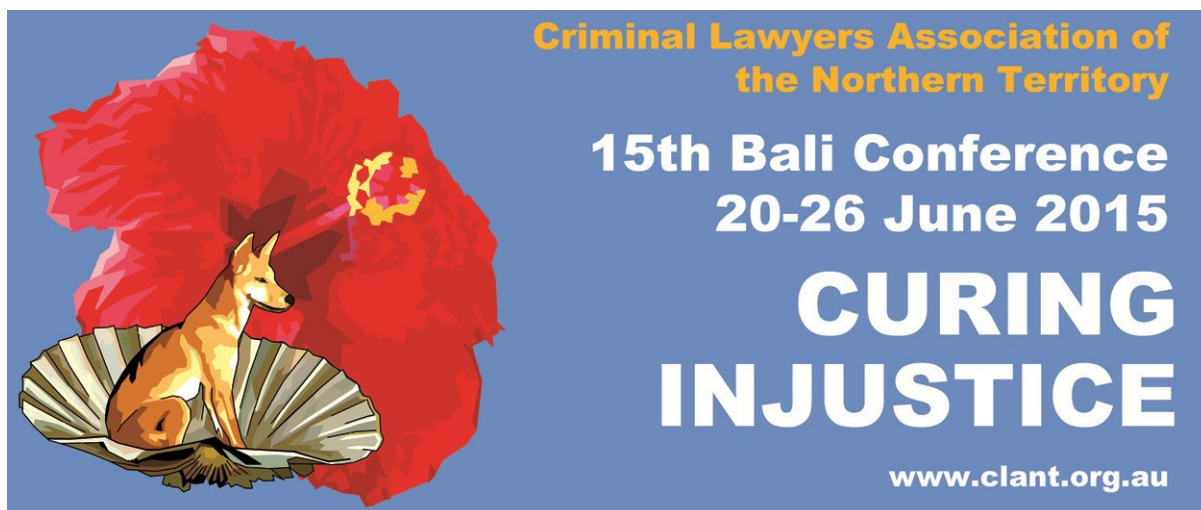


Criminal Lawyers Association of the Northern Territory (CLANT)

FIFTEENTH BIENNIAL CONFERENCE



PRESENTERS

Russell Goldflam, CLANT President
WELCOME



Following a 15 year career in adult education, including ten years at the Institute for Aboriginal Development in Alice Springs, Russell completed a Bachelor of Laws (Hons) through Macquarie University. Since being admitted to practice in 1997, Russell has worked for the Northern Territory Legal Aid Commission, and has been the Principal Legal Officer of its Alice Springs office since 2001. Russell has been the President of the Criminal Lawyers Association of the Northern Territory since 2011. Russell is an Associate of the Indigenous Law Centre at the University of New

South Wales, a Commissioner of the Northern Territory Legal Aid Commission and member of the Northern Territory Law Reform Committee. Russell has a strong interest in and actively advocating for law reform, with a particular focus on alcohol policy. He is a contributor to the on-line Omnificent English Dictionary in Limerick Form (OEDILF), the eponymous leader of *Rusty and the Infidels* (reputedly one of the leading klezmer bands in Central Australia).

John Elferink MLA, NT Attorney-General & Minister for Justice
OPENING ADDRESS



John Elferink was born in the Netherlands, moving to Darwin as a young child. He joined the NT Police as a 17 year-old cadet, rising to the rank of Sergeant, and was working as an Alice Springs based policeman at the time of his surprise victory in the outback seat of MacDonnell at the 1997 election. Mr Elferink was re-elected in 2001, and held the seat until 2005. In 2008 he was elected to the seat of Port Darwin. While in the police force he undertook a Bachelor of

Arts by correspondence. While a parliamentarian, he did likewise to obtain a Bachelor of Laws, and was admitted to practice in 2009. His vision for the Northern Territory is for it to be an area for growth, with a prosperous economy and where crime is a rarity rather than constant. In addition to his law and justice portfolios, Mr Elferink is Minister for Children and Families, Minister for Health, Minister for Disability Services, Minister for Mental Health Services and Minister for Correctional Services.

