act serves to facilitate the exclusion of Maori views and perspectives from the final outcome of exploration decisions. Further, we will examine the relationship between the Crown Minerals Act and the Resource Management Act 1991 to consider and contrast opportunities for participation and decision making at the different stages of mineral extraction. We will ask whether Maori participation under the Resource Management provides for greater substantive influence over decision making; and, if so, what the significance of Maori perspectives being considered at the later planning stages of mineral extraction rather than the prior allocation stage are for environmental and cultural justice.

Dr Maria Bargh is Tumuaki/Head of School, Te Kawa a Māui/School of Māori Studies and is a Senior Lecturer in the School. Maria studied at Victoria University of Wellington before completing her PhD in Political Science and International Relations at the Australian National University in 2002. Her research interests focus on Māori politics including constitutional change and Māori representation, voting in local and general elections, and the Māori economy including hidden and diverse economies such as Māori in the private military industry. She also researches on matters related to Māori resources, such as freshwater, mining, and renewable energy.

Estair Van Wagner is an Assistant Professor at Osgoode Hall Law School in Toronto, Canada. Prior to joining Osgoode in 2017 she was a Lecturer at the Victoria University of Wellington, Faculty of Law in New Zealand. She completed undergraduate and postgraduate studies in political science, law, and environmental studies at the University of Victoria, Osgoode Hall Law School, and York University. Her research interests include the relationship between property law and land use decision-making, public participation in land use and natural resource decisions, critical theoretical perspectives on property law and theory, feminist and Indigenous legal theory, Indigenous rights, and environmental health.

Institutionalising gender equality: constraining social change?

Amy Barrow

This paper explores the institutionalisation of gender equality in Hong Kong drawing on a case study of the Hong Kong Women's Commission. In 1995, the Beijing Declaration and Platform for Action called for the development of centralised institutional mechanisms for the advancement of women to act as a catalyst to mainstream gender in legislation, public policy and programming. While there has been widespread adoption of national machineries globally, the effectiveness of institutional mechanisms in advancing gender equality and women's empowerment varies, and in some cases has declined over time. In contrast with the Equal Opportunities Commission, a statutory body created under the Sex Discrimination Ordinance 1995, Hong Kong's Women's Commission was set up in 2001 as an advisory body primarily responsible for advising the Hong Kong government of its obligations under CEDAW. Grounded in qualitative research interviews with current and former members of the Women's Commission as well as civil society activists and scholars, this paper considers the role of the Hong Kong Women's Commission in advancing the status of women, by mapping and evaluating specific strategies that have been adopted as a means of promoting women's empowerment. One such strategy is the Gender Mainstreaming Checklist, but to date, there has been limited evaluation of whether this strategy has effectively diffused a gender perspective in legislation, public policy and programming or is little more than a tick box exercise. More broadly this research paper seeks to explore whether institutionalising 'gender equality' has the unintended consequence of diminishing rather than advancing women's legal and social status. Rather than empowering women, does the institutionalisation of gender equality strategies serve to entrench gender as a bureaucratic tool, thus constraining social change?

Amy Barrow is a Senior Lecturer at Macquarie Law School where she researches in the area of human rights law, policy and society. Amy is a member of the WILPF Academic Network and a founding member of the Everywoman Everywhere Coalition, which grew out of the Initiative on Violence against Women at the Harvard Kennedy School's Carr Center for Human Rights Policy. With Joy L. Chia, she co-edited the book *Gender, Violence and the State in Asia* Routledge (2016). Prior to joining Macquarie Law School, she held posts at the Chinese University of Hong Kong and the University of Manchester in the UK.

Ceremonial Protest: The Legal Regulation of Marriage in the Australian Civil Wedding Ceremony

Becky Batagol

This paper examines how heterosexual civil wedding ceremonies are used in Australia as a vehicle to protest against marriage inequality. Marriage of same-sex couples is not permitted in Australia, which leaves Australia as the last developed, English-speaking country which does not have marriage equality.

The heteronormative nature of marriage in Australia must be announced at every civil marriage ceremony by law. This paper draws upon interviews with newlyweds and civil celebrants to examine how heterosexual brides and grooms who support marriage equality and the civil celebrants who marry them, use their wedding ceremonies to protest marriage law in Australia. Based upon the data, the paper argues that the exclusion of anyone other than heterosexuals from marriage does not protect the institution of marriage, but may directly damage it. Not only are LGBTIQ couples unable to access marriage, but straight couples may be unwilling to join an institution seen as exclusionary and outdated.

Dr Becky Batagol is a researcher and teacher with a focus on family law, family violence, non-adversarial justice, dispute resolution, gender, child protection and constitutional law.

Becky is the co-author of *Non-Adversarial Justice* (2nd ed, 2014), *Bargaining in the Shadow of the Law? The Case of Family Mediation* (2011) and the author of many academic articles. Becky is the editor of the ADR Research Network blog and tweets regularly under the handle @BeckyBatagol.

Becky is the President of the Australian Dispute Resolution Research Network and is Deputy Director of the Australian Centre for Justice Innovation. In 2015 Becky worked as a research consultant to the Royal Commission into Family Violence. She has also consulted to the Victorian Law Reform Commission. Becky's outstanding teaching has been recognised at the 2014 Australian Awards for University Teaching with a Citation for Outstanding Contribution to Student Learning.

What Happens When the Unstoppable Force of Multiculturalized Immigration Meets the Immovable Object of the Equality Principle?

Amy Benjamin

If short, bland pronouncements are to be believed, the final communiqué coming out of this year's G7 meeting in Taormina, Italy suggests that Europe is ready to distance herself from the "open borders" movement. While this is a welcome development it unfortunately does not herald a new era of consensus within Europe on matters of immigration policy. Far from it. The acrimony has not so much disappeared as shifted – from "open borders" to "open societies," from questions of immigration (Must we let them in?) to questions of integration (How to deal with them once they're here?) The battle lines are becoming increasingly clear as multiculturalists face off against nationalists – the former armed with facile slogans and ad hominem, the latter handicapped by poorly-articulated positions. As one might expect, the debate is rarely enlightening.

Now would therefore seem a good time to take a large step back, and a very deep breath, and return to first principles. Exactly how much may a state that claims to be liberal ask of its newcomers in terms of integration and assimilation? The answer emerges quite readily once we recognize that liberalism rests on a hierarchy – not a bundle – of values, the highest of which is the value of equality. Equality places limits on the subsidiary liberal values of freedom and diversity. These limits in turn entail some important restrictions on the multiculturalist project as it relates to religion and speech rights.

This paper concludes that while the primacy of equality does not come to the rescue of the nationalists, neither does it secure for the multiculturalists the empty-vessel societies they appear to so ardently desire.

Amy Benjamin was born and raised in San Francisco, California. She received a bachelor's degree in history from Princeton University in 1988 and a law degree (Juris Doctor) from Yale Law School in 1993. Following law school, she clerked for Justice Stephen G. Breyer on the First Circuit Court of Appeals (Boston) and worked as a trial lawyer for the U.S. Department of Justice (Southern District of New York). Amy is currently employed as a law lecturer at Auckland University of Technology Law School, where she teaches Public International Law, Legal Philosophy, and Legal System. Her most recent academic publication is "To Wreck a State: The New International Crime" (New Criminal Law Review 2016).

Ngā Kōti Rangatahi: insights from a research project

Stella Black

Kōti Rangatahi are marae based youth courts that have been in operation since 2008. There are now 14 of them countrywide. Drawing on the findings of a research project, aimed at exploring 'what is tikanga' within four kōti rangatahi marae. The marae varied from an urban pan-tribal location at Hoani Waititi marae in West Auckland and three Bay of Plenty provincial

marae with waka (canoe), (iwi (tribal), and hapū (sub-tribal) affiliations. The research draws on the observations, interviews and key informant discussions to highlight the strengths each marae based approach offered rangatahi and whanau. These are then viewed against the practical and systemic barriers and challenges presented in each area. The research offers insights into the cultural shaping of the courts and considers how kaumātua, youth justice professionals and stakeholders are adapting their practices including the application of tikanga (values and practices).

Stella Black (BA (Hons)/LLB) has worked on a diverse range of research projects in the fields of palliative care, end-of-life care, mental health, addictions and several service delivery evaluations. She has an interest in social justice and health related issues for Māori young and old. She is currently involved in the research on three specialist courts including four Kōti Rangatahi/marae based youth courts. Overall, the project aims to identify the therapeutic practices and outcomes in these specialist courts, but in the Kōti Rangatahi setting, the research also explores 'what is tikanga?' The research provides insights into the cultural shaping of these courts.

Extension of Pharmaceutical Patent Rights – Bad Medicine?

Rachel Bradshaw

Meaningful access to affordable pharmaceuticals is essential for good health care. The process of developing much needed pharmaceutical products is lengthy and expensive. Pharmaceutical companies invest millions of dollars in the research and development of new pharmaceutical products, so it is appropriate that patent rights are granted to recover costs and to generate profits.

Australian patent law offers stronger intellectual property rights for pharmaceutical patents than many other nations. In addition to the standard 20-year protection for all patents, a further 5-year protection is possible through a successful extension of term (EoT) application. It was thought this extension of intellectual property rights would attract more investment in Australia and stimulate innovation; however, the 2016 Productivity Commission Inquiry Report has stated the 'EoT scheme has had little effect on investment and innovation' in Australia. Conversely, the indications are that the EoT scheme may have contributed to reduced innovation due to the suppression of legitimate competition which may have resulted in more expensive pharmaceuticals for consumers and tax payers (via Pharmaceutical Benefits Scheme).

This presentation will consider whether Australian patent law has produced an imbalance between adequate protection of intellectual property rights and public access to varied and

affordable pharmaceuticals. The Australian system will be compared to other nations (including New Zealand) to determine whether an overprotection of intellectual property rights exists and the possible negative impacts on good health care for society.

Rachel Bradshaw is a Law Lecturer and First Year Coordinator for Law at the College of Business, Law and Governance at James Cook University in Townsville, Australia. Rachel has a Bachelor of Laws (Hons) from James Cook University and a Master of Laws Degree from Queensland University of Technology.

“Doctors, Patients, and the Law: Medical Malpractice Litigation in Canada, 1900-1935”

R. Blake Brown

This paper explores the debates over medical malpractice in Canada between 1900 and 1935. Fears of a growing malpractice problem led physicians to advocate for statutory changes, and to form a mutual defense organization, the Canadian Medical Protective Association, in 1901. However, several developments in medical practice in the early twentieth century, including more ambitious surgeries and the widespread use of x-ray technology, produced new opportunities for negligence and thus lawsuits. The medical profession responded by ferociously fighting against malpractice claims inside and outside the courtroom. The Canadian Medical Protective Association led this fight across the country. Outside the courtroom, physicians sought to smear the reputations of patient-plaintiffs. Inside the courtroom, the Canadian Medical Protective Association hired elite lawyers to defend doctors and selected test cases to establish doctor-friendly case law. Judges tended to support the position of physicians, using their authority to keep malpractice cases out of the hands of jurors. The court battles that ensued shed light on attitudes towards personal responsibility and medical ethics, and how the legal profession weighed policy choices in determining the rights of patients versus the interests of medical professionals and hospitals. These legal developments proved important. Medical malpractice remained less prominent in Canadian tort law than in the United States. While this benefitted physicians, this paper will explore how this might have prevented many injured patients from receiving compensation. In examining this largely unexplored topic, this paper employs various sources, including archival materials, annual reports of the Canadian Medical Protective Association, newspapers, legislative debates, medical and legal journals, reported cases, and legislation.

This paper is associated with the Justice Institutions, Practice and Practitioners conference sub-theme as it addresses topics such as litigants, legal ethics, legal practice, and the role of judges and lawyers in limiting access to justice to injured parties.

Dr. Blake Brown is an Associate Professor in the Department of History at Saint Mary's University in Nova Scotia, Canada. He is the author of *A Trying Question: The Jury in Nineteenth-Century Canada* (University of Toronto Press, 2009) and *Arming and Disarming: A History of Gun Control in Canada* (University of Toronto Press, 2012). His articles have appeared in journals such as the *Canadian Historical Review*, *Canadian Journal of Law and Society*, the *American Journal of Legal History*, and the *Journal of Law & Social Inquiry*. Dr. Brown is currently writing a history of Canadian law, and a history of malpractice law.

An Auto-ethnographic Case Study of New Zealand Civil Procedure as Process-oriented Failure to Deliver Effective Justice

Edgar A Burns and Brian J Walker

This paper applies a collaborative auto-ethnographic method to elucidate engagement with the New Zealand civil legal process—not as lawyers or other functionaries within the legal system—but as rural horticultural family businesses. This method is applied here as an academic framing to what we dub a “regional winebox” case study—alluding to the 1994 New Zealand *Winebox Inquiry*. This paper first (1) briefly outlines what is meant by auto-collaborative ethnography as an academic investigatory research method; second (2) gives an outline of the substance of the main steps and core narrative of a thirty-year process to get redress from a bank and its lawyer, costing hundreds of thousands of dollars, half successful and half unsuccessful; third (3) concluding comments draw implications from the case study account about system dysfunction vitiating the delivery of civil justice in New Zealand.

Edgar Burns lectures in sociology at La Trobe University, Australia. His research interests revolve around professions, expertise, social theory and organisational performance. One of his PhD students is investigating racialised policing.

Brian Walker operates an open-field plant nursery in Hastings, New Zealand. He has long experience in business and is a qualified psychotherapist and does consultations using his psychotherapeutic and business skills.

What lies beneath? The role of law, society and history in the fight for Indigenous sea rights in Australia

Lauren Butterly

Law, society and history have played an overlapping role in how Indigenous rights to the sea have been recognised, or failed to be recognised, in colonised jurisdictions. The Australian

experience is particularly useful because it demonstrates a jurisdiction where Indigenous land and sea rights were debated and legislated for contemporaneously, but with significantly divergent results. This helps us to more fully understand how law, society and history impacted debates about Indigenous rights to the sea - as opposed to land - and how this contextually underlies the modern fight for Indigenous sea rights.

The Australian legislature first seriously debated the issue of Indigenous rights to land and sea in the late 1960s. Their consideration, at that time, was limited to the jurisdiction of the Northern Territory (NT). Aboriginal land and sea rights were investigated, and then formally legislated for, in the NT in the mid-1970s. This legislation has led to a unique and strong modern system of Aboriginal owned land in the NT. Yet, the same cannot be said for the sea.

This paper will take one crucial historical period in the evolution of Indigenous rights to the sea in the NT: the first ever Sea Closure application in the early 1980s. Although the Indigenous applicants explained that they did not want to close the seas completely and were willing to negotiate, the recreational and commercial fisherman fought the application hard; driven by a strong 'frontier' society mentality. The legal counsel for the commercial fisherman submitted in the opening hearing that this was a 'gross restriction of a liberty' to my clients and was 'without precedent'. This paper argues that the historical themes that inform the frontier society are still playing a central and detrimental, yet silent, role in the current legal negotiations around Indigenous rights to the sea.

Lauren Butterly is a Lecturer at the University of New South Wales (UNSW) Law Faculty where she researches in the areas of environmental law, Indigenous title, heritage and administrative law. Lauren holds a Bachelor of Arts (History) focusing on Indigenous history and a Bachelor of Laws with First Class Honours, both from the University of Western Australia. Following graduation from university, Lauren served as the Principal Associate to Chief Justice Wayne Martin of the Supreme Court of Western Australia and then worked as a solicitor, specializing in administrative and environmental law, at a top tier law firm. Lauren is a Centre Member of the UNSW Indigenous Law Centre.

Crossing the Boundary: Exploring Legal Education Beyond the Class Room

Gary Cazalet

A traditional legal education includes a heavy emphasis on critical legal analysis taught in a class room or online environment using text base sources. It leaves little room for creative thinking or action. Ken Robinson in his celebrated Ted talk suggests that traditional school education kills creativity. Might his analysis and conclusions be relevant to legal education?

Creativity is an essential attribute in the skilful practice of law and in teaching and research. In a rapidly changing legal and wider job market our students need to be able to use creative thinking to fashion novel and appropriate responses to difficult questions and problems. Creativity also has a role in relieving stress, providing a sense of self-worth and feeling happy.

With the appropriate environment, the right modelling and thoughtful (and sometimes risky) teaching, creativity can be brought back to life in ways that provide positive benefits to both the professional and personal well-being of students and their teachers.

How might we inspire and model creative thinking and action? In this walking tour, we will be encouraged and challenged to think beyond the traditional class room in a series of curated experiences and discussions.

Gary Cazalet is Director of the Civil Justice Research Group and Senior Lecturer at the Melbourne Law School, University of Melbourne. He teaches across a broad range of subjects including, Advocacy, Negotiation, Dispute Resolution, Law Apps (a law and technology subject) and Law & Literature. He has a deep interest and commitment to teaching and has served as the School's Director of Teaching. His areas of research include the teaching and development of creative thinking skills in legal education, innovation and technology and civil procedure. Prior to joining the Law School, he was a barrister at the independent Victorian Bar, a mediator and a solicitor.

Work-Related Stress, Anxiety and Depression among Public Sector Lawyers and Support Staff

Janet Chan and Holly Blackmore

While work stress is often associated with lawyers in large commercial firms, this paper examines the neglected problem of work stress among legal service providers in public sector organisations. Public sector lawyers typically earn a much lower salary than lawyers in large firms, but their service to disadvantaged clients is equally important and no less stressful. The work of legal support staff is also a much neglected research area, even though they regularly perform stressful 'emotional labour' in support of lawyers and their clients. By studying both lawyers and their support staff, the paper investigates work stress in a holistic and critical way, taking into account the generic and specific drivers of stress in this type of organisation, and the structural and cultural factors that influence employees' conception of stress and reception to wellbeing programs. Instead of treating lawyer's work stress in isolation, the paper describes how stress is experienced, mitigated or aggravated by external, professional as well as internal, organisational demands and support systems.

Janet Chan, Professor at UNSW Law, is a multidisciplinary scholar with research interests in criminal justice policy and practice, sociology of organisation and occupation, and the social organisation of creativity. She has been researching work stress and wellbeing of Australian lawyers since 2011.

The Prophets and the Law

Justice Denis Clifford and Monique van Alphen Fyfe

This paper is the first step in a larger project to study the history of the interactions between the Māori prophets and the law. Inspired by the Māori Television documentary series *The Prophets*, the project will focus on the six prophets of the 19th and 20th centuries, the subject of that series, and the reaction to them of the three branches of government, the Executive, the Legislature and the Judiciary. The aim of the study is to identify the substantive qualities of those interactions and to ascertain whether, notwithstanding the rights-depriving features of many of those interactions, more complex patterns of sustained reciprocity and cross-pollination of legal concepts and practices were taking place.

The paper provides an account of the actions of the Executive, the Legislature and the Judiciary in response to the prophets, and places those actions in the context of the wider general history of the Māori–Crown relationship. It poses the question and provides initial hypotheses as to how the law responded to the phenomenon of the prophets, how that response affected them and their followers individually, and how that response changed as each of them appeared.

Although specific actors and acts within this context have been subject to academic scrutiny of varying intensity, this paper is the start of collating this legal history as a cohesive whole. As such, the paper incorporates familiar incidents such as the imprisonment without trial of Te Kooti Arikirangi and familiar legislation such as the Tohunga Suppression Act 1907. It sets those incidents against the wider context of legal responses to Māori autonomy, such as land confiscation, recognising aspects of that wider context that were themselves responses to the prophets.

Justice Denis Clifford was appointed a Judge of the High Court in April 2006 and of the Court of Appeal in April 2017. He credits cases he has sat on, such as the *Proprietors of Wakatu*, *Haronga v Waitangi Tribunal* and *Paki*, as awakening him to the “well recorded and richly detailed” narrative that is the history of the complex interactions between Māori and the law since, at least, *He Wakaputanga o te Rangatiratanga* in 1835.

Monique van Alphen Fyfe is currently a judges’ clerk at the High Court of Wellington. She holds a LLB (Hons) and BArch (Hons) from VUW.

The authors anticipate that the paper would be best identified with the subtheme of justice institutions and practice, but could also be placed within the subthemes of cultural justice and/or transitional justice.

The Transplantation of Common Law in the British West Indies and the reverberations thereof, 1700-1900.

Justine K. Collins

The peoples of the Commonwealth Caribbean (British West Indies) are inheritors of laws and legal systems fashioned by the British in the political and economic context of Empire; illustrated by the unequivocal identity shared with English law and extant laws within those territories in the field of constitutional and public law.

The development of plantations was based on British Land law and land tenure regimes which gave way to the legal creation of precincts and parishes; therein land law was the clearest evidence of English law's transference to the colonies. Inheritance of land and property such as slaves was precedential on the male line especially the oldest legitimate son. Therefore, based on such laws and policies the planter class emerged in the British West Indies to the exclusion of all others; i.e. free blacks or mixed persons who would be the illegitimates of said planters. Such laws hence did not just create a class system but also racial schisms based on property rights and evidently colour.

The presentation will focus on the enactment of the Amelioration Act of 1798 which had quite the impact on the legal make-up of the plantation societies and on constitutional arrangements, specifically in relation to its link to a more racialized society. The extent of this impact and its diverse reverberations throughout the various British West Indian islands will be depicted and examined; ultimately revealing why Amelioration as an avenue to emancipation, failed to live up to the purpose for which it was instituted. In addition, the role played by land procurements in the stratification of the post emancipation society will be analyzed specifically in terms of its linkage to Amelioration attempts and effects.

Justine Collins obtained her Bachelors of Law with Hons. (LLB) From Manchester Metropolitan University in 2005, from then went on to Bristol University for a Postgraduate Certificate in Commercial Law. Justine did her first Master degree (LLM) in International Financial Law at the University of Manchester in 2008. Her second Masters was a MA Dual degree between Sheffield University (Global Politics & Law) and Doshisha University, Kyoto, Japan (2013-2015). Currently Justine is within her first year of Doctoral employment at the

Max Planck Institute for European Legal History, Frankfurt, after completing a 6-month orientation scholarship at the same institute.

The Heart of the Matter: A Queer Feminist Critique of the Criminalisation of Fraudulent Consent

Sharon Cowan

This paper offers a feminist and queer critique of some recent assault and sexual assault cases, in order to argue that contemporary criminal law and criminalisation approaches should take account of the marginalization and stigmatization of already structurally disadvantaged individuals. In particular, the paper article will examine the discourses of criminalization relating to the sexual transmission of HIV, alongside those that surround recent prosecutions of trans men for sexual assault. These two types of cases will be analysed against the backdrop of “fraudulent” sexual consent cases more generally – what we might call ‘everyday’ cases of deception that do not currently amount to criminal offences in the UK - for example, where someone has lied about or failed to disclose one of their attributes (such as their religion or their marital status) to induce another to engage in sex.