Trevor Riley CJ (NT Supreme Court)
INTRODUCTORY REMARKS



Trevor Riley was appointed Chief Justice of the Supreme Court of the Northern Territory in 2010, having been a Justice of the Court since 1999. Chief Justice Riley joined the Northern Territory Bar in 1985, and was appointed Queen's Counsel in 1989. He was counsel in the Royal Commission into Aboriginal Deaths in Custody and President of the Northern Territory Bar Association from 1993 to 1997, and also served on many other bodies. He was a former part-time lecturer at the Faculty of Law at the Northern Territory University and is an occasional lecturer in Advocacy.

Walter Sofronoff QC
"Apologia for the Legal Profession"

This paper will deal with the reasons, historical, theoretical and drawn from current affairs, as to why the existence of an independent legal profession is essential to the rule of law.



Walter Sofronoff was admitted to the Bar in 1977 and Commissioned as Queen's Counsel in 1988. From 2005 to 2014 he was Solicitor-General of Queensland and has now returned to the private bar. Mr Sofronoff has held positions as President and Vice President of the Bar Association of Queensland, Adjunct Professor of Law at the University of Queensland, Lecturer to the Bar Practice Course and Bar Association of Queensland Advanced Legal Education Program, President of the

Queensland Anti-Discrimination Tribunal, fellow of the Australian Academy of Law and member of the Legal Panel of the Royal Australian Navy Reserve. Mr Sofronoff is also a qualified mediator and a Grade 1 Arbitrator.

Stephen Lawrence
"Detention and prosecution of Australian captured insurgents in Afghanistan"

This paper will examine the way in which suspected Taliban insurgents have been detained and in some cases prosecuted during the various phases of the conflict in Afghanistan post the events of September 2001. The paper draws on the author's experience working at the Justice Centre in Parwan at Bagram, Afghanistan 2013-2014. The paper assesses the international and national legal basis for detention and prosecution and examines to what extent the processes adopted complied with law.



Stephen Lawrence is a barrister at Sir Owen Dixon Chambers in Sydney. Immediately prior to being called to the Bar he held the position of Principal Legal Officer (Western Region) with the Aboriginal Legal Service

NSW/ACT. Stephen's international experience includes as a Public Defender in Solomon Islands 2004-2007, where he appeared in trials and appeals arising out of the armed conflict in Solomon Islands 1998-2003. In 2011 Stephen was a 'Kathryn Wadia International Fellow' with the International Legal Foundation and helped establish a public defender office in Ramallah, Palestinian Territories. Stephen deployed in 2013 to Bagram, Afghanistan with the Australian Civilian Corps for 12 months where he assisted Afghan lawyers defending persons charged with terrorism and related offences under Afghan domestic law at the Justice Centre in Parwan. Stephen has a Masters in Law (International Law) from the Australian National University.

Felicity Graham

"Fingerprints and Expert Identification Evidence: Markers of Unreliability"

... fingerprint evidence has been afforded a near magical quality in our culture. In essence, we have adopted a cultural assumption that a government representative's assertion that a defendant's fingerprint was found at a crime scene is an infallible fact, and not merely the examiner's opinion. As a consequence, fingerprint evidence is often all that is needed to convict a defendant, even in the absence of any other evidence of guilt. Unfortunately, our societal acceptance of the infallibility of examiners' opinions appears to be misplaced (State v Quintana (2004) UT App 103 P.3d 168, Thorne J, [13]-[14])

Recent international examples of wrongful identification based on fingerprint comparisons demand close scrutiny of the contemporary practices of fingerprint examiners and the continued reliance on their expert identification evidence in our criminal justice system. There needs to be a radical shift in the legal culture vis-à-vis fingerprint evidence. Fingerprint identification evidence should not enter the jury room or the mind of a Magistrate surrounded by an air of magic. The aims of this paper are (1) to demonstrate the importance of the tribunal of fact being made aware of the dangers of relying on fingerprint identification evidence in a criminal trial, particularly in cases where that evidence represents the high-water mark for proof of the identity of the offender; and (2) to provide a practical model to achieve that awareness through cross-examination, and judicial warnings and directions. Ultimately it will be argued that, as a result of a number of weaknesses inherent in the field, fingerprint identification evidence is a type of evidence that warrants a warning under section 165 of the *Uniform Evidence Act* as being the kind of evidence that may be unreliable.



Felicity is a Sydney based Barrister with extensive experience appearing across New South Wales in criminal matters in both the summary jurisdiction and on indictment. Prior to being called to the Bar Felicity was Principal Legal Officer and Trial Advocate at the Aboriginal Legal Service (NSW/ACT), in the Western Region. Felicity obtained a Bachelor of Arts and Bachelor of Laws (Hons) from the University of Sydney in 2007 and commenced her legal career as Tipstaff to the Honourable Justice Barr in the Supreme Court of New South Wales.

Dr Thalia Anthony and Will Crawford

"Northern Territory Indigenous community sentencing mechanisms: an order for substantive equality"

Indigenous Community Courts and Law and Justice Groups in the Northern Territory provide an avenue for greater Indigenous engagement in the justice system. These mechanisms can inform the court of factors relevant to the background and experiences of Indigenous defendants, community-based sentencing options and rehabilitative measures. This paper considers the operation, outcomes and challenges for

Community Courts, particularly following their discontinuation due to policy and narrow legislative interpretations. We argue that legislation recently enacted facilitates the re-instigation of Community Courts. However, this is also supported by the legal principles of individualised justice and substantive equality, and Indigenous concepts of two-way law. The realisation of these principles requires that Indigenous communities are appropriately engaged in setting up the courts and their views are accounted for by judicial officers in the sentencing process.



Dr Thalia Anthony is a senior lecturer in Law at the University of Technology, Sydney. She is an expert on criminal law and procedure and Indigenous people and the law. Her research is grounded in legal history and understandings of the colonial legacy in legal institutions. She has developed new approaches to researching and understanding the role of the criminal law in governing Indigenous communities and how the state regulates Indigenous-based justice strategies. Her research is informed by fieldwork in Indigenous communities such as Warlpiri communities in central Australia and partnerships with Indigenous legal organisations in Australia and overseas. Dr Anthony's research informs her teaching in terms of advancing strategies for Indigenous cultural competencies in Law curricular, which had its genesis in 2008 when she organised an Australian and New Zealand conference on this theme.

Her research has had an impact on policy development and public debates in relation to remedies for wrongs inflicted on Indigenous peoples. Her work has been referred to in Senate committee reports, parliamentary debates, policy announcements and law reform committee reports. Dr Anthony has also written submissions for United Nations committees, prepared and reviewed research briefs for the Attorney-Generals' Indigenous Justice Clearinghouse, conducted research for the Royal Commission into Institutional Responses to Child Sexual Abuse and appeared before several parliamentary inquiries on Indigenous redress schemes. She has also been involved in preparing litigation for Indigenous stolen wages.

Dr Anthony's scholarship is published in a number of books, including her influential monograph, *Indigenous People, Crime and Punishment* (Routledge 2013) and a forthcoming book with Professor Harry Blagg, *Decolonising Criminology* (Palgrave 2016).

Will Crawford is the coordinator of the Legal Education, Training and Projects team at the North Australian Aboriginal Justice Agency ('NAAJA'). Prior to this, Will practised for nearly 10 years in both criminal and civil law at NAAJA, Fitzroy Legal Service and Ashurst (then 'Blake Dawson Waldron').

Will has a strong interest in indigenous participation in sentencing and dispute resolution. He has co-authored articles on indigenous sentencing mechanisms, indigenous mediation models and community development methodology for remote Aboriginal communities.

He has wide experience in cross-cultural project management and was formerly the Program Coordinator of the Sudanese Australian Integrated Learning Program in Victoria. Will is currently a member of the CLANT committee. From 2011 to 2013, he co-convened the Northern Territory chapter of Australian Lawyers for Human Rights.