These cases are examined in order to illustrate criminal law’s failure to understand and apply substantive equality in sexual offence cases. Particularly with respect to consent, I will examine the extent to which and the ways in which systemic inequalities are (not) recognized in these cases, and to highlight some of the underlying heteronormative assumptions about sex and gender that seem to influence decision-making. The problems I identify are not jurisdiction specific, but stem from a particular way of thinking about what the criminal law is for. I will argue that current approaches perpetuate the stigmatization and exclusion of some of the most marginalized of its subjects – those who are trans and/or living with HIV.

Sharon Cowan is the Professor of Feminist and Queer Legal Studies at the University of Edinburgh’s School of Law. Her research interests include: Gender, Sexuality and the Law; Feminist Legal Theory; Criminal Law; Criminal Justice; Asylum studies. Recent projects include a UK-wide empirical project, (with Helen Baillot and Vanessa Munro, funded by the Nuffield Foundation) examining at the way in which women asylum claimants whose applications are based on a claim of rape, are treated by the Asylum and Immigration Appeal Tribunal. Sharon is presently working on a comparative socio-legal project looking at the impact of law on transgender people; and, with Vanessa Munro, a Scottish Feminist Judgments Project.

Outrage: Firefighting foam and the legal governance of land contamination

Penny Crofts

Governments internationally have developed regulatory regimes to manage contaminated land and its remediation. Departments of Defence have a legacy of contaminated sites from historical and contemporary activities due to ignorance, expediency or inadequate planning. This paper will focus on how the Australian Defence Force (failed to) regulate the use of toxic firefighting foam (containing PFAS chemicals) in Oakey aviation exercises. The Oakey example has international resonance, in part because of the widespread use of PFAS, but also because of the historic scientific uncertainty as to the potential negative environmental and health impacts of PFAS. Oakey provides a case study of the need for regulatory regimes to manage the communication of land contamination with affected communities, and the potential for community involvement in the remediation of land. This paper draws upon outrage theory as a means of framing analysis of the continued difficulties for governments in developing appropriate regulatory frameworks to effectively communicate with the community about contamination and remediation.

Associate Professor Crofts is an international expert on criminal law, models of culpability and the legal regulation of the sex industry. Her research is cross-disciplinary, drawing upon a range of historical, philosophical, empirical and literary materials to enrich her analysis of the law. Her research is in the area of socio-legal studies coalescing around issues of justice in criminal law in practice and theory makes a distinctive contribution to critical evaluations of criminal legal models of culpability and enforcement. Penny is currently researching the legal governance of contaminated land in NSW.

Three Illusions of Modern Politics

Jonathan Crowe

Modern political discourse is characterised by three pervasive and harmful illusions: the illusions of control, desert and revenge. The *illusion of control* holds that we can manage our social and economic environment to keep ourselves safe from harm. The *illusion of desert* holds that in a well governed society people generally get what they deserve. The *illusion of revenge* holds that it is beneficial and legitimate to punish those who transgress legal and social norms. I discuss the central role these illusions play in current political debates, drawing on work in social psychology to explain their persistent appeal. I then try to imagine a radically new form of political discourse based on accepting that we are not in control, people don't get what they deserve and coercion is not the answer. I argue that this reimagined politics holds important advantages over the current paradigm.

Jonathan Crowe is Professor of Law at Bond University and the current President of the Australasian Society of Legal Philosophy. His research examines the philosophical relationship between law and ethics, looking at issues such as the nature and foundations of legal obligation and the role of ethics in legal reasoning. His work has appeared in numerous leading international and Australian journals, including the *Modern Law Review*, the *Oxford Journal of Legal Studies*, *Law and Critique*, the *Melbourne University Law Review*, the *Sydney Law Review* and the *Australian Journal of Legal Philosophy*.

Women, Sport and the Law in the Twenty-First Century

Chris Davies

A feature of sport in Australia and New Zealand has been the rise of women's sport, particularly in the regard to leagues in team sports, namely netball, cricket, basketball and Australian football. Rugby union's appearance at the 2016 Rio Olympic Games in its sevens format included women, with Australia's gold medal win giving the team a higher profile on the world sevens circuit. These leagues have exceeded expectations in regard to crowds and television ratings, creating greater interest in the sport itself. There are a few legal aspects to the formation of these leagues, the Australian Football League (AFL) Women's League, for instance, relied on a draft system to spread the available playing talent, like it does with the men's competition. It is the author's view that the AFL draft system, while a restraint on a player's trade, is a reasonable, and therefore a legal, one. The AFL also utilises a salary cap which the author considers to be a reasonable restraint of trade. However, a feature of some women's leagues has been the implementation of a maximum wage restraint that limits how much each individual player can earn, rather the club being restricted on its overall salaries. While this is a greater restraint on a player than a salary cap, it is the author's view that maximum wages can be a reasonable restraint when dealing with fledgling leagues. Issues of labour market controls are not restricted to women's sport. However, there are a few areas, such as the issue of the participation of pregnant women and intersex athletes, that are unique to women's sport, with the present legal position being that it is discriminatory to exclude pregnant women and intersex athletes from women's sport.

Dr Chris Davies teaches law at James Cook University with his main research area being sports law. He has published widely on topics such as labour market controls in sport, competition law, discrimination in sport and sporting contracts. He is also one of the co-authors of the Australian *Sports Law* textbook, as well as having contributed to a number of international sports law books.

The Detective and Scientist: The Science (and Art) of Fire and Arson Investigation as Expert Evidence

Rachel Dioso-Villa

In the past decade, the forensic sciences have been scrutinized by the academic community, international agencies and government bodies as to the scientific basis and empirical research performed to validate the claims practitioners make when testifying as expert witnesses in the courtroom. In the United States, forensic error or misleading forensic evidence are present in 74% of DNA exoneration cases and in Australia they are present in 31% of factual innocence wrongful conviction cases. Excluding cases where forensic experts intentionally mislead judges and juries in their testimony, there are underlying problematic issues with the way in which forensic evidence is presented in court. Forensic science claims to follow scientific tenets of hypothesis testing, the scientific method, testing for error; however, for many forensic disciplines, they embrace and rely on the subjective measures of interpretation, experience and intuition. This paper examines the role of one such forensic science, fire and arson investigation expertise, and examines the role that fire experts play in wrongful convictions. It also questions how and whether fire experts must marry two skillsets of a detective and scientist to interpret physical evidence at a fire scene.

The Paradox of Nongovernmental Advocacy: On Why Justice Begins When Representation Ends

Giulia Dondoli

On 30 June 2016, the European Court of Human Rights (the Court) decided in *Taddeucci and McCall v Italy* that a binational same sex couple was discriminated against because they were not allowed to marry in Italy, and at the same time, they were unable to live in Italy as a couple. Such decision signals a positive step forward for the LGBTI (lesbian, gay, bisexual, transgender, and intersex) communities in Europe, as it opens up for a much needed conversation on the indirect discriminations suffered by many LGBTI couples. The presentation discusses the Court's jurisprudence on LGBTI couples, and it aims make two points. First, the Court has finally accepted a principle of indirect discrimination for same sex couples as a consequence of the persistent lobby of a number of nongovernmental organisations (NGOs). It is shown that for nearly one decade human rights NGOs have consistently submitted third party interventions in asking the Court to recognise that unmarried same sex couples suffer indirect discriminations on grounds of sexual orientation when they cannot access rights and benefits attached to marriage. Second, to be successful in their advocacy, NGOs pursued a strategic litigations' plan to advance their agenda, but at the expenses of the individual applicants. It is demonstrated that in several occasions, the

NGO third party interventions presented legal arguments decided among the leaders of the organisations and not necessarily in line with the needs and the desires of the individual applicants. In conclusion, the presentation highlights the paradox of nongovernmental advocacy. If on the one hand, NGOs demonstrated to be powerful agents of justice for the communities they aim to advocate for; on the other hand, they pursue a strategic litigations' plan that did not allow them to fully represent such same communities.

Giulia Dondoli is a PhD candidate at Te – Piringa Faculty of Law of the University of Waikato, with an interest on nongovernmental advocacy and human rights law. Giulia developed a research methodology founded on transnational advocacy network theories and social movement theories to research how nongovernmental organisations (NGOs) influence the creation of new human rights norms.

Can the United Nations increase the Recognition of Indigenous Rights to Self-Determination within Colonial Nation States?

Cathryn Eatock

The proposed LSAANZ Conference presentation addresses the transitional justice for Indigenous Peoples theme and issues considered in my current PhD study assessing the capacity for Indigenous advocacy at the United Nations to influence colonial settler states' recognition of Indigenous rights to self-determination, as asserted in the *Declaration on the Rights of Indigenous Peoples*. The PhD seeks to analyse Indigenous participation at the United Nations as a means to address the power disparities between Indigenous peoples and settler states, and capacity to influence national responsiveness to implement Indigenous rights to self-determination. The study intends to draw on experiences from four comparative settler states; Canada, the United States of America, New Zealand and Bolivia, that may inform the Australian context. The Ph.D. takes an Indigenous methodological approach, based on an Indigenous epistemological analysis that seeks to challenge contemporary structures of colonization and hegemony, drawing on broader theoretical frameworks of 'Conflict Theory' and 'Critical Indigenous Theory'. Specifically, this paper would consider current global processes to extend Indigenous participation to the General Assembly of the United Nations and challenges Indigenous peoples face in extending their participation into broader States based mechanisms. In addition, the paper will also address national processes of recognition through the recent Referendum Councils proposed constitutional amendments to recognise Australia's Indigenous peoples and for the establishment of Aboriginal representation through the creation of a new Indigenous body to report to Parliament, with its authority mandated through the constitution. The Referendum Councils Report also calls for the establishment of a Makarrata/Treaty Commission to be established, which will include a Truth and Justice Commission. This analysis would consider the likely challenges to these proposals

and how current amendments to the United Nations Expert Mechanism to the Rights of Indigenous Peoples may support the Australian government in responding to these claims for Indigenous rights.

Cathryn Eatock is a Kairi/Badjula woman, who is considering the impact of the United Nations in facilitating the implementation of self-determination within nation states and how this may be strengthened to better inform Australia. Cathryn draws on her background campaigning for Aboriginal rights, her experience advocating at the United Nations, previous employment in the Aboriginal community and as a Senior Policy Officer in the NSW Government, to inform her approach. Cathryn's current PhD Candidacy is with the Department of Sociology and Social Policy, School of Social and Political Sciences, Faculty of Arts and Social Science, University of Sydney.

Fixing the socio-legal 'fix' in Aotearoa/New Zealand: Where next?

Kim Economides

This paper examines theoretical and more practical obstacles to the future development of socio-legal and interdisciplinary legal research in New Zealand, and the need for change. Is pragmatism, positivism and empiricism in (socio)-legal scholarship a strength or weakness when it comes to law teaching, legal analysis and practical law reform? What priorities and interests - ideological, professional and economic - tend to dominate and drive legal research agendas and who should direct and control these agendas in future, and how? The relationship between law and different sections of New Zealand society is continually evolving, but in what direction(s)? My paper builds on and updates previous analyses in light of latest socio-legal research being undertaken within and beyond New Zealand's universities. I also look at what kind of socio-legal research is typically not being undertaken, and why. Is there a need for more diversity, in method or subject-matter, and is it too soon to identify a distinctive New Zealand approach to socio-legal studies? Finally, I consider the adequacy of institutional investment for this sub-discipline and what more could be done to better support legal and other researchers dedicated to explaining the interaction of law and society in New Zealand.

Kim Economides is professor of law at Flinders Law, Flinders University.

Families as holders of economic, social and cultural group rights

Penny Ehrhardt

I am interested in potential international human rights law strategies for the progressive realisation of the economic, social and cultural rights of single-parent families.

According to Article 16(3) of the Universal Declaration of Human Rights: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Moreover, vulnerability theorists stress the functional interdependence and relational essence of the family. Yet most discussion of families and human rights focuses on individual rights *to* or *in* a family, rather than explicit group rights arguments. Meanwhile, theories of group rights have concentrated on cultural, linguistic, and religious groups, with a particular focus on disempowered minorities; and have only occasionally considered the family as a group.

In this paper, I argue that the wording of Article 16(3) requires us to acknowledge families as holders of group rights. I consider potential criticisms of such an approach, and offer rebuttals to them. Finally, I outline why the group rights lens is helpful in mounting a rights argument to address the unequal economic, social and cultural position of single-parent families across societies and through time.

Penny Ehrhardt (Oxford University) is a DPhil (Law) candidate, Convenor of the Oxford Children's and Family Law Discussion Group, Secretary of the Oxford Children's Rights Network, and an Associate Editor of the *Oxford Commonwealth Law Journal*. She maintains an interest in law and society through membership of the Family Policy Research Group associated with Oxford University's Department of Social Policy and Intervention, and as a co-organiser of the Oxford Human Welfare Conference at Green Templeton College.

After studying law and history at Otago and Victoria Universities, and working as an historian and policy analyst, Penny went on to establish Ehrhardt Advisors, a policy, research and evaluation company. She is a (non-practicing) Barrister and Solicitor, and holds an M.St in International Human Rights Law from Oxford University. Penny has published in the areas of family violence intervention, community development, gender, and ethnicity. Her latest piece, a book chapter entitled 'Lotus and Labrys – The role and legacy of two young women's movements in Wellington, New Zealand at the end of the millennium' will be released this month.

What Comes After Neutrality? A New Paradigm for Mediation Ethics

Rachael Field and Jonathan Crowe

The dominant paradigm of mediation ethics gives a central role to the notion of mediator neutrality. However, this focus has been criticised in recent decades for being unrealistic and overlooking the power dynamics between the parties. There is now a significant body of

academic literature questioning whether mediators can ever truly be neutral and asking whether the concept of neutrality serves to mask the mediator's actual power and influence. A number of authors have argued that it can be beneficial for vulnerable parties if mediators are prepared to play a more proactive role in appropriate cases. The centrality of neutrality in mediation ethics, then, has increasingly been questioned and undermined. There is, however, a lack of consensus on what should replace it.

This paper advances a framework for a new paradigm of mediation ethics focused on the notion of party self-determination. We offer an account of the meaning and importance of self-determination in the mediation context, showing how it offers a sound foundation for the legitimacy of the process. We then outline an ethical method that mediators can use to promote self-determination through a contextual and relational approach that emphasises informed consent and a professional outlook. Mediator neutrality is not a requirement of this approach, although it may be an aspect of a mediator's technique. The method therefore offers a way to move mediation ethics beyond the problematic emphasis on neutrality and towards a more realistic framework for mediation practice.

Rachael Field is Professor of Law at Bond University. Her areas of research expertise include dispute resolution, family law, domestic violence and legal education. Her PhD thesis was on the topic of mediation ethics. She has a portfolio of more than seventy-five scholarly publications, and is co-author of four books. Rachael is the founder of the Australian Wellness Network for Law, and a co-founder of the Australian Dispute Resolution Research Network. She has served as President of Women's Legal Service Queensland since 2004. In 2013, Rachael was named Queensland Woman Lawyer of the Year.

Jonathan Crowe is Professor of Law at Bond University and the current President of the Australasian Society of Legal Philosophy. His research examines the philosophical relationship between law and ethics, looking at issues such as the nature and foundations of legal obligation and the role of ethics in legal reasoning. His work has appeared in numerous leading international and Australian journals, including the *Modern Law Review*, the *Oxford Journal of Legal Studies*, *Law and Critique*, the *Melbourne University Law Review*, the *Sydney Law Review* and the *Australian Journal of Legal Philosophy*.

Procedural Justice in context: comparisons between perceptions of public police officers and private security personnel

Jesse Fielder

The private security industry is expanding rapidly. One explanation for this rapid growth has been the rise of 'risk thinking'. Governments, organisations and individuals have become

increasingly preoccupied with the idea of risk management and the management of crime. As a result of this rapid expansion, private security practitioners now find themselves dealing with an ever increasing diversification of roles, tasks and responsibilities. These new functions are increasingly overlapping with duties and roles traditionally fulfilled by the public police force. Negative perceptions about the legitimacy of private security by members of the public hinder the effective and timely fulfilment of their duties. These negative perceptions can manifest through an unwillingness to cooperate with security generally. This study aims to explore whether use of procedural justice by private security staff can enhance public perceptions of the legitimacy of private security actors, as well as the public's willingness to cooperate with these actors. While procedural justice effects on legitimacy and cooperation have been well established in the public policing context, effects in the private security context have not yet been well explored. Using survey data from members of the Australian public (N=1551), this research aims to compare and contrast the public's perceptions of police officers against perceptions of private security personnel. Of interest is how their perceptions of procedural justice are related to perceptions of legitimacy and self-reported willingness to cooperate with authorities, and whether these differ across the two policing contexts. Importantly, the findings demonstrate that procedural justice matters equally in the private security context as it does in the public policing context.

Jesse Fielder is a PhD student in the School of Criminology and Criminal Justice at Griffith University in Brisbane, Australia.

Criminal Record Expungement as Cultural Justice

Allen George

Over the past 5 years many state jurisdictions in Australia have enacted law that allows for the expungement of historical homosexual offences. The opportunity to remove a 'criminal stain' from homosexually active men convicted of sex offences is one of numerous shifts in the law over the past three decades that is argued to be another step in undoing the wrongs of the past and another required move toward social acceptance and equality for members of sexual minorities. Cultural justice is a central concept informing argument for change in the law. This paper will explore the concept of cultural justice in relation to the LGBTIQ community via discourses on the expungement of historical homosexual offences through law reform reports, including submissions from the public and organisations, and parliamentary debates throughout Australia. These sources highlight the use of human rights discourse, anti-discrimination legislation, and the need for sensitive administrative procedures to remove criminal convictions from people, both alive and dead, as a means to ameliorate past hurt and trauma for individuals, their families and the wider LGBTI community. The paper will also consider the relevance of other forms of justice, such as restorative and transitional justice,

as a framework to conceptualise and assist in the delivery of justice for the LGBTIQ community.

Allen George is a Scholarly Teaching Fellow in Socio-Legal Studies at the University of Sydney, Australia. His areas of research are violence against lesbians and gay men, same-sex marriage and the legal regulation and decriminalization of homosexual activity.

Is Fetal Alcohol Spectrum Disorder (FASD) a Race Issue?

Anita Gibbs and Kesia Sherwood

Prevalence rates for FASD within indigenous populations have been cited as higher than rates in non-indigenous populations. One recent randomised study in the USA, however, showed no difference for rates and ethnicity in the general population. These potential inconsistencies call into question the legitimacy of drawing connections between FASD and ethnicity, and prompt a need for discussion about how and why such connections have previously been made.

In Australia and Canada, studies have indicated that rates of FASD within incarcerated populations are very high (up to 30%), and these populations are over represented within indigenous groups. In New Zealand, we have no prevalence data to help us gauge prevalence rates for Māori, although anecdotally a disproportionate number of Māori are assessed and diagnosed with FASD. If we accept that prevalence rates of FASD are higher amongst Māori, we need to ask 'Why is this so?'. Given the context of colonisation, historical state-based abuses and structural and overt discrimination towards indigenous populations, the results are unsurprising. High rates of poverty, and substance misuse among Māori, as well as other socio-economic determinants of well-being show Māori are not fairing as well as they should be.

In this presentation, we will ask: Is FASD a race issue? We will explore the prevalence rates of FASD and tease out whether they are higher for indigenous populations. We will discuss whether indigenous populations are more likely to be referred for assessment and therefore more likely to be diagnosed with FASD than their non-indigenous counterparts. We will explore the factors that make it more likely that disproportionate numbers of indigenous people will be impacted by FASD.

Anita Gibbs is an Associate Professor at Otago teaching in the areas of criminal justice, sociology and social work. She is also an adoptive parent of two sons with FASD and ADHD. Anita participates actively in FASD awareness and professional training activities in New Zealand, and specifically supports local families here in Dunedin. Anita is a strong advocate

for her own family and is working with her sons to promote positive images and stories of families living with and managing FASD. She is also undertaking research on a variety of FASD related projects.

Kesia Sherwood is a PhD candidate with the Faculty of Law at the University of Otago. She is supervised by Nicola Taylor and Mark Henaghan and is researching the connection between FASD and youth offending in New Zealand. She commenced her enrolment by analysing the current diagnostic schemes for FASD in both Canada and New Zealand, and has since researched the connection between the physiological effects of prenatal alcohol exposure and the resulting patterns of behaviour in affected individuals, and New Zealand's current legislative framework in this field. She is currently interviewing young people, parents, professionals and key stakeholders for the empirical component of her doctoral research.

Reconciling Patient and Medical Practitioner Interests Where Conscientious Object is Asserted

Robin Margaret Gibson

The code of ethics promulgated by the Medical Board of Australia called '*Good Medical Practice: A Code of Conduct for Doctors in Australia*', recognises that medical practitioners may refuse to carry out some procedures, on conscientious objection grounds. However, asserting a conscientious objection may conflict with other obligations within the code. The code stipulates that it is a medical practitioner's duty to make the care of the patient his or her first priority. Therefore, any legally-sanctioned procedure that is necessary for the health and well-being of a patient should be provided.

Research has suggested that those practitioners who are most likely to refuse to carry out a procedure, are male, or very religious. Where a woman's health is jeopardised by a conscientious refusal, that refusal conflicts with the overriding duty of each medical practitioner to patient primacy and may be gender discrimination.

The most common operations to which medical practitioners may object are abortion, sterilisation, contraception and in vitro fertilisation techniques, all of which are legally permitted in Australia. Government legislation restricts particular functions such as performing medical procedures or prescribing restricted drugs to registered medical

practitioners. This government monopoly and the criminalisation of performance by unregistered persons means that the patient may have limited alternatives. This may have devastating consequences for a patient whose life is at risk.

Whilst there is no community expectation that medical practitioners should always be required to act against conscience, medical professionalism and the principles of patient-centred care demand that alternative arrangements be made so that patients are not abandoned. Suggestions will be made in the paper presented.

Robin Margaret Gibson - PhC (Syd), BA, LLB, LLM (ANU) is a retired practising solicitor from Canberra. She specialised in commercial law, property and estates. She received Specialist Accreditation in Commercial Law through Law Society of New South Wales, though was admitted in both ACT and NSW. Robin's LLM was in Commercial Law.

Robin submitted a PhD thesis at ANU and is currently undertaking revisions suggested by her examiners. The title of my thesis is Bridging the Gap between Rhetoric and Reality: Can the Law Enforce Quality Patient-Centred Care in Australia? Robin's abstract captures a part of the thesis.