Mary Chalmers

All's Fair in Love and Law? - the relevance and admissibility of a domestic violence history in criminal trials

We have heard much in the Australian media in recent times about the national epidemic of domestic and family violence. There is apparent renewed zeal at both state and federal levels to address it with numerous ongoing inquiries and law reform efforts.

We have all heard the statistics. In Australia 1 in 3 women have been subjected to physical violence and nearly 1 in 5 to sexual violence in their lifetime.

Indigenous women face much higher risk factors than non-indigenous women. An indigenous woman is 35 times more likely to be hospitalised than non-indigenous Australian, and 5 times more likely to be a homicide victim. It is also recognised that sexual violence occurs in Indigenous communities at rates that far exceed those for non-Indigenous Australians. If anyone has a doubt about those statistics they need only visit the Supreme Court of the Northern Territory's website and review sentencing remarks every day for a year – this will give you a mere glimpse of the iceberg.

Criminal prosecutions play a significant role in addressing this violence – there is a strong public interest in complaints being prosecuted and offenders punished and rehabilitated. At a projected cost of \$15.6 billion for 2021-22, there is considerable public interest for financial reasons alone in reducing the levels of domestic and family violence.

In the current environment, from a prosecutorial point of view there is the question of can we do it better? It is a question that has been asked by law reformers to date and no doubt it is a question that will continue to be asked as various parliamentary and other high level inquiries roll out.

A better prosecution does not simply mean a higher conviction rate. It incorporates a broader consideration of the public interest including issues of fairness, to both the accused and the complainant, and ensuring that the Court, whether at trial or in sentencing, has a complete picture of the offending (and offender). Only then can the criminal justice system make a full contribution to reducing the levels of domestic and family violence through the sentencing process.

This paper explores the extent to which a history of domestic violence between an accused and a complainant (victim) should/could be before the tribunal of fact in a criminal trial, and additionally, before a sentencing Judge upon sentencing of an offender. To what extent is the oft referred to "dynamics of family violence" relevant in any given prosecution? To what extent is it admissible?

Necessarily the paper touches on matters of legislative and procedural reform that have been raised in this context.

Since 2009 Mary Chalmers has worked as a Crown Prosecutor with the Office of the Director of Public Prosecutions NT, prosecuting mainly sexual assault matters. Mary received her Bachelor of Laws from Northern Territory University (now Charles Darwin University) in 2000, after having graduated with a Bachelor of Arts in 1994. She has completed Graduate Diplomas in Legal Practice at the College of Law in New South Wales and in Military Law at the University of Melbourne. Mary has been an Army reserve legal officer since 2002. After working as in house solicitor with the Ombudsman then NT Police Mary moved to Summary Prosecutions before working for two and a half years as a Crown Prosecutor in the Solomon Islands as part of the RAMSI Law & Justice Program, specialising in fraud and corruption matters.

Georgia Lewer**“Administrative law for criminal lawyers”**

Administrative law is having an increasing influence on all areas of law in Australia. Accordingly, it is becoming more important for criminal lawyers in their practice to be able to draw from the fundamental tenets of administrative law. This paper will focus upon a number of areas of administrative law, with the aim to assist criminal practitioners in their daily work. It is designed for criminal practitioners with limited knowledge or experience in administrative law. This paper will firstly consider some of the developments in contemporary statutory interpretation, with a focus on the interpretation of criminal and quasi criminal statutes. Second, it will consider the availability of judicial review and writs (or orders in the nature) of prerogative relief and, particularly, their availability as a substitute or parallel for statutory bases of appeal. Thirdly, it will discuss some of the bases for judicial review, including jurisdictional error, abuse of process, lack of procedural fairness, taking into account irrelevant considerations, failing to take into account relevant considerations and *Wednesbury* unreasonableness and the expanding overlap between the jurisprudence relating to error in administrative law and grounds for appellate review in criminal law. Finally, it will consider administrative law and its practical impact on the prosecution of criminal offences, including the possibility of challenges to search, telephone intercept and surveillance device warrants and other challenges to regulatory or executive orders that may form the bases of many investigatory processes or the foundation of criminal liability. This paper will discuss how such collateral challenges intercept with substantive criminal proceedings and the reception of evidence pursuant to the *Evidence Act*.