Is a Basic Income a Good Idea? Thinking about Gender, Rights and the Organization of Care

Beth Goldblatt

The changing nature of work and the potential decrease in employment has led to consideration of the idea of a basic income, a state-provided, universal social security payment to all adult citizens. The idea of a basic income is not new and the paper will examine the historical origins and thinking behind it and some of the debates that have arisen in assessing its value and utility. It will consider recent discussions around the introduction of a basic income in countries such as Finland, Canada and the Netherlands, related programs in developing countries, and responses to the idea in Australia. The paper will engage with arguments for and against a basic income, looking in particular at the gender and human rights implications of such a policy, including issues of social and economic equality. This will include a consideration of Jennifer Nedelsky and others' proposals for the reorganisation of care and work and whether these might offer a complementary or alternative response to a basic income.

Beth Goldblatt is an Associate Professor in the Faculty of Law at the University of Technology, Sydney. She is a Visiting Fellow of the Australian Human Rights Centre in the Faculty of Law at the University of New South Wales and an Honorary Senior Research Fellow of the Faculty of Law at the University of the Witwatersrand. Her work focuses on feminist legal theory and gender, family law, equality and discrimination, comparative constitutional law, transitional

justice, disability, and human rights with a focus on economic and social rights and the right to social security in particular.

Engendering Trust? Gender Mainstreaming in the Tonga Police 2009-2017

Hannah Gordon

For many countries, low levels of trust are a feature of public-police relations. For some developing nations, in particular, increasing levels of trust has become a priority, and a range of measures have been adopted in attempts to achieve this. One of these is gender mainstreaming, a concept which aims to address gender biases in prevailing routines, and attempts to produce more representative police forces.

Gender mainstreaming's most visible feature is often an increase in the numbers of female police employees. Studies considering why increasing female representation is expected to result in higher levels of trust in the police are rare. Likewise, there are few studies considering whether gender mainstreaming results in increased levels of trust in the police.

This presentation will explore the results of a study which aims to address these gaps through a social identity perspective lens. The social identity perspective focuses on our knowledge of ourselves as members of social groups, the value that we place on belonging to these groups, and the ways in which this can affect our attitudes and behaviour. When the social identity perspective is applied to instances of gender mainstreaming in the police, we can expect that females' levels of trust in the police will increase when female representation in the police increases. This hypothesis will be tested in relation to a case study of the Tonga Police.

Hannah Gordon is a PhD candidate at the National Centre for Peace and Conflict Studies at the University of Otago. Her research interests include Security Sector Reform, specifically in relation to the police; understanding systemic gender inequality in security organisations, as well as in their relationships with the public; and theories of trust and legitimacy in public-police relations. Her PhD research involved her being based in Tonga for three months, working with the Tongan Police, as well as civilians. She has worked as a Research Assistant at Otago, as well as in consulting roles.

Sex, Lies and the Legacy of the *Hutchinson* Decision: Sexual Fraud in Canadian Law

Lise Gotell

In *R v Hutchinson* [2014 SCC 19], the Supreme Court of Canada grappled with intentional condom sabotage resulting in pregnancy. In upholding the accused's conviction, the majority found that the complainant consented, but that her consent was invalidated by fraud, that is by deception and a deprivation that is equally serious to a "significant risk of serious bodily harm." The *Hutchinson* decision thus includes a comparatively expansive interpretation of sexual fraud vitiating consent, one that extends beyond impersonation and deception about the sexual nature of the act. However, this expansive definition of fraud is coupled with a narrowing of the scope for sexual consent in Canadian law. The majority drew a strict boundary around "voluntary agreement to the sexual activity in question," arguing that one consents to the identity of the person who is doing the touching, to the sexual nature of the touching, and to "the physical sex act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys) (para. 55)." In the majority's view, this does not even include being able to specify that consent depends upon condom use. This narrow conception of "sexual activity in question" contradicts earlier decisions defining the purpose of sexual assault law as "having control over who touches one's body and how" (*R. v. Ewanchuk* [1999] 1 SCR 330 at para. 28)

In this paper, I trace the impacts of *Hutchinson* for the interpretation of sexual consent and sexual fraud in Canadian law. As I will demonstrate, by excising "how" from scope of sexual consent, *Hutchinson* retreats from the affirmative consent standard that had been consolidated in the past two decades, thus undermining sexual autonomy. Moreover, by conflating sexual fraud with bodily harm, *Hutchinson* has left a confusing legacy for the consideration of sexual deception, making it unclear whether condom deception without pregnancy, or the practice of "stealthing," would vitiate consent in Canadian law.

Lise Gotell is Vice Dean of the Faculty of Arts and Professor of Women's and Gender Studies at the University of Alberta. For the past several years, her published work has focused on the implications of Canadian sexual assault reforms, including interrogating the legal standard for consent and evaluating the effectiveness of legislative restrictions on sexual history evidence and confidential records. Lise is National Chair of the Canadian feminist litigation organization, the Women's Legal Education and Action Fund.

Theorizing Failed Prosecutions

Jon B. Gould and Richard A. Leo

For more than one-hundred years now, common law countries have been focused on the problem of wrongful convictions. The United Kingdom created the Criminal Cases Review Commission, Canada utilizes Royal Commissions of Inquiry, and Australia, New Zealand, and

the United States sponsor innocence networks, each dedicated to uncovering and rectifying cases in which an innocent defendant was convicted.

Although exonerating the innocent is a crucial and admirable goal, the focus on wrongful convictions has drawn attention away from two other categories of error in the criminal justice system that warrant further study. These include “near misses,” in which a factually innocent defendant is indicted but eventually released before conviction, and “failed prosecutions,” where a suspect who is factually guilty nonetheless escapes conviction. Although some scholars (including ourselves) have begun to examine near misses, very little work has been devoted to failed prosecutions.

This paper is a first step to examining failed prosecutions, developing theory that seeks to explain how the guilty go free after arrest or citation. The paper brings together classical theories from criminology – including definitions of guilt – and synthesizes them with known sources of wrongful convictions, psychological research on individual and organizational decision-making, and socio-legal research on difference and community. In addition to providing a comprehensive theory for failed prosecutions, this paper will lay out an ambitious research agenda to test the hypotheses through empirical research.

Jon B. Gould is professor of public affairs and law at American University in Washington, D.C. The author of four books and more than 50 articles and reports, his work has been recognized on such subjects as wrongful convictions, indigent defense, and hate speech. Dr. Gould was executive director of the Innocence Commission for Virginia and served as senior policy advisor in the Obama Administration’s Justice Department. He was also principal investigator for the Preventing Wrongful Convictions Project, a three-year research project funded by the National Institute of Justice studying the causes of erroneous convictions in the United States.

Richard A. Leo is the Hamill Family Professor of Law and Psychology at the University San Francisco School of Law, and a fellow in the Institute for Legal Research at the University of California, Berkeley School of Law. Dr. Leo is one of the leading experts in the world on police interrogation practices, the impact of *Miranda*, psychological coercion, false confessions, and the wrongful conviction of the innocent. Dr. Leo has authored more than 100 articles in leading scientific and legal journals as well as several books, including the multiple award-winning *Police Interrogation and American Justice* (Harvard University Press, 2008).

‘Law and Objectivity’

Renata Grossi

Objectivity can be described as a meta-narrative of law, a strategic or background emotion that drives many legal processes. It is often a 'stand in' for rational decision making, for legitimacy, predictability and even truth. It comes to be seen as the opposite to subjective, emotional, partial, self-interested and biased decision making. It has been understood as being essential to the rule of law, central to individual freedom and autonomy and therefore central to the delivery of justice.

Critical jurisprudence has mounted a fairly sustained attack on the idea of objectivity. This critique claims that objectivity is both fallacious and ideological. It is fallacious because it is impossible to speak of a legal decision being completely free of some subjective interpretation, and it is ideological because it is a mask for power exercised through the structures of class, gender, culture, race, sexuality, ethnicity, religion, politics and economics. As such it is the opposite of justice.

Without necessarily wishing to disrupt the importance that objectivity occupies in our legal thinking, this paper will drill down and consider what precisely we mean by objectivity in law before asking whether critical approaches are as disruptive to objectivity as they claim.

Renata Grossi is an interdisciplinary legal scholar with an interest in the area of law and love. She is the author of *Looking for Love in the Legal Discourse of Marriage* (ANU Press, 2014). Other on point publications include 'Which Love in Law?: Zenon Bankowski and the Meaning of Love', (2015) *Law in Context*, 34(1) 42 – 57; 'Understanding Law and Emotion' (2015), *Emotion Review*, 7(1): 55-60; 'The Meaning of Love in the Debate for Legal Recognition of Same-Sex Marriage in Australia, (2012) *International Journal of Law in Context*, 8(4) 487-504. She has co-edited a special edition of *Law in Context* on the theme of law and love and is a co-editor of *The Radicalism of Romantic Love: Critical perspectives*, (Routledge, April 2017).

Think Like a Butcher: Strategic Lawmaking to Devalue the Animal Body

Oliver Hailes

Inspired by New Zealand's inaugural Animal Law Conference, this paper situates efforts toward legal standing and fair treatment for animals within a strategic framework. Ethical and environmental imperatives demand that we reduce the exploitation of nonhumans. And there are exciting experiments that do so; from habeas corpus applications for apes to the legislative recognition of sentience. But these fail to confront the fact that many nonhumans remain private property owned and exploited lawfully within a capitalist value regime and mode of production. Instead of addressing the suffering subject from the ideal perspective of the legal philosopher I propose to approach the commodified object from the material

perspective of the profit-hungry butcher. That is, I move away from the puzzle of the animal mind toward the animal body as a site of economic activity and a vehicle for investment — raw material to be transformed into a commodity for sale. In so doing I follow David Harvey to show how capital as “value in motion” flows through stages of *production* (farm and factory), value *realisation* (supermarket and restaurant), profit *distribution* (including the credit and tax systems) and *reinvestment* back in production. Visualising this cycle helps to locate choke points in the value chain as opportunities for strategic lawmaking: The Animal Welfare Act 1999 imposes obligations that reduce the profitability of rearing, shearing, milking and slaughtering; and product-labelling requirements help to demystify the fetishism of flesh, reduce consumer demand and thereby threaten a return on the initial outlay. At the same time, state institutions and civil society remain committed to exploitation by creating new markets through trade liberalisation, bankrolling changes to land use, and absorbing deleterious externalities. I argue the pragmatic goal of Animal Law must be to devalue the animal body to promote private and public divestment out of exploitative industries.

Oliver is an enrolled barrister and solicitor based in Wellington. His work on the constitutional impact of the Trans-Pacific Partnership has won several legal writing awards. Next year he will commence postgraduate studies in International Law at the University of Cambridge as a Woolf Fisher Scholar.

The War Prerogative: Toward a Socio-Legal Analysis

Michael Head

The issue of war, whether formally declared or not, has become a major and critical political and legal issue internationally.

Public, parliamentary and constitutional debates have erupted since the turn of the century in Western countries, particularly after the declaration and adoption by many governments of the ‘war on terrorism’ and the United States-led intervention into Iraq in 2003.

Today, the clouds of war hang over not just the Middle East but also Ukraine, Korea and the South China Sea, raising the spectre of wider wars involving the nuclear powers of the US, Russia and China.

These developments have been accompanied by sometimes substantial anti-war protests, as well as demands for democratic control over the commencement of military action.

This paper will survey the extraordinary executive and prerogative powers to declare war or launch military action, as well as any applicable constitutional conventions, legislation and legal doctrines.

With a focus on Australia and New Zealand, this paper will canvass the following questions:

Who currently has the power/authority to declare war?

Who currently has the power to launch military action without formally declaring war?

How and why have those powers arisen historically?

Who *should* hold such powers?

How, if at all, can those powers be controlled, legally or politically?

None of these politico-legal issues can be realistically considered in isolation from the underlying causes and consequences of war, although a full examination of those geo-strategic, economic, political and other factors is beyond the scope of the proposed paper.

This paper is part of the work on a forthcoming book, *The power to launch war: Global and domestic implications*, to be published by Routledge in 2018.

Michael Head, B.Juris, LLB (Hons) (Monash), LLM (Columbia), PhD (UWS), is Professor of Law, Western Sydney University. He has published a substantial range of books and refereed articles relating to public law, legal theory and civil liberties, notably: *Emergency Powers in Theory and Practice: The long shadow of Carl Schmitt*, Ashgate 2016. *Crimes Against the State*, Ashgate, 2011. *Calling Out the Troops, The Australian Military and Civil Unrest, The Legal and Constitutional Issues*, The Federation Press, 2009. *Evgeny Pashukanis: A Critical Re-Appraisal*, Routledge-Cavendish, 2007. *Administrative Law: Context and Critique*, The Federation Press, Fourth edition 2017

Minority Rights Advocacy for Incarcerated Indigenous Australians: The Impact of Article 27 of the ICCPR

Emma Henderson

Article 27 of the ICCPR protects the right of persons belonging to ethnic and linguistic minorities to enjoy their own culture and language, in community with other members of their group. The decision to transfer Indigenous Australians away from their traditional lands and Community for the purposes of incarceration is a potential violation of this fundamental human right. Twenty-five years after the Royal Commission Report into Aboriginal Deaths in Custody recommended that Indigenous prisoners should not be transferred away from their families unless it is absolutely unavoidable, Indigenous Australians are still incarcerated in ways which breach Article 27. This paper focuses on the parameters of Article 27 in the

context of human rights advocacy in Australia, and on the parameters and interplay between the UN Complaints mechanism and the domestic justice system.

Dr Emma Henderson researches and teaches in the areas of criminal law, international human rights law, law reform, and critical legal theory in the law school at La Trobe University in Melbourne, Australia. Emma coordinates and teaches LAW3HRL (Human Rights Law), and LAW5HRA (Human Rights Advocacy), an internship programme run in conjunction with Australian Lawyers for Human Rights. As the Director of Postgraduate Studies, Emma oversees the progress of Law School Higher Degree Research students. In 2016 Emma led a team of researchers to file Communications with the United Nations Human Rights Committee alleging serious violations of the human rights of two indigenous men held in mandatory detention in the Northern Territory, in breach of Australia's legal obligations under the International Covenant of Civil and Political Rights, and the Convention on the Rights of Persons with Disabilities; these matters are both ongoing.

Children's Rights Judgment Project

Kathryn Hollingsworth and Helen Stalford

This paper examines the aims, methodology and results of the *Children's Rights Judgments*, funded by the Arts and Humanities Research Council, and involving 56 academics and legal practitioners from across the world. The project revisited existing legal judgments relating to children and considered how they might have been drafted if adjudicated from a children's rights perspective. An innovative and highly effective legal methodology - judgment re-writing – was thus extended to children's rights. The *Children's Rights Judgments* was distinctive and innovative in several ways. First, it is the only project so far to have focused exclusively on children and to attempt to bring children's rights theories, law, principles, and methods to bear on the rewritten versions. Second, it has a wider jurisdictional scope than other projects, engaging with 28 judgments spanning seven domestic jurisdictions and four supra-national courts. Finally, the collection seeks to compare and contrast how children's rights can be interpreted and applied across different substantive areas of law, thereby avoiding the common tendency to locate children's rights' discussions within a single legal context (particularly family law and medical decision-making).

This paper sets out the justifications for the project (why a children's rights approach?) before identifying and exploring the five markers of a children's rights judgment: (i) the utilisation of formal legal tools including the CRC in domestic proceedings and the supranational courts; (ii) the use of scholarship to inform key concepts and tensions; (iii) the endorsement of child friendly procedures to maximise children's participation in legal processes; (iv) the

centralisation of the child's voice and experience in the narrative of the judgment; and (v) the communication of the judgment in a child-friendly way.

Kathryn Hollingsworth and **Helen Stalford** are the co-directors of the AHRC funded *Children's Rights Judgment Project*. Kathryn Hollingsworth is a professor of law at Newcastle Law School, Newcastle University (UK) where she researches and writes in the area of children's rights in youth justice. Helen Stalford is professor of law at Liverpool Law School and founding director of the European Children's Rights Unit (ECRU). She is a leading expert on European children's rights, having researched and published extensively in this area.

Vulnerability, Anonymity and Children's Rights in the English Criminal Justice System

Kathryn Hollingsworth

Over the past six or seven years, the English youth justice system has seen a shift from the 'responsibilisation' agenda emerging from New Labour's reforms in the 1990s, towards one that focuses much more on children's vulnerability. This paper examines this shift and what it means for children's rights in the youth justice system. Drawing on recent developments in the law protecting children's anonymity in criminal proceedings, the paper argues that although vulnerability has great potential for children's rights, it is a potential yet to materialise within the context of criminal justice.

Kathryn Hollingsworth is Professor of Law at Newcastle University where she researches in the area of children's rights in youth justice. She is particularly interested in the theorisation of children's rights in the youth justice context. She has published and presented widely in this area and is currently working on a book, to be published by Hart, entitled *Children, Rights and Criminal Justice*. She is also the co-director (with Professor Helen Stalford) of the Children Rights Judgment Project and co-editor (with Helen Stalford and Stephen Gilmore) of *Children's Rights Judgments: From Academic Vision to New Practice* (Hart, 2017, forthcoming).

Beyond Procedural Justice to Mentalizing in Mediation and Lawyering:

Jill Howieson

“The soul speaks its truth only under quiet, inviting, and trustworthy conditions.”

- Parker J Palmer

The procedural justice paradigm has many applications. It is well established that in mediation, ADR, law and lawyering that if the elements of procedural justice are present then the parties are likely to find the outcomes fair and satisfying, and in the case of lawyering are likely to follow their lawyer’s advice (Howieson, 2011). However, it has often been difficult to *teach* procedural justice. What is the human capacity that professionals engage with when they are *being* procedurally fair?

This paper focuses on the concept of mentalizing, which is a fundamental human capacity that enables us to think about and reflect upon the workings of one’s own mind and other people’s minds and enables us to make sense of and even more importantly, to anticipate, each other’s actions (Allen et al, 2008).

As fundamental as mentalizing is to humanity, the research shows that people can lose mentalising capacity when they become highly emotional, such as in times of conflict or considerable stress. When mentalizing capacity is impaired or ‘offline’, we become alienated from others and ourselves, our behaviours become unpredictable and erratic, and we are unable to act in a way that makes sense (Allen et al, 2008). More importantly, when mentalising is impaired we cannot make good decisions.

In order to restore our mentalizing function then, we need to be encouraged to attend to the mental states in ourselves, and the mental states of others. Professionals can assist in this restoration by taking what is referred to as a ‘mentalizing stance’. Essentially, a mentalizing stance moves beyond *being* procedurally fair to engaging the parties’ mentalizing systems. Thereby, as well as invoking perceptions of fairness and satisfaction, the practitioner can connect to the person’s humanity and assist in the resolution and repair of the human psyche as well as the conflict.

Jill Howieson, PhD (Law), LLB (Hons), BA (Hons) (Psych), BA (English) as an Associate Professor in the Law School at the University of Western Australia. Jill is the Director of Professionalism and is the coordinator of the Negotiation and Mediation, and Dispute Resolution courses in the School. Jill is the co-author of *Negotiation: strategy style skills* (LexisNexis, 2015) and practices, researches and teaches in negotiation, mediation and ADR. She has published internationally and nationally in these areas. Jill is a board member of the Australian National Mediator Standards Board, Director of UWA’s RMAB and is a nationally accredited mediator.

Farm debt mediation as an access to justice mechanism

Hanna Jaireth

This paper explores the contribution that farm debt mediation (FDM) makes to access to justice in Australia drawing on feedback to a 2017 review of the *Farm Debt Mediation Act 1994* (NSW). Recent inquiries that call for nationally harmonised FDM include the Parliamentary Joint Committee on Corporations and Financial Services' *Impairment of Customer Loans: Report* (2016) and the Australian Small Business and Family Enterprise Ombudsman, *Inquiry into Small Business Loans* (2016). Harmonised FDM is on the agenda of the Agriculture Senior Officials' Committee (AGSOC) and Agriculture Ministers' Forum (AGMIN).

This paper provides an overview of selected key issues raised in consultations about FDM during review. It comments on

- FDM in the context of national reform of dispute resolution in the financial sector.
- safeguards to redress imbalances of power
- scope and application issues, discussing several judicial decisions

FDM is a simple, voluntary and confidential process that is accessible and enforceable. FDM was pioneered in NSW when that state led the nation with alternative dispute resolution (ADR), and after a protracted rural crisis and a high number of farmer suicides. ADR has since become an integral part of Australian civil dispute resolution processes. The use of FDM tends to fluctuate with financial and climatic conditions.

Dr Hanna Jaireth is a Farm Debt Mediation Officer and reviewed the *Farm Debt Mediation Act 1994* (NSW) for the NSW Rural Assistance Authority in 2017. Hanna has a longstanding interest in ecologically sustainable development and human rights. Her current interests include dispute resolution and environmental democracy. Hanna has worked as an academic, lawyer, public servant, parliamentary inquiry secretary and journalist in a range of private and public sector positions, many with an environmental focus. She was a member of the ACT Heritage Council 2004–17, a member of the management committee of the EDO (ACT) (1995–2004, and chair 2012–2015), and she has been a member of several IUCN Commissions since 1996. Hanna was an elected NGO representative on the Australian Committee of the IUCN in 2013, and the national editor of the *National Environmental Law Review* (2010–13). She has undergraduate arts/law and postgraduate qualifications in international relations and mediation.

Using Restorative, Relational and Transformative interventions to disrupt the Continuum of Sexual and Gender Based Violence

Natasha Jolly

In the aftermath of conflict related sexual and gender based violence, there are conspicuous silences and truncated narratives surrounding the trauma and memories of survivors, particularly women. Through a literature review and thematic analysis, my paper will touch upon how current transitional justice fora like war crimes tribunals and truth and reconciliation commissions are constructed in a manner that do not do justice to the suffering of victims, thereby trivialising or straight-jacketing their testimonies to fit dominant narratives of historical records. In the process, they simplify the complexities of gendered warscapes and the war-peace continuum of sexual and gender based violence, thus failing in bringing about the interpersonal and inter-communal healing and reconciliation that they profess to. In such scenarios where wounds of societal cleavages run deep, I propose an exploration of restorative dialogue practices on both sides of the victim-perpetrator divide, as transformative reparative interventions to address the trust deficit. Through empathetic engagement, acknowledgement of the other, active listening and constructive use of voice in dialogue, a psychosocial continuum of care that is both complementary and supplementary to transitional justice mandates can be created to bring about ideational social change, thereby linking peacemaking criminology, peace psychology and peace education.

Natasha Jolly is a lawyer by training with Masters degrees in Public International Law and International Peace and Security from University College London and King's College London respectively. A former legal apprentice at the UN International Criminal Tribunal for the Former Yugoslavia, she is currently pursuing a PhD at the National Centre for Peace and Conflict Studies in the University of Otago, New Zealand. Natasha tutors undergraduate law, sociology and criminology papers. Her research interests revolve around sexual & gender based violence, post-conflict reconciliation and relational justice. Natasha is also a trained peer mediator.

From Board Gender Diversity to Workplace Diversity – Lessons from Uber

Akshaya Kamalnath

Gender equality in the corporate world seems like an idea whose time has come. We saw the issue of gender diversity on corporate boards take centre stage after the financial crisis with States introducing both hard and soft laws in this regard. However, the recent incidents at Uber, the poster child of the start-up world, which ultimately lead to resignation of the founder CEO and a board member shows that gender diversity efforts must be more concrete.

This paper will examine the many rationales for board gender diversity and argue that board gender quotas or other measures that merely seek to make corporate boards diverse will not be enough to end gender inequality in the corporate world. This paper will then build on some of the diversity related recommendations of the Holder Committee set up by the board of Uber, and present other suggestions that might ensure that gender diversity efforts do not

merely stop at the level of the board, but instead aim to make workplaces at various levels more diverse. Ultimately, workplace diversity efforts will not only help address some of the structural barriers that women face but also to ensure that there is a pipeline of women that are able to naturally progress into board roles.

Dr. Akshaya Kamalnath is a Lecturer at Deakin law school in Melbourne. She has a doctoral degree from Deakin Law School, LLM from NYU Law School (New York) and LLB from Nalsar Law University (India). Prior to joining academia, Akshaya worked as a corporate lawyer in India. Her doctoral dissertation was on corporate board gender diversity.

Communicative Justice: Considering Positive Freedom of Speech

Andrew Kenyon

Free speech is perhaps the classic negative liberty. It is often understood as freedom from state censorship or, more accurately, as the strict legal evaluation of any restriction on speech. But that is not the only way to understand communicative freedom, as work in political philosophy, media studies and media policy suggests. Free speech can also be said to involve an obligation on states to pursue sustained diversity in public communication, to pursue multiplicity of voice and viewpoint. This can be described as the freedom's positive dimensions. While the two dimensions collapse into each other to some degree, the labels positive and negative are useful heuristically as well as being prominent across many disciplines addressing freedom. Their value here is that freedom of expression having both positive and negative dimensions offers people a measure of communicative justice and the possibility of wider forms of justice. This idea of positive free speech, which echoes decades of international debate about communication rights, underpins many analyses of justice in other realms—cultural, criminal, environmental, gender, transitional and so forth—as well as claims to legitimacy in self-government. Communicative freedom and the ideas of voice and audience within it are significant for pursuing all those forms of justice. This paper briefly outlines the idea of positive free speech, drawing from law and legal writing in several jurisdictions. It then explores what work on positive freedom from political philosophy offers for understanding free speech. The lessons concern resources and pluralism, free speech's collective aspects, and how communicative freedom always arises within existing social, and discursive, contexts. In that, positive freedom is a horizon to be pursued, rather than a state of justice simply to be obtained once and for all.

Andrew Kenyon is Professor of Law and a Director of the Centre for Media and Communications Law at the University of Melbourne. He researches in comparative media law, including defamation, privacy, free speech and media policy. As well as law, this work draws on social and political research. He is a former president of the Law and Society

Association of Australia and New Zealand and its past visiting appointments include the University of British Columbia, the London School of Economics, and Université Paris 1 Panthéon Sorbonne.

Transgender Marriage Cases in the Asia-Pacific

Henry Kha

Scholarship on the subject of transgender marriage cases in the Asia-Pacific typically compares the local jurisdictional cases with the English case law, particularly the landmark decision of *Corbett v Corbett (or se Ashley)* [1971] P 83. This paper shall provide a comparative analysis of the legal recognition of transgender marriage between Australia, New Zealand and Hong Kong. These are the only jurisdictions in the Asia-Pacific to have legally recognised transgender marriage. The focus will be on how each of these legal jurisdictions have influenced each other in providing the jurisprudential framework of recognising transgender marriage. Therefore, the legal relationships among the peripheral jurisdictions of these current and former British Commonwealth territories will be the focus of the paper rather than the relationship between the metropole and the periphery. The landmark transgender marriage cases include the Family Court of Australia case of *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, the High Court of New Zealand case of *Attorney-General v Family Court at Otahuhu* (1994) 12 FRNZ 643, and the Hong Kong Court of Final Appeal case of *W v Registrar of Marriages* [2013] HKCFA 39. The *Corbett* case rejected the recognition of transgender marriage based on an endocrinological deterministic view of sex. Whereas the Australian, New Zealand and Hong Kong courts have rejected *Corbett* and accepted transgender marriage based on sociological criteria. The paper will argue that each of the above-mentioned Asia-Pacific cases on transgender marriage played a significant role in influencing the recognition of transgender marriage among Australia, New Zealand and Hong Kong.

Dr Henry Kha is a lecturer at the University of Auckland, Faculty of Law and is the course coordinator for family law. His main area of research is in the field of family law and legal history. He has recently been awarded his PhD from the University of Queensland. The thesis was entitled: "The Reform of English Divorce Law: 1857–1937." Henry graduated from the University of New South Wales with a Juris Doctor and was awarded the Dean's List for Excellence in Academic Performance. He has also graduated from the University of Sydney with a Bachelor of Arts (Advanced)(Honours).

Constitutional Encyclopaedia or Curious Citizenship: Different Conceptions of Civics Education in New Zealand

Dean R Knight

Everyone is once again talking about civics education. Poor constitutional literacy is routinely blamed for the decline in public participation and citizen engagement. Current debates about governance and constitutional reform are generating pleas for more or better civics education. Political parties are incorporating civics education in their manifestos.

Yet the refrain of civics education is blunt and undeveloped.

What do we mean by civics education? What style of education? And for what purpose?

Some seem to have in mind didactic lectures from a *constitutional encyclopaedia*. Young people and others should be schooled in civic institutions, constitutional processes and legal rules of our democratic system. For them, civics education is about showcasing the inner workings of government, along with the mechanisms available to citizens to participate in the business of governance. Some go further and suggest that a sacred codified constitutional instrument is the key to democratic literacy. If our democracy is like a vehicle, this model of civics education positions citizens as mechanics or car enthusiasts – knowledge of the operating manual and familiarity with the working parts are the essential focus.

Others speak of values-based education centred on *inspiring active citizenship*. Meta-concepts of power, authority and dialogue are emphasised and institutions, processes and rules take a back seat. Learning is localised and situated in contexts familiar with young people – schools, neighbourhoods, iwi and the like. Democracy is experienced by confronting problems commensurate with this microcosmic focus. Being able to drive the vehicle of democracy from place-to-place is valued more than an intimate understanding of the dynamics of its engine.

In this paper, I explore these different models of civics education, including their different character and the extent to which they are provided for within New Zealand's primary and secondary curriculum. I identify the putative purposes of the increasing calls for more and better civics education and examine the extent to which these purposes might be achieved by these different models. In doing so, I argue our focus should be on inspiring active citizenship rather than replicating a class on constitutional law.

Dean Knight graduated from Victoria with LLB(Hons) and BCA degrees, rejoining the faculty of law as an academic in 2005 after a number of years in practice in with an Australasian law firm (specialising in litigation, public law and local government). He has completed a PhD at London School of Economics and Political Science ("Vigilance and Restraint in the Common Law of Judicial Review: Scope, Grounds, Intensity, Context) and LLM by thesis at the University of British Columbia ("Estoppel (principles?) in public law: the substantive protection of legitimate expectations"). He specialises in public law, with scholarly interests across a wide range of topics in constitutional and administrative law. Areas of particular emphasis in his

work include judicial review of administrative action, local government and democracy, and constitutional reform. In addition, he maintains an interest in gay and lesbian legal issues, particularly various human rights issues and reforms in this area.

Law, Social Justice and Edwardian Irish Divorce

Peter Kuch

This paper builds on research undertaken for my recently published *Irish Divorce/Joyce's Ulysses* (Palgrave) by investigating issues of law and social justice raised by attempts to introduce a uniform procedure throughout the United Kingdom for granting *decrees absolute* following the 1857 Matrimonial Causes Act, 20 & 21 Vict., c. 85. Drawing on Hansard, a brief review of relevant case-law and legal interpretations of domicile, this paper will focus on key aspects of social justice raised during debates about Irish divorce that range from controversies surrounding the passing of the 1857 Act to W. B. Yeats speech on divorce delivered to the Free State Senate in 1925, available at <http://www.oireachtas.ie/parliament/education/historicaldebatesandspeeches/>

Peter Kuch studied with Richard Ellmann and John Kelly at Oxford. Since then he has held posts at the University of Newcastle, Australia; Université de Caen, France; and the University of New South Wales, Australia. He has also held Fellowships at the Australian National University; Trinity College, Dublin; and at the University of Notre Dame, Indiana. At present he is the inaugural Eamon Cleary Professor of Irish Studies at the University of Otago. He is the author of some 60 books, book chapters and refereed journal articles. His most recent publication, *Irish Divorce/Joyce's Ulysses* (Palgrave Macmillan, 2017), has been reviewed by Terence Killeen in *The Irish Times* as "hugely impressive", a book that by showing that divorce is possible for Molly and Bloom "changes the balance of forces in the relationship, and in the whole concept of marriage in Ireland also."

Memory and Nostalgia in Law

Marett Leiboff

If the development of the critical field of cultural legal studies tells us anything, it is that the non-legal cultural influences that shape and form lawyers affects their practices of legal

interpretation. Despite this, law maintains an imagined dissociation between those influences and the interpretation of law. It is easy to think that the practices of legal interpretation mean that lawyers will put these non-legal cultural touchstones to one side, making law work regardless. Alternatively, because these influences are not 'law' it might be assumed that these will make no difference to the interpretation or application of the law itself, that lawyers – and as appropriate, jurors – will encode law *aside* from these kinds allusions or illustrations.

Inevitably, cultural reference points are unique and individual, shaped generationally, and through the particulars of existence. Some of these reference points are grounded in the past as well as the present. But there is now a tendency to dismiss readings of the present shaped through history or outside current sites of injustice as having limited or no relevance now. But there is an alternate reading that is highly critical and dismissive these memories, histories, or cultural forms as a misplaced and dangerous *nostalgia*, grounded in criticisms that spring from observations such as those of Hardt and Negri in *Empire* that 'We must cleanse ourselves of any misplaced nostalgia for the belle époque of that modernity.'

The liberatory claims built into this dismissal of nostalgia, however, now functions as a slapdown against reference points that act as markers reminding us of harm and oppression through law. The claim that references to the past are merely nostalgia damns history and memory, but instead valorises the possibility of radical rewritings of the past in order to suit the needs of the present. For law to lose its history and its memory, recast as mere nostalgia, invites radical re-readings of the conditions in which law is shaped, in the present to the intentional rewriting of the past in order to remove protections of law more broadly. The mere use of the word 'alternative' is now something that smacks of a dangerous reorientation that dismisses historical wrongs, and that works to create new modes of injustice, drawing on the past, that cannot be referenced without the tools of history and memory to help notice when law goes wrong, and injustice follows. This then begs the question: are claims of nostalgia agents of injustice?

Marett Leiboff is Associate Professor at the School of Law, University of Wollongong Australia. Her research and scholarship centre on the legal theories of cultural legal studies, law and humanities and theatrical jurisprudence, with a particular focus on how the nonlegal formation of the lawyer affects and influences practices of legal interpretation. She works with history, biography, and different cultural forms, and how they are experienced and encountered, in order to understand how lawyers interpret legal texts through time, and how non-legal experience through generational change affects that interpretation, and what this means for legal integrity.

Judicial Policy, Public Perception and the Science of Bias

Inbar Levy

The right to an impartial and independent tribunal in the determination of civil disputes and criminal charges is a vital procedural measure to ensure the administration of justice. While the legal test for apprehended bias requires the court to assess the perception of a fair-minded and informed member of the public regarding the risk of bias, little attention has been given to what the public thinks in reality. The article presents a behaviourally informed perspective of the law of bias. Using doctrinal analysis and drawing on psychological literature, it argues that the law of bias must be re-examined with a view to closing the gap between the case law on which factors give rise to a reasonable risk of bias, public attitudes and studies on human decision-making.

Inbar Levy completed her DPhil in Law at University College, Oxford, where she was awarded the Modern Law Review Doctoral Scholarship and the Oxford Faculty of Law Scholarship. Her project, titled 'Behavioural Analysis of Civil Procedure Rules' investigates the implications of findings derived from empirical behavioural psychology for legal reasoning and practice. She had been awarded a Joint Law and Psychology LLB with Magna Cum Laude honours and subsequently an LLM with similar honours from the Hebrew University of Jerusalem. Before going to Oxford, she served as a legal advising officer in the Military Advocate General unit of the Israeli Defense Forces. Inbar held a Visiting Research Fellow position at Columbia Law School in the City of New York and a Visiting Researcher position at Harvard Law School.

Normative jurisprudence and legal education

Julian Ligertwood

This paper draws on my current PhD project which examines the legal thought of Roberto Unger and which argues amongst other things that we ought to develop and teach a contemporary normative jurisprudence in law schools. I describe what is meant by normative legal thought, or normative jurisprudence, and discuss its decline in legal thought and culture, including within legal education. I then suggest one way to help reverse this anti-normative trend in legal education.

Given that subjects such as jurisprudence are usually regarded as fairly trivial in the training of lawyers, and are characterised either as a basic introduction to law or as an esoteric elective course, I argue for a modernisation of traditional jurisprudence courses by incorporating a contemporary heuristic that explains and critiques past and current prominent approaches to legal thought and that suggests a reorientation towards what Brian Tamanaha describes as social legal theory as a way of reengaging with normative legal questions.

Julian Ligertwood is an Australian academic who currently teaches at the College of Law and Justice, Victoria University, Melbourne. His principle teaching and research interests are jurisprudence, in particular legal method and the intersection between legal and social theory; and labour law, in particular the nexus between international labour law and domestic regulation. Julian is currently completing a PhD thesis on the legal thought of Roberto Unger.

“A Restorative Approach to Human Rights”

Jennifer Llewellyn

Transitional contexts and established democracies alike have witnessed the rise of alternatives criminal justice processes as means of dealing with violations of human rights. In transitional contexts these developments have often taken the form of truth commissions tasked with dealing with past abuses and establishing human rights respecting cultures. Established democracies have also employed such processes in response to widespread, systemic and/or historical human rights violations in addition to permanent domestic human rights institutions.

These developments are interesting not only as practical innovations, but for the insights they offer about the nature of human rights and the harms that result from their violation. Many of these institutions have come under significant critique and pressure for reform from two distinct directions: those who argue they have failed to adequately vindicate and protect individual human rights and those who suggest current approaches do not do enough to achieve the fundamental social change required to ensure human rights.

This presentation explores the extent to which the most urgent conceptual and operational issues prompting calls for reform are reflective of the limits and weakness of the liberal individualist frame for rights undergirding human rights discourse and institutions, including: the tension between private and public law processes in response to human rights violations, individual vs. group/collective rights and, generally, the tension between protection for human rights and reconciliation in the wake of historic and systemic abuses. This paper develops an alternative relational conception of human rights and considers its implications for understanding the nature, purpose and scope of human rights and how to protect them. In doing so it, will consider recent reforms at the Nova Scotia Human Rights Commission to implement a restorative approach to human rights and the example of the first restorative public inquiry in Canada for the Home for Colored Children.

Jennifer Llewellyn is the Viscount Bennett Professor of Law at the Schulich School of Law at Dalhousie University in Halifax. Her research is focused on relational theory, restorative justice, truth commissions, and human rights law. She has written extensively on the theory and practice of a restorative approach. She is currently Director of the International Learning Community on a Restorative Approach. Professor Llewellyn advises and supports restorative projects and programs nationally and internationally including Nova Scotia's Restorative Justice Program and the Human Rights Commission. She recently facilitated the design of the restorative public inquiry into the Home for Colored Children. She previously advised the Assembly of First Nations and Canadian Truth and Reconciliation Commission on the response to Residential School abuse.

Decolonising Archives: Indigenous Challenges to Record Keeping in 'Reconciling' Settler-Colonial States

Trish Luker

When settler colonial polities, such as Australia and Canada, have established avenues for reparations as part of processes of reconciliation with Indigenous peoples, contentions over reliability and interpretation of state-produced archival records have come into sharp relief. Furthermore, disputes have arisen about government obligations to provide access to their archival records for the purposes of assessing reparations. There are also important questions about access to and responsibility for contemporaneous records of testimonial and documentary evidence produced in proceedings.

In Australia, the archives of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families are held by the National Archives of Australia are not available on open access; they require an application under freedom of information legislation. Important questions concerning Indigenous rights to cultural and intellectual property have been raised in the wake of the Inquiry, including responsibility for ownership and control, custodianship and right to correct the record. There is also interest in a 'right to forget' or 'right to be forgotten', that is, the right to have personal data destroyed, and its potential to conflict with other public interest issues.

In Canada, disputes emerged in relation archival records in the context of reparations processes for survivors of residential schools under the Indian Residential Schools Settlement Agreement (IRSSA) and the subsequent Truth and Reconciliation Commission (TRC). As a result, there has been litigation concerning the government's obligation to provide access to records for the IRSSA reparations process, as well as actions which resulted in an order for the destruction of records, currently under appeal.

In this paper, I consider competing interests at stake in the principle of public access for Indigenous owners of intellectual property when applied to material held in cultural institutions, focussing on Australia and Canada. I anticipate that this will open into discussions about moves for decolonisation of archives in Aotearoa – New Zealand.

Dr Trish Luker is based at the Faculty of Law, University of Technology Sydney. Her research focus is in interdisciplinary studies of law and humanities, particularly in relation to documentary practices, court processes and evidence law. She is co-editor of *Australian Feminist Judgments: Righting and Rewriting Law* (2014). Her current research projects are: 'The Court as Archive: Rethinking the Institutional Role of Federal Courts of Record' (with Ann Genovese and Kim Rubenstein) and 'What is a Document? Evidentiary Challenges in a Digital Age' (with Katherine Biber).

Rivers as Legal Persons: Are we Throwing out the Baby with the Bath Water by Excluding an Environmental Science Perspective from the Legal Framework?

Fiona MacDonald

I will argue that, from an environmental science perspective, recognising rivers as having legal standing potentially creates as many problems as it solves. Declaring a river a legal person does not, of itself, direct attention to maintaining the river as a sustainable resource. If the basis of a declaration is 'environmental justice' it conflates economic, social and cultural justice but does not necessarily address justice for the environment as such. Focusing on rivers as legal persons demonstrates why this conflation is problematic. Is the river being managed for the better use of humans or to maintain the health of the river system? What happens if they are not, or not perceived to be, the same thing? Depending on how environmental justice is defined, and on who is the intended recipient of fair treatment, the resources of a river system may be wasted rather than preserved.

Three rivers, the Whanganui River in New Zealand, and the Ganga and Yamuna Rivers in India have now been recognised as having legal standing. In each of these cases there seems to be an underlying assumption that achieving environmental justice by returning rivers to cultural groups equates to maintaining rivers as sustainable resources. This assumption is not necessarily valid and it cannot be assumed that recognising a river as a legal person, within a cultural context, will operate to maintain the environmental value of the river. Water is a critical resource, essential to all forms of life, and in many places, is under stress because of human demands. With climate change, there are many areas in which water stress is likely to increase. When recognising rivers as legal persons environmental perspectives must be explicitly addressed using science as the foundation for management. Using the Whanganui,

Ganga and Yamuna rivers as examples, my paper explores the place of science in informing the development for legal standing and fair treatment of rivers.

Fiona MacDonald is undertaking a PhD in the Law School at Sydney University. Her PhD includes environmental science and economics components. Fiona has undergraduate degrees in Law (1985), Economics (1985) and Environmental Science (2014), and master's degrees in International Law and International Relations (2016), Environmental Resource Management (2016), and a Master of Research (Biological Science), for which she is awaiting results. Fiona was a legal practitioner for about 20 years, working variously as a prosecutor, defence counsel and in private practice. Fiona qualified as a registered nurse in 1972 and worked as a nurse, at different times, for about 14 years.

Culture and nature in the legal rights of rivers: Cases from Aotearoa New Zealand and Colombia

Elizabeth Macpherson

Legal frameworks regulating rivers have long centred on managing and preserving river resources for the benefit of humans; rivers must be efficiently managed, and river health effectively protected, so that humans might continue to benefit from them. Yet, there is a perceived 'ecocentric' shift in some recent water laws, which suggest that rivers have value in of themselves. Conversely, humans, who have historically used and abused natural resources, owe obligations to protect river rights and interests.

Specific declarations of 'legal personality' are the newest tool being used by courts and legislatures to recognise and protect the rights of nature in rivers. However, laws that recognise rivers as legal persons are inextricably linked to the humans who uphold and enforce river rights, and have been driven largely by indigenous communities, who claim distinct relationships with water based on guardianship, symbiosis and respect. Legislation passed in March 2017 declaring that the Whanganui River is a legal person (*Te Awa Tupua*) follows claims of cultural 'difference' by the Whanganui River Iwi, whereby they are interdependent with and responsible for the river. Similarly, the decision of the Constitutional Court of Colombia in November 2016 that the Rio Atrato is 'the subject of rights' was a case brought by indigenous and afro-descendent communities who claimed interdependency with the river. Although the Court expressly adopts an 'ecocentric focus', it describes the river's interests both as 'biocultural' in nature and representing 'third generation human rights'.

In this paper I interrogate the co-option and adaptation of human rights norms to protect the rights of rivers in Aotearoa New Zealand and Colombia. In both cases, legal personality is deemed necessary, not merely as recognition the intrinsic value of nature, but a necessary condition for the exercise of (cultural) human rights. That being so, is there scope for

recognising the legal rights of rivers in situations where ‘nature’ and ‘human nature’ do not align? More importantly, if river rights are third generation human rights, are we witnessing the subtle constitutionalism of the rights of nature?

Elizabeth Macpherson is a Lecturer at the University of Canterbury. She researches natural resources, environmental and indigenous law, in Australasian and Latin American contexts. Elizabeth completed her PhD on Indigenous Water Rights at the University of Melbourne in 2016, under the Human Rights Scholarship, and worked as a teaching and research fellow at the Centre for Resources, Energy and Environmental Law. She has practiced indigenous rights and natural resources law in New Zealand, Australia and Chile, including representing Māori claimants in the Waitangi Tribunal and as Principal Legal Adviser, Aboriginal Affairs for the Victorian Government. In 2016 she was the Assistant Director, Aboriginal Affairs Policy, where she advised on the proposal for a Treaty with Aboriginal Victorians.

Writing Lives: Judgements as biographical writing with material effect.

LJ Maher

In 2017, Tree J of the Family Court of Australia decided in Re: Lucas [2016] FamCA 1129 that 17 year old Lucas was “competent to consent to the administration of stage two treatment [the administration of testosterone] for the condition called Gender Dysphoria in Adolescents and Adults.” In his judgement agreeing to Lucas’ request, Tree J wrote:

What other section of our youth is required to endure such an ordeal to attain the corporeal manifestation of their identity? [...] Indeed, considering that this court’s ordinary task is largely to make decisions reflecting children’s best interests, the mandatory ordeal which Gender Dysphoria youth must endure to access the only available treatment for their condition, seems to be anything but in their best interests.

This paper will consider Re: Lucas as a piece of biographical, or ‘life’, writing that has regulatory force. I contend that, as life-writing, judgements stand apart from other modes of writing that explore subjectivity insofar as their determinations have a material impact on the bodies they purport to regulate. In Re: Lucas this material impact is manifested in Lucas’ ability to (and the potential for prohibition against) access hormones necessary to more comfortably inhabit his own body. I argue that there is therefore an ethical imperative to read judgements as more than mere statements of law. I elaborate on Julie Rak’s assertion that life-writing is discursive (rather than a genre), and I consider the implications of an overlap between life-writing and legal discourses as ways of constituting knowledge derived from social practices, forms of subjectivity, and power relations. By approaching judgements as literature that purports to regulate bodies and subjectivities I want to advance a form of reading that enables those bodies and subjectivities to resist interpolation.

LJ Maher was awarded a PhD by Monash University in 2016 for “99 Problems; An Exploration of Writerly Ontologies in Transmedial Life-Writing.” She examined transmedial life-writing by musicians focusing on their explorations of self and otherness in relation to their creative output and their relationships with their audiences. She recently spoke at the International Association for Biography and Autobiography (IABA) conference on the question of reader agency in relation to transmedial life-writing. She is now bringing together her legal and literary backgrounds by examining law as literature. She teaches at both Monash and Deakin Universities, lecturing across supernatural literature, genre studies, narratology, and adaptation studies.

Rape Myths as Barriers To Fair Trial Practice

Elisabeth McDonald and Paulette Benton-Greig

The overall goal of our Marsden-supported project is to find better ways of testing the evidence of rape complainants by producing new knowledge of rape trial process and the extent to which current law and practice impede fair process and just outcomes. We believe that research grounded in an analysis of what actually happens in court provides the strongest foundation for change proposals. By investigating language, discourse and interaction in the courtroom, our research aims to produce original insights into the subtle ways that rape myths operate. The questioning of the complainant during cross-examination is a focus because it is the aspect of court proceedings that has been most widely criticised, and has been largely immune from the decades of law reform. We aim for detailed descriptions of the question-answer sequences that function to undermine a complainant’s credibility, attribute blame to her and construe the sexual activity as consensual.

The strategies used to challenge the credibility of adult rape complainants will be scrutinised for the ways in which they rest upon and reproduce hegemonic discourses of gender and sexuality that are implicated in rape myths. These kinds of culturally shared meaning systems provide what has been referred to as the cultural scaffolding of rape. Using critical and discursive analytic methods particularly with regard to the cross-examination process, the operation of the interactional practices for undermining the complainant’s credibility will be examined.

In this paper we offer some early observations concerning the interaction between questioning technique and characterisations of rape and rape victims in complainant testimony. Examples from recent New Zealand trials will be used to demonstrate how the discursive battle over gendered sexual relations is playing out in our courtrooms today and how this allows juries to colour their assessment of credibility and reasonableness with discriminatory myths and stereotypes.

Elisabeth McDonald researches in the areas of criminal law, evidence and law and sexuality - with sexual violence at the intersection of all those inquiries. She began exploring feminist challenges to evidential rulings when marking the 1993 Suffrage Centennial and in 1994 obtained FoRST funding to examine the experience of women rape complainants. Since then Elisabeth has published widely about the prosecution of sexual violence, including co-authorship of a Law Foundation funded book *From 'Real Rape' to Real Justice* (2011). In 2014 she received a Marsden grant to look at the role of rape mythology in the trial process.

Paulette Benton-Greig's area of interest is gender and sexuality. Her current doctoral research is a socio-cultural analysis of online sex seeking in New Zealand, she teaches gender and sexuality courses in the medical humanities and social sciences, and has undertaken policy, advocacy, service provision and research in various aspects of violence against women. Sexual violence and the criminal justice system is a particular issue of concern, and this has involved her in the Taskforce for Action on Sexual Violence, restorative justice after sexual harm, court services for victims and this research on improving the way rape trials work.

Juridical Individualism and the Offence of Animal Cruelty

Alexandra McEwan

This paper explores the concept of individual responsibility as it pertains to the offence of animal cruelty. The first, broad aim is to present animal cruelty as an offence which, on examination, reveals some of the contradictions that have emerged within the criminal justice system under the influence of neoliberalism since the 1970s. The second, more specific, aim is to demonstrate how one strand of animal protection advocacy, that which focuses on higher maximum penalties and tougher sentencing for animal cruelty offences, plays into these contradictions, to the detriment of the animal protection movement's larger goals.

The paper takes the form of a case study. It examines the introduction, in 2014, of a 'serious animal cruelty' offence (section 242) into the *Criminal Code* (Qld). The analysis is informed by Alan Norrie's work on legal individualism and the criminal law, including Norrie's rendering of T H Marshall's theory of citizenship.

The somewhat counterintuitive story that emerges is structured by the growing tensions between civil and political citizenship under neoliberalism, alongside the dismantling of social citizenship during the same period. A doctrinal analysis of the offence of animal cruelty highlights the ideological dimensions of strict liability, especially its role in minimising perceptions of criminality relating to offences perpetrated by corporations. The paper expounds how the *mens rea* - strict liability binary that lies at the heart of the animal cruelty

offence, combined with animal protection advocacy that relies on retributive philosophies of punishment based on individual responsibility and intentionality, plays into and stabilises the legitimacy of corporate violence against animals in the name of civil citizenship.

Alexandra McEwan was awarded a PhD from the ANU College of Law, Australian National University in January 2017. Her thesis, *The Concept Violence: A Proposed Framework for the Study of Animal Protection Law and Policy* examines animal protection laws through an approach that draws on Pierre Bourdieu's social theory, Giorgio Agamben's political philosophy, and critical criminal law.

Alex has been working as a researcher, educator and project manager within a social justice framework for more than two decades in a range of areas including Aboriginal and Torres Strait Islander peoples' health and social policy, clinical legal education, mental health, sexual and reproductive health, and corruption and integrity frameworks. Her understanding of social justice grew out of working with homeless young people in inner city Sydney, providing health care services and education to sex workers, and working as a primary health care nurse in remote Aboriginal communities in Cape York, north Queensland. Her interest in animal protection arose when she completed an LLB honours thesis on Martha Nussbaum's capabilities approach for non-human species (2008).

Alex recently commenced as Lecturer: Law at Central Queensland University's Melbourne campus.

Peace-building from above or below? A juxtaposition of United Nations Human Rights Council and grass roots activities in transitional justice: Sri Lanka and Northern Ireland.

Fiona McGaughey

Sri Lanka and Northern Ireland have both experienced periods of conflict and horrific human rights abuses. In these jurisdictions, and globally, there is a keen interest among scholars, practitioners, policy makers and the survivors of wars and conflict in achieving transitional justice. This socio-legal study situated within a human rights normative framework, uses a case study approach. It begins by briefly considering selected transitional justice grassroots activities within Sri Lanka and Northern Ireland. Then, using documentary analysis, it identifies and analyses transitional justice related recommendations made by the UN Human Rights Council in its Universal Periodic Review (UPR) of Sri Lanka and the United Kingdom of Great Britain and Northern Ireland. The paper reflects on the merit of grassroots activities based on available evidence on their impact on the communities affected. It also evaluates the influence of the UPR recommendations – in particular, whether the States accepted the transitional justice related recommendations.

Another key consideration in the paper is the role and influence of the various stakeholders – local Non-governmental Organisations (NGOs), international NGOs, the States involved, and the States external to the conflict. It concludes that the distinction between the State-centric review at the UN level and the grassroots activities at a local level is a false dichotomy. States are closely involved in grassroots activities, through funding and other measures and civil society is closely involved in the UPR in a form of dispersed global governance, concluding that NGOs play a unique local-to-global role, ‘glocalisation’. Understanding that conflict and reconciliation are highly contextual, the paper nonetheless concludes that where possible, local NGOs must be involved in both grassroots activities and international monitoring via the UPR. It makes a contribution to understanding how actors and glocalisation can be used to come to terms with a legacy of large-scale past abuses and achieve reconciliation.

Fiona McGaughey is a Lecturer at the University of Western Australia Law School, teaching international law, in particular human rights, and law and society. Her PhD was on the role of Non-governmental Organisations (NGOs) in United Nations human rights State reporting mechanisms. Using socio-legal research methods, her other research interests include transitional justice, minority rights and disability rights. She has previously worked in research and policy roles in the NGO sector in Ireland and Australia. Fiona completed her Bachelor of Laws (Honours) at the Queen’s University of Belfast during the conflict period and the dawn of the peace process.

Epistemologies of anticipation: Between fears of litigation and fears of risk in the EMF debate.

David Mercer

The debate surrounding possible health risks of Electric and Magnetic Fields (EMF) associated with mobile telephones, powerlines, and communication devices, has persisted for a number of decades. Despite assurances in the safety of EMF from most mainstream scientific authorities there have been a small but persistent number of scientific studies suggesting the presence of risk. In response, the International Agency for Research into Cancer (IARC) has listed EMF as a low level possible carcinogen: although it should be noted it shares a level of classification with things like processed foods such as pickled vegetables. The debate has resisted neat scientific closure and as such has sometimes found its way into courts via planning disputes involving the roll out of new telecommunications infrastructure, and personal injury claims from individuals who believe they have been harmed by exposure to EMF emitting technologies. Notable examples have involved legal attempts to limit ‘wi-fi’ installations in schools and the spread of smart meters, and claims for compensation for brain tumours caused by mobile telephone use and failure of employers to make reasonable adjustments for workers who claim they suffer from electro-sensitivity. The current paper

will explore the way the outcomes of EMF litigation (focusing on number of recent cases) are important beyond their formal legal relevance as part of the 'culture' of the EMF debate. In particular, I will examine the way regulators and activists place different constructions on the policy relevance of legal outcomes, and also the epistemological status of EMF science linked to litigation. It will be noted that a feature of these disagreements involves the use of contrasting rhetorical strategies of entanglement and dis-entanglement of fears of litigation risk and fears of EMF risk.

David Mercer is Associate Professor in Science and Technology Studies at the University of Wollongong, Australia. He has published widely on topics involving science and the law; expert evidence; public understanding of science and scientific controversies. Case studies have included: Toxic Torts; Creation Science; The EMF debate; Synthetic Biology and Climate Change. One of the key pre-occupations of this work has been the way demands of legal and regulatory contexts can shape the way the science and expertise relevant to them is constructed.

“A Woman’s Tongue”

Gender, Swearing and the Law

Elyse Methven

This paper interrogates how representations of gender in criminal justice discourse can perpetuate stereotypes in relation to women and swear words. Drawing on my PhD research on the representation of offensive language crimes, I recount judgments from obscene language trials in the nineteenth and early twentieth centuries in Australia. In these judgments, swearing was represented as an 'unladylike' pursuit that women needed protection from; it was considered unnatural for women to utter – and to hear – a 'manly oath'. This was despite evidence that in the mid-nineteenth century, the number of men and women involved in obscene language cases as complainants and defendants was fairly evenly divided. Newspapers and obscene language judgments of this period largely expressed the view that if four-letter words could not be eradicated from the English language, such words should be confined to spaces where a man could speak without moderation: a bar, a business meeting or a sporting contest. After outlining this historical context, this paper demonstrates that modern criminal justice discourse continues to perpetuate conservative stereotypes about gender, swearing and place. I apply the ideas of cultural theorist and anthropologist Mary Douglas (1966) to argue that judgments about whether language is offensive or inoffensive are heavily invested in normative assumptions about women, dirt, disorder and being 'out of place'.

Dr Elyse Methven is a Lecturer at the Faculty of Law, University of Technology Sydney (UTS). She recently completed her PhD thesis as a Quentin Bryce Scholar at UTS, titled *Dirty Talk: A*

Critical Discourse Analysis of Offensive Language Crimes. Elyse researches in the fields of criminal law and linguistics, and is particularly interested the interrelationship between law, language, power and inequality. Prior to commencing her doctoral research, Elyse was a solicitor at the NSW Crime Commission.

Compensation Orders in a Corporate Context

Tom Middleton

Given the increasing number of corporate collapses (see for example, HIH Insurance Ltd, Storm Financial Ltd, Trio Capital Ltd, Banksia Securities Ltd, Queensland Nickel - to name but a few), it is suggested that the government should adopt a more principled and uniform approach to the corporate compensation laws and to the use of public funds to compensate the victims of corporate collapses particularly where those collapses involve a perceived failure on the part of the corporate regulator. These corporate collapses impact on a wide range of victims including investors, creditors, members of superannuation funds and insurance policy holders. Corporate collapses jeopardise the collection of taxation revenue and thereby detrimentally affect government funded programmes and the society at large. A range of reforms are suggested in this paper included improvements to the regulator's power to commence public interest proceedings on behalf of impecunious victims.

In recent corporate collapses the courts have imposed many pecuniary penalties on the contraveners, but none of those penalties were used to compensate the victims of those collapses. Under the current law, the government is the beneficiary or the recipient of the pecuniary penalties. Arguably, it should be held accountable for regulatory failures and, from a public policy perspective, it should pay the pecuniary penalties to those victims.

In addition, it is suggested that a permanent statutory compensation fund be established to assist the victims of future collapses, perhaps based on the United States' fair fund.

The reforms suggested in this paper would promote public and private interests and world's best practice and provide better protection for the investing public and creditors and make them more willing to invest in the Australian and New Zealand financial markets. The adoption of best practice in the regulatory laws promotes more effective regulation and public confidence in the integrity and credibility of the regulatory system and enhances the economic and social welfare of all citizens.

Dr Tom Middleton is an Associate Professor in the School of Law, James Cook University, Townsville. He is admitted as a Solicitor of the Supreme Court of Queensland.

He earned a Bachelor of Commerce and a Ph.D from James Cook University and, a Bachelor of Laws (Hons) and a Masters Degree in Legal Practice at Queensland University of Technology.

In 1999 he wrote a two volume book (looseleaf and on-line service) entitled “ASIC Corporate Investigations and Hearings,” published by Thomson Reuters, Sydney. He currently updates this book 5 times per year and it has been in continuous publication for the past 18 years. It is the leading publication for legal practitioners in relation to the Australian Securities and Investments Commission’s investigative and enforcement powers.

He has published numerous refereed articles and a number of these have been cited by the Courts, Academics and Law Reform Commissions in Australia and New Zealand. Those articles have also been utilised by government agencies including the Commonwealth Treasury in the context of proposals for law reform.

He is a foundation staff member in the School of Law and he currently teaches third and fourth year law subjects in both Townsville and Cairns.

Promoting Environmental Justice in Biodiversity Conservation: an Assessment of Ecosystem Approach

Sheikh Noor Mohammad

Amidst endless debates and confusions as to its concept, boundary and applicability, environmental justice entails the fair treatment and meaningful involvement of human being into the exploration, conservation, management and sustainable utilisation of biological resources. It is realised by the global community that without valuing ecosystem resources, sustainable development cannot be sustained. Maintenance of ecosystem integrity is, therefore a prime need for ensuring environmental justice for generations which largely depend on ‘sustainable use of natural resources’. In this context, the ecosystem approach (‘EA’) emerged in the international environmental realm bridging between conservation and rational use of biological resources. The EA is endorsed by the UN Convention on Biological Diversity for promoting justice both for the people and nature. It presents a set of mechanisms; most notable are equitable benefit sharing, conservation and sustainable use, adaptive management, intersectoral coordination, participatory practices for promoting environmental justice to save the people and the planet. The conservationists, experts and researchers are pursuing for the integration of the EA’s notions into the regional and national policy framework to ensure environmental sustainability. The recent trend to the incorporation of EA’s notions in legal and policy regimes and its practical applications in state practices indicate its gradual acceptance as a result of the global agenda on climate change.

Against this backdrop, this paper attempts to examine the status of EA's environmental justice ensuring mechanisms in the international biodiversity laws in light of major international treaties and state practices. It will finally evaluate the application of EA's environmental justice ensuring components into the biodiversity linked policy and practices in the biodiversity rich South Asian countries for ensuring the environmental justices to their climate vulnerable mangrove dependent communities and unique biodiversity.

Sheikh Noor Mohammad is a career civil servant and legal researcher. He is currently doing his PhD research at Macquarie Law School, Australia. He is a Deputy Secretary to the Government of Bangladesh. Earlier he was a lawyer in the Supreme Court of Bangladesh. After completing LL.B (Honours) and LL.M from the University of Dhaka, he did MSc in Environmental Science from the University of Greenwich, UK. He awarded Macquarie University Research Excellence Scholarship in 2015. His research works have been published in international journals.

Buy bust! On the Ethics and Effectiveness of Undercover Drugs Policing

Leah Moyle

This paper will explore the ways in which undercover 'buy bust' operations are commonly used as a tactic that provide opportunities to gain intelligence and penetrate the upper echelons of the illicit drugs market. Drawing on drug market rapid analysis undertaken in the UK, it is argued that undercover 'test purchases' are disproportionately directed towards low-level, visible user-dealers who - when presented with the opportunity - routinely choose involvement in small-scale dealing as an alternative to what they perceive to be more harmful, morally shameful income generating crimes. Drawing on qualitative data and analysis of court cases, this paper will explore the lived experiences of those caught up in these operations and report the attendant outcomes for those sentenced and punished for these offences. Focusing on the effects of undercover policing at community level, it is suggested that this tactic can also lead to counterproductive public health and crime displacement effects and might be usefully conceptualised as an example of 'symbolic policing' (Coomber et al. 2017). Given the new emphasis on vulnerable people policing (VPP) and a move toward harm reduction, it is argued that reliance on buy busts are not only inconsistent with these approaches, but might also be understood as ineffective and representing an act of entrapment.

Leah Moyle is a Research Fellow at Griffith Criminology Institute, Griffith University, Australia. Prior to this she was a Lecturer in Criminology and Sociology at Royal Holloway, University of London (UK). Leah's research interest focus primarily on understanding illicit drug markets and 'non-commercial' drug supply through sociological and criminological frameworks. She

has published a number of drug market related research articles and reports and is currently working on projects which analyse the policing of street drug markets, sentencing approaches towards low-level drug dealers, and understanding vulnerability in drug markets.

Policing Muslims in the age of terrorism: The interplay between procedural justice and stigmatisation in shaping Muslims' willingness to report terror threats.

Kristina Murphy

Islamic-inspired terrorism has led governments to introduce new counter terrorism policies and laws aimed at tackling the problem. This has had a profound negative impact on Muslim communities. Muslims living in the West have expressed feeling stigmatized by institutional responses to terrorism. Such feelings have implications for their willingness to work collaboratively with police to report terror threats. Using survey data collected from 800 Muslims living in Australia the current paper examines how feelings of stigmatisation and perceptions of procedural justice policing are associated with Muslims' willingness to report terror threats to police. Findings reveal that both factors interact to shape willingness to work with police. Specifically, procedural justice policing appears most effective in promoting Muslims' intentions to report terror threats to police for Muslims who report a heightened sense of stigmatisation.

Kristina Murphy is a Professor in the School of Criminology and Criminal Justice and a member of the Griffith Criminology Institute at Griffith University in Brisbane, Australia. Kristina's research draws on social psychological theory to understand how citizens respond to authorities. She argues that effective regulation depends on being responsive to individuals' needs, values and behaviours.

She focuses on the concept of procedural justice; the idea that dealing with citizens in a procedurally fair and respectful manner, and providing citizens voice in decision-making will promote trust in authorities and will encourage citizens' willingness to cooperate with authorities.

The Role of a Law Student Pledge in Shaping Positive Professional Identities: A Case Study from Australia

Trish Mundy, John Littrich, Karina Murray, Kate Tubridy

In 2017, the School of Law at the University of Wollongong introduced a *Law Student Pledge* to the incoming first year student cohort. Introduced as part of Orientation week activities,

the Pledge was designed as an important symbolic message to students that their career as a legal professional starts from the day they begin their law studies. It invited them to commit to core values, attitudes and practices that are seen as important to developing a positive legal professional identity and meeting the standards expected of them as future lawyers. These values included a commitment to the UOW Student Charter, the highest standard of academic integrity, coming to class prepared and ready to engage, and to generally pursuing their studies to the best of their ability. Students were invited to show their commitment by signing this Pledge in their first weeks of law school. Reinforcement of the pledge occurred in subsequent follow up with students across the year, with particular linkage made to the legal ethics and professional responsibility subject studied in second semester of first year.

This paper reports on the introduction and utility of adopting the Law Student Pledge for newly commencing law students at UOW and considers the findings from a number of focus groups held with first year students. In particular, it reflects on the impact, benefits and challenges of adopting the Pledge and assesses the effects on shaping students' attitudes and understanding of academic integrity and their professional identity as future lawyers. More broadly, the paper considers US practice and experience in the use of oaths and pledges within US legal education and the lessons and limitations in the Australian context.

Karina Murray – on behalf of the research team listed above, in her previous career, Karina worked in a number of positions in the public sector. Since joining UOW in 2006 she has taught a range of subjects, including Foundations of Law, Ethics and Statutory Interpretation. She was recognised with an Australian Award for University Teaching in 2015, as well as Outstanding Contribution to Teaching and Learning awards in 2011 and 2013. She publishes in the area of legal ethics and is a co-author of the third edition of *Lawyers in Australia* (Federation Press, 2015). Her other research interests are in statutory interpretation and legal education.

Housing – a Right or a Basic Necessity? An Analysis of the Bangladesh Supreme Court's Approach

S M Atia Naznin

Housing is not a right, rather a non-justiciable basic necessity under the Bangladesh Constitution. The Bangladesh Supreme Court, however, has been adjudicating the violations of this basic necessity in litigations on forced slum evictions. Although the judicial approach has been acclaimed as liberal, it is reflective of a weak enforcement for not directly enforcing forced slum evictions as violations of the right to housing. The Court instead has devised an indirect means of enforcement by seeing the alleged violations to infringe the justiciable right to life. International law, by contrast, has been progressive in acknowledging housing as a

right and imposing a strict prohibition on forced evictions. Current paper argues that the Bangladesh Supreme Court has missed the opportunity to refer to this international development in interpreting the justiciability of the basic necessity of housing. Accordingly, the paper, first, examines the international human rights instruments to establish forced evictions as violations of the right to housing. It then looks into the constitutional and legal frameworks of Bangladesh that still deny housing as a right, therefore, provide inadequate protection even during forced slum evictions. Third, it analyses the relevant judicial decisions to understand the Supreme Court's reluctance to conceive 'right' in housing. It, however, remains doubtful as to whether the international obligations are applicable to the dualist legal system of Bangladesh. This paper shows that even the classic dualist position asserts on the use of international law to define the scope of national obligation and prefers the former if any conflict arises. In fact, the application of international law in litigations on arbitrary slum evictions requires judicial craftsmanship that is sensitive towards realising social justice. Overall, present paper suggests a way through which the Court can develop a concrete jurisprudential standard of justiciability of the basis necessity of housing in Bangladesh.

S M Atia Naznin Doctor of Philosophy in Law Candidate is currently doing PhD in Law at Macquarie University under the Macquarie University Research Excellence Scholarship. Naznin is also a tutor at the Law School. Naznin completed Master of Human Rights and Democratisation from University of Sydney, Australia and Bachelor and Master of Laws from University of Dhaka, Bangladesh. Before coming to Macquarie, Naznin was a lecturer of law at BRAC University, Bangladesh. Naznin also worked as a national consultant and research fellow of the UNDP. Naznin is an enrolled advocate of the Bangladesh Bar Council. Naznin's research interests include comparative constitutional law, theories of judicial review and enforcement of socio-economic rights.

Curbing national anxieties: Vietnamese legislation on LGBT issues

Linh Nguyen

Since the economic reforms known as 'Đổi mới' in 1986, Vietnam has opened its door to the global market. This has allowed the importation of new cultural and social understandings of gender and sexuality. Under the impacts of globalisation, Vietnamese legislation has been changing and adapting in response to these social developments. Like any other members of a society, LGBT people and their related legal and civil rights and responsibilities are governed by legislation. Any conflict, ignorance or intervention in the recognition of homosexuality and transgender will impede the realisation and protection of LGBT people's rights. Understanding the legal and social background of a country allows us to perceive the challenges that LGBT people in that country are dealing with and how these issues are being tackled. In this paper, I will examine the laws revolving around legal and civil aspects of same-

sex relationships, transgender and children of LGBT people. A close look at the laws and regulations will provide insight into national anxiety concerning perceived threats to the family structure, the claims of sexual citizenship and the issue of heteronormativity in Vietnamese legislation. In addition to the legal changes, I also provide context with reference to social changes as a result of advocacy movements by Vietnamese non-governmental organisations situated in the context of globalisation. I will also consider the new provisions regarding sex change and gender identity in the Vietnam Civil Code of 2015, which came into effect in 2017. These provisions have removed certain legal barriers to the recognition of surgically modified bodies.

Thi Huyen Linh Nguyen is a PhD candidate based at the University of Wollongong. Her research focuses on the representation of LGBT characters in contemporary movies and resulting social debates. She is also engaged in LGBT movements in Vietnam. Her most recent article is 'New Zealand same-sex marriage legislation in the Australian media' (*Continuum: Journal of Media & Cultural Studies*).

'What does the Race Power Say About Us?'

Jennifer Nielsen

The concept of 'race' has historical import in Australian legal thinking. It is notorious that the Constitutional Conventions ensured that Federal Parliament gained legal power – s 51(xxvi) – to enact racially discriminatory laws (Expert Panel, 2012). In contemporary terms, though science discounts a human taxonomy according to 'race' (Hollinsworth, 2005), racialised practices remain vivid in the Australian legal and social landscape, through social constructions by which we attribute 'raced' meaning to combinations of human, social and cultural characteristics (Moreton-Robinson, 2000; 2015). So despite 'race' being an empty category of humanity (through lacking any factual basis), people continue to experience ideas about 'race' in ways that are real and lethal (Purdy, 1997).

Recent debate on the constitutional recognition of Aboriginal and Torres Strait Islander Peoples has opened legal questions about 'modern' Australia's continued commitment to ideas of race. Why do we continue delineating parliamentary power through outdated and discounted theories of race? Why do we remain one of the few modern nations that lacks a Bill of Rights, and in particular, the non-derogable ban on racial discrimination that international legal standards regard as fundamental to 'fair minded' nations (JSC, 2015)?

A response proposed by the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution (2012) was the insertion of an equality provision to entrench a constitutional right to racial non-discrimination (s 116A). Despite the international

significance of such a right, this proposal generated controversy. For instance, Professor Greg Craven, a prominent Australian constitutional law commentator, described it as ‘an unsaleable proposal for a sweeping constitutional ban on racial discrimination’ and that ‘Australians will never vote for such a one-line bill of rights, giving the courts a vague and sweeping power to remodel society’ (2014).

Using a critical race and whiteness theory lens, this paper critiques the Australian jurisprudence on the race power to ask what our continued commitment to legal thinking delineated by ideas about race says about our approach to justice and, importantly, what it says about us.

Jennifer Nielsen is an Associate Professor in the School of Law and Justice at Southern Cross University. Her research is in the field of race and the law, applying Critical Race and Whiteness theory to mainstream Australian law in order to expose its normative standards and tendency to privilege ‘white’ interests. She is a co-editor of the 2016 edited collection, *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (with Simon Young and Jeremy Patrick, Federation Press).

Māori Purposes Acts: Towards Justice?

Angela O’Meara

Māori Purposes Bills were commonly described in Parliament’s debating chamber as ‘washing-up’ Bills, which suggested they were usually considered to be of little importance. This paper seeks to challenge this perspective.

This paper sits within a broader research project which explores the Māori Purposes Acts as a body of law, beginning in 1931. The broader project considers the content of the legislation, the legislative process, the role of Māori Purposes Acts within the legislative framework, and in particular it looks at the petitions process and “settlement” provisions contained within these Acts.

In particular, this paper considers whether the Māori Purposes Acts provided a vehicle for Māori to seek justice prior to the modern Treaty of Waitangi settlements process.

The research remains a work in progress, but in the paper I will address the following topics: Petitions to Parliament by Maori, which were marshalled through the process by the Māori Purposes Acts, from Native Affairs Committee favourable recommendation to the Native or Maori Land Court for investigation by the Māori Purposes Acts, sometimes resulting in further legislative provision. Examples may include petitions by Ngai Tahu; the Tarawera and Tataraka Blocks; Wakapuaka; Pukepuke Tangiora estate.

Settlement of claims provisions, for both minor and significant wrongs and historical claims, sometimes arising from petitions. Examples may include adjustments to the 1944 Ngai Tahu settlement; Taupo waters provisions; settlement of the Aorangi and Patutahi claims; surplus lands claims.

A mechanism for Māori to seek relief from and remedies for particular problems, often including rectification or compensation for mistakes (ie land erroneously included in grants or transfers) or the creation of special exceptions to work around restrictive legislative provisions.

Permitting particular governance arrangements to exist outside the principal land legislation and allowing for a degree of autonomy, for example Wi Pere Trust.

Angela O'Meara has been a practicing lawyer for most of her career. Angela began working for Māori entities a number of years ago, focusing on commercial and governance issues. Angela's work included advising Wi Pere Trust on the development of a Bill to reform its governance arrangements, which resulted in the Māori Purposes Act 2017. This experience stimulated her interest in the Māori Purposes Acts, which is the subject of her research. Angela is studying for a Masters degree in law at Victoria University, by thesis, under the supervision of Dr Carwyn Jones.

Are Plaintiffs in Medical Negligence Claims Being Heard in Mediation: A Lack of Procedural Justice?

Tina Popa and Kathy Douglas

In Australian courts mediation is a widely used case management tool. State and Federal civil procedure legislation supports the use of mediation to promote the settlement of disputes prior to hearing. However, many argue that court-connected mediation has been colonised by litigious paradigms and that party voice and self-determination have been sidelined. Some mediators adopt a settlement model of mediation so parties have little opportunity to contribute to the process. In contrast the facilitative model of mediation supports party engagement, voice and self-determination. There is value in parties being able to tell the story of their dispute in mediation as it provides the experience of procedural justice for court users. Procedural justice theory argues that giving parties voice, courtesy and respect in a court process can assist with the acceptance of court outcomes. This may be particularly true in medical negligence disputes as these disputes can be emotional due to claimants often wishing for an explanation of the negligence and potentially an apology. In an attempt to understand what occurs in mediation in medical negligence disputes a qualitative doctoral

research study was undertaken in Melbourne, Australia. Semi-structured interviews were conducted with 24 senior lawyers who were repeat players in mediation in the courts. Although many lawyers in the study saw the benefits of party voice in mediation, they did not allow their clients to speak as they feared clients' statements could harm subsequent litigation. Lawyers' involvement meant that the process was more akin to a settlement conference where lawyers bartered for monetary compensation. The authors argue that courts need to value the party experience of procedural justice in mediation and adopt a facilitative mediation model as part of case management that allows for the party voice to be heard.

Associate Professor Kathy Douglas researches and teaches about conflict and alternative dispute resolution (ADR) in the Juris Doctor at RMIT. She researches about conflict resolution in a variety of areas including mediation practice, dispute resolution and education and conflict and planning.

She has practiced as a mediator for many years and has trained government and community groups in mediation. She has received funding to research mediation from the Legal Services Board, Victoria and the Australasian Institute for Judicial Administration. She originally practiced as a criminal lawyer and consequently researches in restorative justice. She is a founding member of the ADR Research Network and is a member of the Australian Dispute Resolution Advisory Council.

Tina Popa is a law lecturer and PhD candidate at RMIT University, researching in tort law, medical law and alternative dispute resolution. Her PhD thesis explores the challenges in litigation and mediation of medical negligence disputes. Tina coordinates and teaches the *Law of Torts* in the Juris Doctor program at RMIT.

Assessing the Effectiveness of Wellbeing Initiatives in a Legal Workplace

Suzanne Poynton, Janet Chan, Melissa Vogt, Jasmine Bruce and Anne Grunseit

Recent years have seen a growth in the body of research demonstrating high levels of stress, anxiety and depression in the Australian legal profession, and a corresponding increase in initiatives introduced by professional organisations and workplaces intended to improve lawyers' mental health and wellbeing. Despite this, relatively little research has been conducted to evaluate the outcome or effectiveness of these initiatives. This paper responds to this gap in the literature by reporting the results of a mixed methods study on the effectiveness of wellbeing initiatives provided by a large public sector legal organisation in Australia. Quantitative results from follow-up surveys suggest that the mental health and wellbeing of staff did, to some extent, improve following the introduction of a number of

initiatives. Qualitative statements from participant interviews provide further insight into these results. These findings highlight the importance of primary interventions, and providing means for staff to reduce their experience of stress, rather than simply responding to stressors. The study also, however, indicates that, where funding and resourcing considerations restrict the capacity of workplaces to reduce lawyers' workload or facilitate extensive flexible working practices, initiatives which support improved peer and staff/managerial relationships may play a significant role.

Dr Suzanne Poynton is an Adjunct Senior Lecturer at UNSW Law and is the Research Manager at the NSW Bureau of Crime Statistics and Research. She has undergraduate and postgraduate qualifications in Psychology and a PhD in Social Science and Policy. Suzanne has extensive research experience, with particular expertise in the use of quantitative research methodologies to evaluate policy and program delivery. She has more than 40 publications on a wide range of crime and criminal justice topics, including her most recent publication "Lawyering stress and work culture" (*UNSW Law Journal*, 2014, with Janet Chan and Jasmine Bruce).

'Fine words butter no parsnips': Can the principle of open justice survive the introduction of an online court?

Sue Prince

Many jurisdictions are embracing technology as a potential gatekeeper for new court processes. In order to encourage less reliance on legal aid and free up judicial resource in the future, policy makers are keen to embrace 'online court' solutions, especially for low value civil claims. In British Columbia, Canada, for example, the online small claims process has replaced the court building with an end-to-end process which provides legal advice, mediation, and access to an online judge. In the UK, plans are afoot for all civil cases under £25,000 to be referred to an 'Online Solutions Court'. Is the institution of the court a place, or a service which can be replicated online, and if so, how can we measure whether the service provided to litigants is fair?

This paper will consider how the principle of open justice can be upheld in this new technological environment. Open justice exists to protect the right of the public to be informed about what happens in the court; both through their ability to attend individual cases and the right of the media to be in the courtroom and to inform more broadly. Open justice has been upheld by the senior judiciary in significant cases such as *Scott v Scott* (1913) and *R v Sussex Justices, ex p McCarthy* (1924). Open justice is guaranteed as part of a right to fair trial, such as in Article 6, European Convention on Human Rights: '...everyone is entitled to a fair and *public* hearing...'. The question of openness is therefore essential to the design

of the online court. This paper will discuss whether the online court offers different and potentially more effective means to meet the requirements of the original principle.

Sue Prince's research interests focus on access to justice in the civil courts looking particularly at the role of court-based mediation. Sue has also conducted research into court-based mediation in the UK, commissioned by the Ministry of Justice. She has designed and teaches one of the first ADR modules to be taught in a UK university.

Sue is a member of the Civil Justice Council Advisory Group on ODR led by Professor Richard Susskind, which has had huge impact on the development of the online courts in England and Wales.

Animals, Sentience and The Law

M. B. Rodriguez Ferrere

Upon the enactment of the Animal Welfare Amendment Act 2015, New Zealand became the first common law nation to explicitly recognise through legislation that animals are sentient. This development continues New Zealand's tradition of possessing one of the most comprehensive and progressive animal welfare legislative frameworks in the world, and a development that has been cited by some as potentially having significant regulatory impact. It would thus appear, at first glance, that New Zealand has a commitment to ensuring fair and just treatment of non-human animals.

In this paper, I shall explore our contemporary understanding of animal sentience, before critiquing the rationale behind the legislative inclusion of the concept. I shall argue that while this development is symbolically important, functionally, it is a development that will have minimal regulatory impact. In doing so, I shall look to the operation of the Animal Welfare Act 1999 in practice, and consider whether our expectations of this framework – and a commitment to justice – are being fulfilled.

M. B. Rodriguez Ferrere is a senior lecturer in the Faculty of Law in the University of Otago. His research interests include administrative law, constitutional law and regulation of non-human animals in the law. He has taught Animals and the Law at since 2013, and alongside Neil Wells, is the co-author of the forthcoming second edition of *Wells on Animal Law in New Zealand*.

Legal services in the context of inequity: Working inclusively with diversity of sex, gender and/or sexuality.

Olivia Rundle

There is a long history of discrimination in both law and society towards people of diverse sex, gender and/or sexuality. Rapid, transformative legal change has occurred since the 1990s and continues in relation to trans, gender diverse, and intersex individuals, same gender couples, and rainbow families. Some legal changes have been imposed retrospectively upon couples and families who have organised their lives based upon different agreements and/or assumptions. Despite fundamental improvements in law, people of diverse sex, gender and/or sexuality continue to suffer stigma, discrimination and risk in society. Legal service providers should foster and maintain awareness of the historical legal frameworks, current law, persistent societal discrimination, and challenges that are particular to clients of diverse sex, gender and/or sexuality. This presentation will draw from the book Hardy, Rundle and Riggs, *Sex, Gender, Sexuality and the Law: Social and Legal Issues Faced by Individuals, Couples and Families* (Thomson Reuters, 2016). The book draws together social science, psychological and legal literature, Australian legislation and case law. The presentation will also explore the NZ context. Through hypothetical examples, the role that lawyers can play in supporting clients with their legal problems and promoting fairness in the context of inequity will be explored.

Dr Olivia Rundle is a Senior Lecturer in Law at the University of Tasmania. She co-authored Hardy, Rundle and Riggs, *Sex, Gender, Sexuality and the Law: Social and Legal Issues Faced by Individuals, Couples and Families* (Thomson Reuters, 2016). Olivia's work includes research, teaching and community engagement in family law (particularly diverse family relationships), dispute resolution (particularly the role of lawyers) and civil procedure. Dr Rundle practised law until 2000, and has worked as a Family Dispute Resolution Practitioner and a (LEADR) accredited Mediator. She is a member of the Australian Dispute Resolution Research Network and Tweets @OCRundle and @ADRRresearch.

The role of Legal and Spatial in Creating Gender Discrimination: a case study on marginalisation of tribal women in Central India

Saika Sabir

This paper is a work of critical legal geography and its interaction with gender and identity politics. By focusing on the unique location of discrimination against the women from marginalised tribal communities residing in Central India, this paper attempts to develop

upon the argument that legal co-creates the spatial while the social and spatial co-creates the legal. Tribal communities residing in the conflict belt of Chattisgarh district of India are marked by absolute marginalisation and do not even have the strategic advantage of mobilisation through participation in electoral democracy. In words of Partho Chatterjee they represent an 'outside' beyond the boundaries of political society existing with continued feeling of alienation. While the political pressures of present form has brought about passionate discussions over ending the discriminations against ethnicity or asserting the rightful claims of these marginal groups, there is little conscious effort on part of the state to understand the protest led by these ethnic groups as an attempt to bring about a fundamental transformation of the structures of political power. In order to curb these protests the state has through ordinances brought these regions under the regulation of Special Laws such as Armed Forces Special Powers Act. Reportedly, application of these laws has brought about massive human rights violation, in particular sexual abuse and rape of the tribal women residing in these areas. Hence by co-relating the legal with the geographical position this paper will establish how discrimination and violation of certain gender category becomes operative.

Saika Sabir is currently working as Senior Research Associate (Law) in O.P.Jindal Global Law School. Prior to this Saika has worked as Research Associate at the Centre for Comparative Law, National Law University Delhi and as a Research Fellow at the Centre for the Study of Social Exclusion and Inclusive Policy, National Law School of India University, Bangalore (2012-16). She has coordinated several research projects including the most recent one coordinated by the Schulze Felitiz Stiftung, Germany. Saika has obtained her Bachelor of Arts and Bachelors of Law (BA LLB) from the University of Calcutta, and her Master of Law from the West Bengal National University of Juridical Sciences. More recently she has obtained her degree in MRes (Law and Society) from the University of Reading, United Kingdom. For studying an MRes (Law and Society) she was honoured with the very prestigious Felix Scholarship and the British Chevening (FCO) Scholarship award.

Is Dissatisfaction with Police Inevitable? Testing an Integrated Model of Motivational Postures and Procedural Justice in Police-Citizen Contacts.

Elise Sargeant, Natasha Madon, and Kristina Murphy

We examine citizen satisfaction with police-citizen encounters. More specifically, we consider whether or not pre-existing defiant postures shape citizens' perceptions of the procedural justice of the encounter, and their general satisfaction with the encounter. Utilizing longitudinal survey data collected from 1,190 citizens, we examine 440 people who reported having personal contact with police in the 12-month period preceding the second survey. We find defiance at Time 1 results in lower perceptions of procedural justice during the police-citizen encounter at Time 2, which in turn leads to reduced satisfaction with police during the

Time 2 encounter. These findings suggest that how citizens view police coming into a police-citizen encounter can impact their perceptions of procedural justice and, in turn, their satisfaction with the encounter. Testing a model of citizen defiance during police-citizen contacts is important because it helps us to better understand the way in which preconceived understandings of the police contribute to citizen interpretations of police-citizen encounters. The implications of the findings for theory and police practice are discussed.

Elise Sargeant, Natasha Madon, Kristina Murphy are lecturers and researchers at the School of Criminology and Criminal Justice and the Griffith Criminology Institute at Griffith University. Their research variously explores procedural justice, perceptions of police, youth, ethnicity, gender, police-citizen contacts and policing practice.

Sacred Law in Legal Modernity: Buddhist Law in Contemporary Sri Lanka

Benjamin Schonthal

A particular story about religion and law percolates up through many recent studies of religious law. This narrative involves a move from fluidity to closure: as the era of the modern nation-state draws near, religious law takes on the rational formalistic qualities that many scholars associate with modern legal culture. Relying on this narrative, one might expect that in the contemporary era of nation-states, fixed borders and centralized, constitution-based legal regimes, Buddhist monastic law in countries like Sri Lanka would follow this trend in becoming more homogenized. These expectations are, however, misguided. While certain state-legal structures do push monastic law in the direction of greater codification and routinization, others push monastic law in the other direction, towards greater fluidity, irresolution and multiplicity. In this paper, I draw upon a number of recent Supreme Court cases to analyse the ways in which Sri Lankan constitutional practice has destabilized conceptions of Buddhist monastic law and, in fact, opened up new opportunities, spaces and incentives for contesting visions about its nature and function.

Benjamin Schonthal is Senior Lecturer in Buddhism and Asian Religions at the University of Otago. He received his Ph.D. in the field of History of Religions at the University of Chicago. His dissertation received the 2013 Law & Society Association Dissertation Award. Ben's research focusses on law and religion in South and Southeast Asia, with a particular focus on Buddhism and law in Sri Lanka. His work appears in the *Journal of Asian Studies*, *Modern Asian Studies*, the *International Journal of Constitutional Law* and elsewhere. Ben's first book, *Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka* came out with Cambridge University Press in Nov, 2016. His current project examines the interplay of Buddhist monastic law and civil law in contemporary Sri Lanka.

Trends in Legal Service Use Following Road Traffic Injury in Victoria, Australia

Clare Scollay, Janneke Berecki-Gisolf & Genevieve Grant

Personal injury is one of the most common types of legal problems experienced by community members. Prior research has established that individuals with this type of legal problem often engage lawyers for help navigating complex and unfamiliar compensation processes, gaining access to benefits, and resolving disputes. Surprisingly, however, little is empirically known about the profile of legal service use amongst compensation claimants, including whether it has changed over time.

The aims of this study were to determine (a) the proportion of claims involving legal service use in the Victorian road crash compensation scheme, (b) whether this proportion changed between 2000 and 2015 and (c) whether changes were due to contextual factors (such as variations in the numbers of road traffic crashes and serious injuries arising from these crashes).

The study involved retrospective analysis of Transport Accident Commission compensation claims and payments data relating to crashes that occurred between January 2000 and December 2015. Crash data from VicRoads and hospitalisation data from the Victorian Injury Surveillance Unit were also analysed. Analyses examined the proportion of claims involving legal services, changes in this proportion over time, and potential reasons for these changes.

Analyses indicated that approximately one fifth of claimants used legal services. In addition, the number and proportion of claims involving legal services increased significantly between 2000 and 2015. This increase remained significant after adjusting for crash type, injury severity, gender, age, socio-economic status and remoteness. This presentation will explore the reasons for the changing profile of legal service use in the Victorian road crash compensation scheme.

Clare Scollay is a PhD Candidate in the Faculty of Law at Monash University. Her research is an empirical study of lawyer use in injury compensation claims.

Dr. Janneke Berecki-Gisolf is a Senior Research Fellow at the Monash University Accident Research Centre, and Director of the Victorian Injury Surveillance Unit.

Dr. Genevieve Grant is a Senior Lecturer in the Faculty of Law at Monash University and Co-Director of the Australian Centre for Justice Innovation.

Proposing a mapping system to aid conceptualization of macro-frameworks in Interdisciplinary Collaborative Practice.

Marilyn Scott

As for all processes available to the legal profession for the carriage of each matter, an appropriate selection of process must be made based on careful assessment of the suitability of both the case and the client. This cluster assessment of case, client and process acquires additional layers of complexity as the process options vary from the standard trial-centric approach, suited to a narrow legal framing of the dispute, to a tailored settlement-centric approach, suited to a wider extra-legal framing of the dispute.

Over time the legal profession has become accustomed to interest-based negotiation, a range of mediation and other dispute resolution process models, in addition to traditional lawyer to lawyer adversarial negotiations. However, it is the emergence of Collaborative Law, and in particular Interdisciplinary Collaborative Practice, which has added further sophistication and complexity to the assessment protocols.

This paper will explore the 'duty to screen' and examine what is being screened for and by whom, and how this may impact process selection. As Interdisciplinary Collaborative Practice has been adapted to the Australian Family Law context practice variations have developed which have identifiably different macro-frameworks. To assist in the initial conceptualization of the macro-framework for how the process and professional inputs will be sequenced in any particular matter a mapping system is proposed to undertake this task.

Marilyn Scott has a close association with the introduction and development of Collaborative Practice in both Australia and New Zealand, having facilitated the first professional training for Collaborative practitioners in both countries. Since 2003 the focus of her research and publications has centred on this emerging practice with particular emphasis on the adaptation of Interdisciplinary Collaborative Practice into the Australian Family Law system.

Youth Offenders with Fetal Alcohol Spectrum Disorder in New Zealand: Addressing Gaps in Support *including* A Local Family's Commitment to Avoiding Justice involvement

Kesia Sherwood

Children and young people with Fetal Alcohol Spectrum Disorder (FASD) have a unique set of social and behavioural traits which predisposes them to offending and recidivism. International research has cited that 60% of individuals with FASD will come into contact with the law at some stage. For many of these individuals, that first contact with the system will begin a cycle of offending and recidivism that is almost impossible to break. This is due to

their inability to engage with regular constructs of the justice system such as rehabilitation, restorative justice and connecting behaviour with consequence.

New Zealand does not currently have adequate policy or legislative tools to deal with this cohort of young offenders. Additionally, no streamlined diagnostic process exists for children with FASD, providing a further impediment to accessing appropriate services and support. My presentation will consider how New Zealand's youth justice system can be more effective in addressing the rehabilitative needs of young offenders with FASD through i) the development of a streamlined diagnostic system, and ii) enactment of appropriate policy and legislation offering an alternate pathway through the justice system.

A local Dunedin family are all too aware of the reality of the connection between FASD and offending. Anita Gibbs and her family have spent a significant amount of time working on strategies within the local community to keep her boys out of the justice system. My presentation will include a semi-structured interview with Anita and her boys, providing the voice and perspectives of young people, and focusing on what they have found helpful and effective in the community. The interview will also provide an opportunity for the family to share some insights about the challenges and exacerbating factors of living with FASD.

Kesia Sherwood is a PhD candidate with the Faculty of Law at the University of Otago. She is supervised by Nicola Taylor and Mark Henaghan and is researching the connection between FASD and youth offending in New Zealand. She commenced her enrolment by analysing the current diagnostic schemes for FASD in both Canada and New Zealand, and has since researched the connection between the physiological effects of prenatal alcohol exposure and the resulting patterns of behaviour in affected individuals, and New Zealand's current legislative framework in this field. She is currently interviewing young people, parents, professionals and key stakeholders for the empirical component of her doctoral research.

Lawyers and Digital Communication

Annie Shum and Kieran Tranter

There has been significant recent concern about digital disruption of the legal profession. At its extreme there is the claim that legal AI and blockchain will render lawyers obsolete. Less extreme it is claimed that digital technology is reducing the quality of legal work and diminishing the prestige and job satisfaction of lawyers. It seems as if digital technology is considered a negative for law and lawyers.

This paper challenges this perception. It is based on the findings from a survey of Queensland lawyers conducted in 2016. There were three major findings. First, that the respondents

considered communicating through digital mediums such as e-mail, computer instant messaging (IMs), Short Message Service (SMS), video conferencing or mobile devices, as a positive factor in their productivity and professional practice. This is in contrast to earlier research that suggested that the speed and connectedness of digital technologies contributes to stress and workplace dissatisfaction in lawyers. Second, it was found that this overall positive assessment of digital communication technologies was across gender, age, years in practice and type of practice. This was also in contrast to earlier studies which showed gender and age difference in assessment by lawyers of the utility and impact of digital communication technologies. Third it was found that lawyers have not wholly migrated to the digital. Our respondents regarded in-person communication to positively affect productivity and satisfaction to a greater extent than digital mediums. While digital communication technologies have become integral to the everyday work of lawyers, there remains a premium placed on the immediacy and intimacy of in-person communication.

Annie Shum graduated with first class honours in law from Griffith University in 2016. She works as law graduate at Mills Oakley Brisbane.

Dr Kieran Tranter is an Associate Professor at Griffith Law School and the Law Futures Centre at Griffith University, Gold Coast Australia. He researches law and technology.

The “Empirical Turn” in Rights Adjudication

Leonid Sirota

Scientific findings are coming to play an increasingly important role in judicial decisions about rights. What has been described in Canada as an “empirical turn” in constitutional jurisprudence has influenced significant, and often controversial, decisions on issues ranging from assisted suicide, to voting rights, to prostitution, in New Zealand, Canada, the United States, and elsewhere. The “empirical turn” is in many ways a welcome one. Adjudication heedless of relevant scientific information can result in a jurisprudence of assumption or even fiction which either under- or overprotects constitutional rights. At the same time, however, the “empirical turn” will bring its lot of difficulties, which may not be insuperable, but of which we must be aware to negotiate the turn successfully.

This paper seeks to outline a number of these difficulties. First, reliance on empirical and social science evidence in constitutional adjudication risks undercutting the stability of legal doctrine. Second, it makes it necessary to ask difficult questions about the quality of the evidence in question, its amenability to meaningful adversarial debate, and the judges’ ability to assess it. Third, it gives rise to questions about legal procedure, including about the degree of deference that is due to trial judges’ findings of fact. Fourth, it risks undermining access to

justice. And fifth, it makes more pressing the perennial apprehensions about the legitimacy of judicial review itself. The courts that have embraced the “empirical turn” have barely addressed some of these issues, and simply ignored others. Yet a more thorough examination of what are likely to be some of the most significant issues for rights litigation in the foreseeable future is required.

Leonid Sirota is a lecturer at the AUT Law School, specializing in constitutional law. He holds a JSD and an LL.M (Legal Theory) from the NYU School of Law, and a BCL/LLB (Hons) from McGill. He is also the creator of the award-winning constitutional law blog Double Aspect.

The use of Domestic Violence Police Reports in Applying the ‘Couple’ or ‘De Facto’ Rule in Australia and New Zealand for the Purposes of Social Security Payment.

Lyndal Sleep

In Australia’s heavily targeted social welfare apparatus, couples are assessed jointly for their eligibility for social security payment. Specific guidelines for deciding if a social security recipient’s relationship is a couple is provided by the ‘couple rule’ in section 4(3) of the *Social Security Act 1991* (Cth). If a social security recipient is found to be part of an undeclared couple they can be denied payment, have their payment reduced or changed, be asked to repay any overpayment and also be criminally prosecuted for fraud. A plethora of information can be used to decide if a social security recipient is indeed a member of a couple for social security purposes. Of particular concern is the use of domestic violence police reports as evidence of a relationship. This is in contrast to the approach in New Zealand, where a similar ‘de facto rule’ can consider situations that involve domestic violence as NOT a de facto relationship for social security payment purposes. This article compares Australia’s and New Zealand’s use of domestic violence police reports in applying the ‘couple’ or ‘de facto’ rule for the purposes of social security payment. It reports on a small research project which aimed to determine how New Zealand decision makers use domestic violence police reports as evidence when applying the ‘de facto rule’ by analysing Social Security Authority (NZ) decisions. It compares and contrasts this project’s findings to a previous similar project which analysed Australian Administrative Appeals Tribunal (AAT) ‘couple rule’ decisions (Sleep, 2016).

Lyndal Sleep is a member of the Law Futures Centre and Lecturer in the School of Human Services and social Work at Griffith University. Lyndal’s research covers sociological approaches to social policy and social security law – with a particular focus on justice, electronic decision making and gender. Lyndal was awarded her PhD on the cohabitation rule in Australian social policy from Griffith Law School in 2016. Her current research compares how domestic violence police reports are used as evidence for an undisclosed relationship for social security purposes in Australia and New Zealand. Lyndal has published in a range of

social policy and socio-legal journals including *Journal of Economic and Social Policy*, *The Alternative Law Journal*, *Australian Journal of Administrative Law*, *The Melbourne Law Review* and *The International Journal for the Semiotics of Law*.

Can thinking about culture ameliorate poor justice outcomes in sentencing?

Mary Spiers Williams

About twenty years ago, some scholars reflected upon the utility of ‘culture’ in making sense of crime and criminal law (for example, Sarat and Simon, 2003). This paper revisits some of those ideas and applies them in the context of case studies from Central Australian summary court hearings.

In places remote and regional from the coloniser-settler dominated large population centres on the fringes of the Australian continent, the culture of these transplanted courts (and the legal actors who animate them) is radically different from the local cultures of those who are subjected to the criminal justice system. In the court spaces of bush courts, the radical differences of the cultures from which the legal actors and defendants are drawn are starkly juxtaposed.

In this paper, I offer case studies that demonstrate that the refusal of legal actors in the criminal justice system to recognize their own cultural specificity has implications for sentencing principle, methodology, and outcomes. A failure to have a proper account of culture in sentencing law, results in confused or inconsistent inferences from evidence of every day practices and Aboriginal law. In some cases, the miscognition of culture can lead to improperly inferred findings that conflate difference with deviance, and manifestly excessive sentencing of Aboriginal defendants.

Mary Spiers Williams’ research is concerned with Indigenous perspectives on state law, legal systems, legal actors and legal education; legal pluralism; criminal justice; and sociolegal methodology. Mary has practiced criminal law in New South Wales and the Northern Territory of Australia, acted as an advocate for Warlpiri people and other desert peoples in central Australia, and lectures in criminal law, evidence, Indigenous peoples and laws, law reform and legal ethics.

Enduring injustice: reactionary discourses in the aftermath of the New Zealand “Unfortunate Experiment” and their effects in the 21st century

Joanne Stagg-Taylor

From the 1960's to the 1980's in the National Women's Hospital in Auckland, New Zealand, Dr Herbert Green carried out what become known as the "Unfortunate Experiment." He deliberately undertreated cervical abnormalities to prove his theories about cervical cancer, his ideas that cervical abnormalities would not progress to cervical cancer and that Pap smears did not detect pre-cancerous lesions. The actions of Dr Green and his colleagues became a national scandal, which led to the groundbreaking Cartwright Inquiry.

The Cartwright Inquiry resulted in a fundamental shift in patient rights in New Zealand, which subsequently led the world in ensuring patient rights, requiring informed consent and implementing human experiment safeguards. However, there was substantial pushback against Cartwright Inquiry recommendations for patient rights, most recently focused around the 25th anniversary of the Cartwright Inquiry in 2008.

The paper will look at how doctor-centric discourses operated as in-group restoration of medical moral identity and to reduce any sense of collect moral debt to patients harmed by inadequate medical care and oversight. Language reflected the aggrieved victimization of today's alt-right; talk of feminist cabals, witch-hunts, persecution, illegitimate power-seeking by "lesser" professions, emotional attacks on logical doctors, restrictions on medical freedom, claims of anti-scientific opposition to research and alleged patient "victimology" were argued to justify the dismantling or reading down of patient's rights post-Cartwright. This paper tracks the rise and influence of those discourses and their effect on modern NZ patient's rights law, including recent gendered approaches to consent to HPV vaccinations, dilution of patient consent requirements and the undermining of ethical oversight standards for experimentation. It will show how gendered backlash discourses re-institute injustice for NZ women and medical patients.

Joanne Stagg-Taylor is a Lecturer at the Griffith Law School at Griffith University, in Queensland. Her current research interests include issues around law, gender and medicine. She is a member of the editorial board of the Australian Feminist Law Journal.

The Prevalence and Context of Sexual Violence at a New Zealand University

Kayla Stewart

International research suggests that university students are an at-risk group for sexual victimisation. While there has been much research internationally measuring the prevalence of campus sexual violence, little attention has been given to the issue in the New Zealand Aotearoa context. Much of the existing research has been conducted from a premise of male perpetration and female victimisation. This gendered victimisation and perpetration paradigm has been the subject of critique, specifically how it leaves little room for experiences of male victimisation or more colloquially, it is met with a response of – “it happens to men to”. However, while limited, research that has considered both female and male victimisation has consistently showed the prevalence of sexual victimisation to be higher for women. Additionally, some research has suggested that sexual victimisation is a gendered experience; that is the contexts and effects differ for males and females. To borrow the idiom ‘comparing apples with oranges’ then, it may be that comparing male and female experiences of sexual victimisation is inappropriate. This project will employ a feminist lens to examine survey data and interviews to determine the prevalence, context and effects of sexual victimisation and perpetration amongst students from the University of Otago and how experiences of victimisation may be gendered in a New Zealand Aotearoa university population. Interviewing survey participants will allow the answers provided in the survey to be contextualised and furthermore allow for a better understanding of what university women and men mean when they report sexual violence in surveys. I evaluate the success and limitations of the research design in achieving these goals.

Kayla Stewart is a PhD candidate in the Department of Sociology, Gender and Social Work at the University of Otago where she previously completed her LLB (Hons) and BA (Sociology). Her PhD topic examines sexual violence at the University of Otago. She is employed as an Assistant Research Fellow in the Otago Legal Issues Centre and has been working on the Centre’s project titled: “Undue Delays in Civil Case Progression in the NZ High Court: Fact or Anecdote?” Kayla enjoys undertaking research where the fields of law and sociology intersect. She is passionate about social justice and social responsibility.

Theorising Indigenous jurisprudence: a Pacific-oriented reading of indigeneity and the law

Tamasailau Suaalii-Sauni

Conversations about an ‘Indigenous jurisprudence’ are new and emerging. They draw on a range of academic, professional and community-based disciplinary/governing practices and philosophies that finds them coming together in fresh and interesting ways. This paper argues that the timing is right to engage in more nuanced theoretical scholarship on what might constitute an Indigenous jurisprudence, where learnings from fields such as legal pluralism, human rights, environmental justice, green criminology, and Indigenous studies might combine to form rich and textured analyses of contemporary law and society. The paper

begins by unpacking key concepts such as indigeneity, law, culture, custom and society, and ends by addressing what an Indigenous jurisprudence might look like for the Pacific region and why it is essential to have one.

Tamasailau Suaalii-Sauni is Associate Professor in Sociology with the Criminology Programme, University of Auckland. Her current research interests focus on Indigenous jurisprudence in the Pacific, Indigenous criminology, and Pasifika indigenous research and evaluation methodologies. She has published numerous articles and book chapters, and has co-edited a number of books relating to Pacific indigeneity. Her most recent work in the field of law and society focuses on legal pluralism in the small Pacific Island state of Samoa (in *Small States in a Legal World*, 2017, Springer Publishing). She is currently co-principal investigator on a Marsden grant awarded in 2016 for a project looking at drawing international comparisons (NZ, Australia and USA) between Maori and Samoan experiences of Youth Justice.

Justice: you can call it what you want, but it just don't mean a thing

Eddie Synot

You can call it what you want
But it just don't mean a thing
No, it just don't mean a thing

A.B. Original, *Reclaim Australia*, 'January 26'

January 26 is officially celebrated as Australia Day, the commemoration of the 1788 landing of the First Fleet and the settlement of New South Wales by the British. The date, its celebration and all that it has come to symbolise have however always been about much more than just the arrival of eleven ships. The day is refined through its repetition as another ritual re-inscription and production of settler colonial sovereignty. That claim to sovereign authority; that same legitimating force of the cry of *terra nullius*. The repetitive celebration, once historically commemorated through the murderous bravado of the bushwhack, then later through such staged spectacles as subdued Aboriginals welcoming the British, is now subconsciously woven into the fabric of the national psyche through a carefully reproduced enjoyment of inclusive multiculturalism where the ecstatic intoxication of the forgotten frontier is now transformed into the rivers of grog that flow on a public holiday. Freedom, one of those apparent Australian values, means that *all* can now celebrate a coming together of the *reconciled* Australian community – one that has forgone its exclusive and violent past, washing itself clean in the tides of history, embracing its welcoming and inclusive present. Yet question that freedom and inclusion, exist as other to that carefully policed inclusion, and the

productive and protective force of such ritualised being, necessitated always by settler colonialism itself, lurch forward from the chasms of yesteryear, throwing off their cleansed veils of the tidal swells of progressive liberalism by marking anew those that would question or claim otherwise.

Commonly now referred to as Invasion Day, January 26 has become a symbol around which a contested and anxious national narrative grapples with a continued Indigenous presence that refuses to be confined and held captive to invasion, not just as a counter-narrative, but as affirmation of self. Yet I argue this has always been the case. An anxious existence, predicated on that which it excluded, has always betrayed itself by its violent outbursts toward an Indigenous being that existed both for itself and as a perineal threat to the presumed totality of settler colonial claims. It is here that I argue that the promise of justice in a reconciled Australia, heightened again due to the more recent questions of constitutional recognition, continues to betray itself through a repetition of these same practices. Rather than delivering on the promise of reconciliation, the justice offered is that of limited inclusion repeated again in settler colonialisms ritual reproduction of legitimated authority through the naming and demarcation of acceptability. I approach this reading of justice and law through the lens of Indigenous hip hop and rap. These lyrical devices, illustrated by examples such as A.B Original's '26 January', highlight the often unseen or ignored fissures in both the promise of justice and the operation of sovereignty and law in settler colonialism. Through these affirmations of not just counter-narrative but Indigenous being, a sense and understanding of the experienced but often ineffable existence of Indigeneity can be heard and understood. Rather than limiting ourselves to what the law or the promise of justice permits, A.B. Original reminds us that 'you can call it what you want, but it just don't mean a thing'.

Eddie Synot is a Wamba Wamba First Nations Person based in Brisbane, Australia. Eddie holds a BA and LLB (Hons) and currently lectures in Indigenous Studies at Griffith University. Eddie is also a PhD Candidate with the Griffith Law School focusing on an interdisciplinary engagement with the intersections of law and humanities. Eddie's research aims to provide a critical engagement with the proposed recognition of Aboriginal and Torres Strait Islander people in the Australian Constitution.

Delineating (Anti-)Discrimination Dialogue: Different judicial approaches to discrimination

Alice Taylor

Legislation prohibiting discrimination based on specific characteristics including race, disability, age, gender, sexuality and gender identity have been in place in Australia for many decades. Despite an acknowledgment from the legislature, the academy and the judiciary that such legislation should be interpreted beneficially and with consideration of the legislation's overarching purpose, courts have struggled to implement a purposive approach. This could be because a purposive approach requires an understanding and appreciation of the structural imbalances that the legislation is designed to limit and overcome. Such an appreciation necessarily requires judges to engage an underpinning legal frame of reference as well as standard legal reasoning. The Australian judiciary has adopted a narrow and formalistic approach to anti-discrimination legislation. This narrow and formalistic approach is not necessarily seen in other Commonwealth common-law jurisdictions which have similar discrimination legislation in place. Using an historical institutionalist approach, the paper will consider factors specific to the judiciary to explain the divergence in approach to this area of law in Australia, Canada and the United Kingdom. This paper will argue that each jurisdiction adopts a different understanding of discrimination law and the extent to which judges apply a purposive approach to such legislation is dependent on whether discrimination law is framed as human rights law, constitutional or quasi-constitutional law, a tort, or as a mere statute, interpreted only by reference to rules of statutory interpretation and without reference to any other type of law.

Alice Taylor is a PhD candidate at the Australian National University College of Law. Her research is focused on discrimination law and, in particular, the way in which the judicial role influences the legal understanding of discrimination law. She obtained a Bachelor of Laws (Hons)/ Bachelor of Politics and Government from Griffith University. Prior to undertaking her current research, she was a lawyer in a large commercial firm, an Associate at a state Supreme Court and the Legal Research Officer at the High Court of Australia.

New Zealand's 2014 Family Justice Reforms: Parents' and Professionals' Perspectives

Nicola Taylor

Like other jurisdictions grappling with the complexities involved in assisting separated parents to resolve parenting disputes, the family justice system in New Zealand was significantly reformed in 2014 to shift the focus away from the Family Court and onto new out-of-court family dispute resolution services. These include a Parenting Through Separation course, family mediation, and limited state-funded legal advice and preparation for mediation to assist parents to resolve their children's post-separation care arrangements. This presentation firstly considers the key features of the 2014 reforms and then provides an overview of the large-scale mixed-methods research project currently being undertaken by a

University of Otago research team (Associate Professor Nicola Taylor, Dr Megan Gollop and Professor Mark Henaghan) to evaluate the reforms. Nationwide online surveys and in-depth interviews are being used to explore separated parents' and family justice professionals' perceptions and experiences of the new dispute resolution pathways now in place. Parents can also opt into two further online surveys and interviews six and twelve months later to provide retrospective and prospective data over several time-points. These follow-ups will primarily focus on the stability and durability of their children's arrangements, any changes in their family situation over time, and any (further) engagement with the family justice system. Preliminary findings from the parents' and professionals' responses to their initial online surveys will be reported in this presentation. The project is the most significant study ever undertaken on New Zealand's family justice system and will provide information about issues, problems and challenges with the reforms, as well as what is working well, from the perspectives of both the professionals who work within it and the separated parents seeking to resolve their children's care arrangements via self-resolution, private agreement, out-of-court or in-court dispute resolution pathways.

Associate Professor Nicola Taylor is Director of the Children's Issues Centre at the University of Otago. She also holds a Leading Thinker Chair in Childhood Studies and works closely with the Law Faculty. Nicola has BSW (Hons) and LLB (Hons) degrees, a PhD, and has been admitted as a Barrister and Solicitor of the High Court of NZ. She has a particular interest in socio-legal research with children, parents and professionals on private law issues concerning children's post-separation care arrangements, relocation, abduction and child-inclusive practice. She is currently co-leading a major project evaluating the 2014 NZ family law reforms.

"I'm going to own this street": *PARK(ing)* and the Practice of Property

Amelia Thorpe

Through a detailed examination of *PARK(ing) Day*, a loosely-organised international event to reclaim street space from cars, this article reveals the intimate connection between property and its social and material context.

Private claims to public streets are not uncommon. In some cases, such claims are swiftly rejected. In others, they receive recognition and respect. Focusing on the particular set of proprietary claims within *PARK(ing) Day*, this article examines the ways in which property on city streets is claimed and contested.

Drawing primarily on fieldwork in Sydney, Australia, the analysis emphasises the degree to which property depends on the networks in which it is situated. *PARK(ing) Day* was based on

a creative rereading of the property producible by paying a parking meter, and this link with legality plays a key role in the event. Yet the property at issue is based on much more than that simple transaction. A more emergent and socially constructed conception of ownership is central in understanding both the making of claims to city streets on *PARK(ing) Day* and the range of responses they generate.

Amelia Thorpe Amelia Thorpe is Research Director (Impact and Engagement), Director of Environmental Law Programs and a Senior Lecturer in Law. She is also a member of the UNSW Women in Research Network (WiRN) Committee.

Amelia's research is at the intersection of law, urban planning and geography, drawing on degrees in Architecture and City Policy as well as professional experience in the planning, transport and housing departments in Western Australia. Her current project examines the ways in which understandings of law, ownership and belonging shape – and are in turn shaped by – practices of participation in urban planning.

The Offence of Terrorist Financing: Criminalization of Financing Conduct or Perversion of Criminal Law?

Hamed Tofangfaz

The international convention on terrorist financing and the western-backed international organizations has found financing of terrorism serious enough to criminalize as an independent offence. While the offence has a preparatory nature, which should be conceptualize as an inchoate offence or complicity, its criminalization as an independent offence expands the boundary of criminal law beyond its principles. This paper aims at examining the justifiability of the terrorist financing offence with regard to the principles and values that liberal criminal law is based on. I have chosen liberal criminal law because, as explained, the idea of criminalization of terrorist financing was issued and developed mainly by Western liberal states. I will narrowly discuss the issue in the context of Anglo-American criminal law.

To do so, I will discover the spectrum of terrorist financing offences, their scope and their elements. Then, I will discuss the role of liberal criminal, and name the values, principles, policies that should have influence on shaping substantive criminal law. Finally, I will identify four main principles that should be deployed in evaluating the justifiability of creating of candidate offence. These principles are the principle of harm, the wrongful requirement, the remoteness requirement, and rule of law standards. I will examine whether the terrorist

financing offence satisfies the standard criteria of criminalization provided by these principles, and so whether it is justified.

Hamed Tofangsaz is a PhD candidate at the Faculty of Law, University of Waikato, New Zealand. He holds master's degrees in international relations (Azad University) and international commerce law (Macquarie University). His main research interests are in transnational criminal law and the comparative study of legal tools taken to suppress transnational crimes. His PhD research focuses on the examination of counter-terrorist financing measures.

The section 18A amendment to the Children Young Persons and Their Families Act 1989 at its potential human rights implications

Gina Tompkins

Section 18A took force on 1 July 2016. Its purpose is to prevent the potential risk of serious child maltreatment to a new class of statutory client called a 'subsequent child' by their parents who have either had a previous permanent removal of a child in their care or been convicted of the death of a child in their care. This approach is unprecedented in contemporary child protection law in New Zealand. Given its innovative approach, a research gap addressing the outcomes for vulnerable families who are targeted by such mechanisms such as section 18A exists.

This research develops a conceptual framework within which legal mechanism such as section 18A can be situated. This conceptual framework compares the neglect and protection statutes that were enacted during the colonisation of Australia and New Zealand to draw parallels between Australian Aboriginal parents, illegitimate mothers in New Zealand, and the two populations of parents identified under 18B(1)(a) and section 18B(1)(b). Through the application of the framework, immediate challenges are identified relating to the drafting of the mechanism, its interpretation and the potential constitutional and human rights issues associated with section 18A's enactment.

Gina Tompkins and I have just submitted my Masters Thesis in Social Work, University of Otago. My Masters thesis examined the legal and social work practice and knowledge base implications for the recent section 18A amendment to the Children Young Persons and their Families Act 1989.

I am currently in the process of enrolling in a full time PHD program at the University of Otago to address some of the research implications that I identified during my Masters Thesis.

Accurate Explanation of a Dispute in an Online Court: A Study Design

Bridgette Toy-Cronin and Bridget Irvine

New Zealand currently has an online portal for litigants in person to make a claim in its small claims tribunal, and previously experimented with litigant completed paper forms in the District Court. The latter initiative was revoked, and pleadings re-introduced, after the judiciary and profession concluded that the information litigants provided was too unstructured.

There is now rapid movement internationally towards online courts for low value civil disputes. These state-led initiatives, like the small claims tribunal and District Court initiatives in New Zealand, require litigants to explain their disputes. Online Courts are held out as promising greater access to justice for people involved in low-value disputes, by providing an easy, lawyerless means to file a dispute in court.

The assumption underpinning all these initiatives is that people are able to accurately and effectively explain their disputes to a court without the assistance of a lawyer. In this session, we present the design of a study that aims to test that assumption by comparing lay people's recounting of a dispute to that of lawyers'. It is a mixed methods study (employing document review, laboratory testing of scenario responses) and will be carried out by a multidisciplinary team drawn from law, psychology, computer science, and linguistics. We discuss the literature and aims of the study, including insights from our previous research on litigants in person and dispute preparation in the New Zealand civil courts.

Bridgette Toy-Cronin is a Senior Lecturer and the Director of the Legal Issues Centre. Bridgette studied law and political studies at the University of Auckland and has an LLM from Harvard Law School, where she studied as a Frank Knox Fellow. She has worked as an intern at the International Criminal Tribunal for Rwanda, a High Court Judges' Clerk, as a human rights lawyer at Cambodian Defenders Project in Phnom Penh and as a civil litigator in New Zealand and Australia. In 2015 she completed her PhD examining litigation in person in the New Zealand Civil Courts. Bridgette's research has an empirical focus, investigating access to justice, the legal profession, judging, dispute resolution and civil procedure.

Bridget Irvine is a Postdoctoral Fellow at the Legal Issues Centre. Bridget studied law and psychology at the University of Otago, and completed her PhD in forensic psychology in 2016. Bridget has a strong interest in applied research—she is interested in investigating ways the lessons from the social sciences can be harnessed to benefit the legal profession. Her PhD research focused on the accuracy of children's testimony in the New Zealand Criminal Courts. She now investigates the accuracy of litigant's evidence in the New Zealand Civil Courts.

The new doctrine of trial-centeredness in China and its political uses

Susan Trevaskes

This paper looks at the political underlay of a recent Chinese justice system reform imperative to ‘make the trial central to the criminal process’, otherwise known as ‘trial centeredness’ (yi shenpan wei zhongxin). This is essentially an effort on behalf of the Chinese Communist Party to embed a greater appreciation for procedural justice into criminal justice decision-making that has for decades overwhelmingly focused on substantive justice.

I argue that it has a rhetorical function in the context of Xi Jinping’s signature governance platform of ‘Governing the Nation in Accordance with the Law’; its political purpose is to bolster the status of procedural justice not just to improve opportunities for judicial fairness but also to exemplify the importance of Xi Jinping’s current ‘rule by moral virtue’ credo.

Susan Trevaskes is a professor of China Studies in the School of Humanities, Languages and Social Sciences and the Griffith Criminology Institute at Griffith University. She is also an Adjunct Director of the Australian Centre on China in the World (CIW) at the Australian National University. She has made contributions to the field of contemporary Chinese criminal justice studies through her work on criminal law, punishment and policing issues in China. Her research contributions have been recognised by a number of ARC grants which have resulted in papers and books on criminal courts, policing serious crime, the death penalty and the political nature of criminal justice in China.

Exploring the Journeys to Thai Prison for Female Prisoners Incarcerated for Sex Trafficking

Dannielle Wade

Human trafficking narratives influence both national and international responses to trafficking including social policy and legislation. These narratives, in combination with international and national institutions (e.g., the United Nations and the United States’ Department of State’s Trafficking in Persons Report), have contributed to the prioritisation of punitive prosecution policies. This punitive focus is particularly concerning for Thailand as it is often portrayed as the “sex capital of the world”. The war on human trafficking in Thailand, as declared by the then Prime Minister in 2004, has morphed into a war on sex trafficking. The visibility of commercial sex establishments in Thailand (e.g., bars that provide sexual services) means that sex workers become an easy target for law enforcement combatting the sex trafficking industry. The combination of political pressure to “do something” about human trafficking and the visibility of sex work in Thailand may contribute to the Thai government

focusing on prosecuting a high number of cases with less attention on a smaller number of key players within trafficking organisations. In doing so, women may be unfairly targeted as offenders of sex trafficking because literature suggests their role in trafficking operations is often in the lower ranks of the hierarchy. There is, however, a limited understanding not only on the role of the female trafficker, but also their pathways to prison. This paper aims to shed light on the life experiences and pathways to prison for women imprisoned in Thailand for sex trafficking offences. I conducted a narrative analysis of life history interviews that draws on the feminist pathways framework to help fill this important gap — the criminalised Thai female sex trafficker — and to add to the limited literature on women's pathways to prison in non-Western contexts.

Dannielle Wade is a Sessional Tutor for the School of Criminology, Griffith University. I worked as a Research Assistant in the Griffith Criminology Institute, Griffith University, for 6 years with Professor Kathleen Daly on her Innovative Justice research projects. I have a BA joint degree in Laws (hons) and Criminology and Criminal Justice from Griffith University and a Graduate Certificate in Gender Studies from Macquarie University. I am currently completing my honours in Criminology (supervised by Dr Sam Jeffries).

Breaches of civil protection orders in intimate partner homicide cases: Looking at the past experience of violence as a key risk factor

Dr Jane Wangmann

This paper will present preliminary findings from a project currently being undertaken in NSW that explores intimate partner homicides that were preceded by a history of violence that included breaches of a civil protection order (reported or unreported). Breaches of civil protection orders have long been identified as an area that requires attention. Successive inquiries have reported continuing complaints about lack of enforcement; inconsistent police response to breaches (particularly where the breach does not involve physical violence); and the failure of some courts to treat such breaches seriously if they do proceed to court. Breaches have also been identified as a lethality risk factor. This reflects the fact that the 'major risk factor for intimate partner homicide...is prior domestic violence' – where breaches of orders provide a concrete manifestation of that history. Every report of the NSW Domestic Violence Death Review team since its inception in have either made recommendations about breaches, or have profiled cases in which the homicide was preceded by breaches. The research aims to inform the development of better policy responses in the context of reported breaches of civil protection orders. It aims to provide additional detailed knowledge about one of the key risk factors in domestic violence homicide cases (that is a history of domestic violence in the relationship).

Dr Jane Wangmann is a senior lecturer in the Faculty of Law, UTS. Her research is concerned with legal responses to intimate partner violence (IPV). In particular she is concerned with how the law defines, understands and conceives of this harm. Her recent work has explored the use of typologies of IPV in family law, and gender differences in men and women's use of violence in civil and criminal legal processes. She is currently a member of the NSW Domestic Violence Death Review Team.

The Contronymic use of 'Secularism' in Fiji's 2012 Constitutional Drafting Process

Thomas White

Fiji's ethno-nationalist coups of 1987 and 2000 drew extensively on the symbolic, institutional and human resources of Fijian Christianity. In tying Christianity to the privileging of Taukei interests over those of Fiji's other major ethnic group, the Indo-Fijians, the coups entrenched a long-standing perception that any historic, legal, political or religious argument that affirmed the relevance of Fijian Christianity to the state, or to national politics, was essentially discriminatory. That is, its underlying motive, whether affirmed or denied, would still be broadly understood as pursuant to a Taukei ethno-nationalism. During Fiji's constitution drafting process of 2012/2013 this was particularly evident. Here the Bainimarama military government – itself coming to power in their 'clean-up' coup of 2006 – vilified as racist any constitutional submission that contested their non-negotiable provision that Fiji would be a secular state.

Yet an analysis of the 7,000 submissions received by the Fiji Constitution Commission, with a special focus on the 844 that rejected a secular state, reveals that anti-secular positions were often more complex than this positioning allows. Whereas many submissions were indeed embedded in an ideology of ethnic chauvinism, in other submissions the rejection of secularism was not merely a case of bad-faith politics, but a problem of missed meaning. In written submissions, and in the dialogues between commissioners and the public, 'secularism' is debated in a fashion that is sharply contronymic. That is, the disagreement over secularism was not just a matter of different values (liberal and traditional) or communal interests (Taukei or Indo-Fijian) colouring the same concept into different shades. Rather, during the constitutional discussions the use of 'secularism' was unreflectingly invoked with two radically contradictory meanings, often in a single exchange. The translation of 'secularism' into Fijian as *vakavuravura*, conveyed a materialistic or even nihilistic understanding that failed not only to find any common meaning with the pluralist and holistic interpretation assumed by the Constitutional commissioners, but in many ways, directly contradicted it.

The paper concludes with a reflection on the charismatic shortcomings of secular ideals and terms when drafting foundational law in predominantly religious nations, and the challenges of translating international constitutional norms into culturally specific, non-Western contexts.

Thomas White is a PhD candidate in the Religions Programme at the University of Otago. Before Otago, Thomas worked for four years at the Fiji National University running the bachelors-level Ethics and Governance programme, a mandatory unit for all students. Having arrived in Fiji in 2011, he lived and worked in Fiji during the country's return to constitutional democracy. He has Masters degrees from Durham University in Religion and Society (2011), and Edinburgh University in Philosophy and Politics (2006).

Delivering Justice to Vulnerable Litigants: Procedural Dilemmas for Justice Institutions

Sonya Willis and Teresa Somes

This paper presents preliminary research assessing how vulnerable litigants are catered for by justice institutions and how such institutions can ensure litigant vulnerability does not result in denial of justice. Civil litigation is generally considered a necessary evil rather than a positive experience for litigants. However, some litigants have vulnerabilities which can increase the challenges facing justice institutions and potentially compromise the capacity of justice institutions to deliver just resolutions. This paper will first seek to identify typical causes of litigant vulnerability including mental and physical illness, disability, technological incapacity and linguistic and cultural difference. Focusing on the example of elderly litigants, who commonly exhibit a variety of vulnerabilities, in the context of the Supreme Court of NSW, and the NSW Civil and Administrative Tribunal. The paper will consider the negative impact of such vulnerabilities on the ability of litigants' to obtain justice. It will be argued that litigant vulnerabilities restrict access to justice in two key ways. First litigant vulnerability imposes barriers to initiating engagement with relevant justice institutions. Secondly litigant vulnerabilities restrict the litigants' ability to undertake necessary procedures required to engage with justice institutions. The paper will then consider what adjustments, if any, are currently made by justice institutions to accommodate or overcome litigant vulnerabilities. Finally this paper will suggest the potential for reform of justice institutions to better accommodate litigant vulnerabilities. The authors hope to benefit from the interdisciplinary nature of the conference to obtain feedback from sociology and justice institution researchers at the conference to inform the ongoing direction of the research.

Our paper focuses particularly on the *Cultural Justice* and *Justice Institutions, Practice and Practitioners* sub themes of the conference. In relation to *Cultural justice*; we are considering the barriers and challenges to justice caused by litigant vulnerabilities; particularly age. In

relation to *Justice Institutions, Practice and Practitioners*; our paper considers the role of the judiciary and litigants in the delivery of procedural justice.

Sonya Willis is a lecturer at Macquarie University where she currently teaches Civil and Criminal Procedure and Litigation and researches in Civil Procedure. Sonya's doctorate examines the interaction between justice, procedural fairness and efficiency in civil procedure at the University of Sydney. Sonya spent a decade as a civil litigator in NSW and maintains a current practicing certificate. Sonya is the author of *Civil Procedure* (Palgrave MacMillan 2012) and of *Civil Dispute Resolution - Themes and theories of civil procedure and its alternatives* (forthcoming Cambridge University Press 2018).

Teresa Somes is a lecturer at Macquarie University who specialises in equity and trusts law, property law and remedies. Teresa's doctorate, through the University of South Australia, considers how an older person may protect their interests when entering an asset for care arrangement, the limitations of the present law and proposals for reform. Teresa has presented on elder law issues at a number of conferences in Australia and has co-authored a number of articles and an ALRC submission with Professor Eileen Webb. Teresa is admitted as a barrister and solicitor of the ACT Supreme Court.

Exploring the Perceptions and Effects of Stress at Work of Law Teachers in the UK and Australia

J. Clare Wilson, Rachael Field, Caroline Strevens and Colin James

Research in Australia and America has shown that law students' wellbeing may significantly decrease during their undergraduate degree. Implicit in such research is the assumption academic staff have a role to play in the maintenance of psychological wellbeing in their students. However, substantially less attention has been paid to the wellbeing of those staff. Indeed, few studies have explored the expectations of academic staff in dealing with stressed students (or indeed, how academic staff perceive their own wellbeing). This paper explores 2 studies involving national surveys of UK and Australian legal academics. The research invited law teachers to complete a survey that included a number of psychometric scales as well as open questions.

In the first of the UK studies, results showed that while most law teachers did not show major signs of depression, 42% reported experiencing significant stress. Indeed, stress was often reported as related to perceptions of unfairness at work, including issues of work load, pace of change and increased responsibility with reduced control at work. The second survey in the

UK was also replicated in Australia and further explored the stress experienced by academics as well as the relationship of stress to work-related quality of life and burnout (again, including issues of unfairness at work). The overall results of the UK and Australian study reveal risk patterns and common experiences that will assist in the design of support systems and legal education programs that minimise unnecessary stress on law teachers, so they in turn can maximise their capacity to respond effectively to law students. Methodological issues and limitations will also be discussed. The conclusion will focus on understanding how academic stress impacts the professional identity of law academics.

J. Clare Wilson: is a Reader in Applied Psychology and the Director of the Quality of Life, Health and Wellbeing Research Group within the Department of Psychology at the University of Portsmouth, UK. Although Clare originally trained as a clinical psychologist (at Otago University), she spent 15 years as a Chartered Forensic Psychologist in the UK. This work included training police and social workers in the evidential interviewing of children in both the UK and Australia. More recently, Clare has returned to clinical psychological research with a focus on positive psychology (that is, self-management of mental health/wellbeing).

Rachael Field: Rachael is a Professor of Law in the Bond Law School, a member of the Executive of Bond University's Centre for Professional Legal Education, and President of Women's Legal Service in Brisbane. She is an Australian Learning and Teaching Fellow and a Senior Fellow of the Higher Education Academy. Rachael founded the Australian Wellness Network for Law. Her areas of research expertise include dispute resolution, family law, domestic violence and legal education, and she has a portfolio of more than 75 scholarly publications, and is co-author of four books. Rachael was the 2013 Queensland Woman Lawyer of the Year.

Caroline Strevens: is a Reader in Legal Education and Head of Department of Portsmouth Law School in the Faculty of Business and Law at the University of Portsmouth. Caroline's academic career was preceded by a career in legal practice as a Solicitor. She joined the University of Portsmouth in 2001 to establish the suite of qualifying law degrees and to expand the LLM programmes and was appointed the first Head of Department when the School of Law was formed in 2008.

Colin James: has been a solicitor since 1989 and a clinical legal educator since 2001. His research interests include domestic violence, family law, legal education, legal history, legal practice and the well-being of law students and lawyers. He has qualifications in law, history, tertiary education and psychology, and currently teaches family law and practice and supervises in professional development courses at the ANU College of Law. His recent publications include as a contributing editor of 'Promoting Law Student and Lawyer Well-Being in Australia and Beyond' (Routledge), 'Being Well in the Law: A guide for lawyers' (Law Society NSW).

Under the Influence? Comparative Explorations of Therapeutic Jurisprudence Consciousness in Drug Courts

Amanda Wilson

There exists a longstanding and growing interest in therapeutic jurisprudence (TJ) spanning over a quarter of a century. Problem solving or problem-oriented courts are a widely recognised example of “applied” therapeutic jurisprudence in Western criminal justice and drug courts are one of the most prominent vehicles for the application of TJ. These courts seek to address the perceived underlying cause of offending behaviour and represent an effort to combat the cycle of drug-dependency and crime. While many studies have evaluated the effectiveness of drug courts, comparatively few have examined the influence of TJ. Subsequently, we know very little about how TJ is interpreted and applied in these settings. This paper presents findings from a comparative study of drug courts in Canada and Australia on the TJ consciousness of drug court professionals. It explores how institutional enactors across four drug court sites understand and make sense of TJ and how, in turn, TJ is given meaning by the ways in which it is enacted and applied in these settings.

Amanda Wilson has worked as a consultant Criminologist since 2007 and has taught social science and criminal justice courses in the Faculty of Arts and Social Sciences and the Faculty of Law at the University of New South Wales since 2008. She has held research positions on various projects at Australian universities and has been employed as a consultant by a number of agencies including NSW Police and the Department of Attorney General and Justice. She is a member of the Global Advisory Council of the TJ Society and the SpinHuis Centre Research on Incarcerated Females at VU University Amsterdam. Her research interests include: therapeutic jurisprudence, gender and intersectionality in criminal justice and comparative criminal justice.

‘Mediators and Substantive Justice: A Sociocultural Perspective’

Bobette Wolski

Disputing and dispute resolution are activities which are largely shaped by the cultural and social context within which they take place. Sociocultural forces influence the dispute resolution preferences of parties in conflict and the way in which particular dispute resolution methods – such as mediation - are perceived and practiced. These forces also impact the role that mediators are expected to play, if any, in attempting to influence the outcome of the mediation such that ‘substantive justice’ or ‘fair outcomes’ are achieved.

The link between culture, society, dispute resolution preferences and the mediator's role and responsibility for outcome fairness is clearly evident when one compares the mediation systems of China and the West. In China, it is common for mediators to deliver lectures on moral virtue and to express opinions about the desired outcome of mediation, that is, an outcome that accords with community standards of fairness, preserves relationships and restores social harmony. Chinese mediators are openly assertive in their efforts. Mediation in the West serves a different function and takes a somewhat different form than mediation in China. Although some 'Western' mediators in some mediations express an opinion as to the likely outcome if the matter does not settle, such interventions are often frowned about. The prevailing attitude in the West is that mediators are only responsible for process fairness, and not for outcome fairness. This paper falls into two main parts. In the first part, the link between culture, society and preference for dispute resolution methods is explored. The impact of culture and society on the purposes of mediation and the practice of mediation including acceptable mediator interventions, is discussed in the second part of the paper. The paper proceeds by way of a comparative analysis of the mediation of interpersonal disputes between individuals, in mainland China and the West (more specifically, the United States and Australia).

Associate Professor Bobette Wolski is an experienced civil and family law litigator. She has also mediated with a number of institutions over a period of 17 years. She is currently an Associate Professor of Law at Bond University where she teaches civil procedure, mediation, ADR and a range of other dispute resolution courses. Bobette has taught dispute resolution in a number of countries including Germany, South Africa and Scotland. She has written numerous articles on dispute resolution, legal skills and legal education. Bobette's PhD focused on ADR ethics. It has been the focus of her research and writing for the last 8 years.