Georgia Lewer is a Sydney based Barrister practising principally in the areas of criminal law (both at first instance and appeal), Commissions of inquiry and inquests, statutory offences, administrative and public law. Georgia also lectures at the University of New South Wales. Georgia holds a Bachelor of Laws (Hons) and a Bachelor of English (Hons) from the University of New South Wales and was admitted as a legal practitioner in 2009. Prior to being called to the bar Georgia worked as Senior Solicitor, Inquiries at the Crown Solicitor's Office, Solicitor with the Children's Legal Service and Aboriginal Legal Service and Solicitor and Barrister with the North Australian Aboriginal Justice Agency. Georgia commenced her career in the law as Tipstaff to the Honourable Justice David Kirby.

Ursula Noye**It looks racist, but can we prove it? Blackstrikes: Louisiana prosecutors and race discrimination in jury selection**

Together with the practices of policing recently exposed in Ferguson and Long Island, the practice of prosecutors in blocking African-Americans from the jury box form part of a legal system that cannot claim to dispense “blind justice”. Since 2003, Reprieve Australia has been exposing this practice - known as ‘Blackstriking’ - in Louisiana, a Deep South state that imprisons the most people per capita in the world, and in which African-Americans are represented twice as much in the prison population.

Using data collected from 390 trials prosecuted by Jefferson Parish between 1994 and 2002, we reported that prosecutors were striking African-Americans from juries up to five times more than Whites. In 22% of the trials, there were no African-American jurors and, in up to 80%, there was no dispositive African-American presence on the jury. The chance this was just a coincidence was one in two billion billions. We now have data from a further 1232 trials prosecuted in Jefferson, Caddo and East Baton Rouge Parishes between 2003 and 2012. While Northwestern University is conducting a comprehensive study of this data, our preliminary results suggest that not much has changed.

Though Blackstriking is unconstitutional, Courts, including the U.S. Supreme Court, have been willing to accept the flimsiest excuses from prosecutors to justify their strikes. In 2005, Reprieve launched a public campaign shaming the Jefferson Parish prosecutor's office into changing its practices. The office changed staffing, ceased blocking access to jury records and slowed the number of death-penalty prosecutions. We now plan to launch a broader campaign – including evidence-based motions in criminal trials, empirical arguments in criminal appeals and civil rights lawsuits – to force open the jury box to African-American citizens.



Ursula Noye is the Vice-President of Reprieve Australia with responsibility for the casework, research and internship programs in the United States and Southeast Asia. Since 2010, she has worked as a lawyer for Justice Connect in Melbourne. In 2012, she was awarded the Blackstrikes Fellowship and subsequently spent 12 months living in Louisiana managing the research project.

Chris Maxwell QC
“Evidence Rules...OK” (hypothetical)

Chris Maxwell will be presenting an interactive session calling upon the experiences of the audience as well as sharing his own from the New South Wales perspective. The real life scenarios will deal in a practical way with such subjects as the hearsay rule and exceptions, the unfavourable witness, the credibility rule, tendency evidence, exercising the court's discretion to exclude evidence, expert evidence and other sections of the Evidence Act which are necessary components for all criminal law practitioners. The presentation seeks to encourage in a stimulating and empathetic way, all participants, but particularly the newer criminal lawyer.



Chris Maxwell was admitted to the Bar in New South Wales in 1975 and was appointed Queen's Counsel in 1989. In 2002 he was appointed as an International Prosecutor working for the United Nations in the former Yugoslavia where he appeared in the domestic courts of Kosovo prosecuting the serious crime, including war crimes. In 2003 he was appointed the Chief International Prosecutor and held that position for 2 years until he returned to his work as a Deputy Senior Crown Prosecutor in New South Wales. Chris taught as a senior fellow with the Australian

Institute of Advocacy for 10 years and regularly lectures practitioners on the law of evidence. He has also lectured prosecutors in Edinburgh, Malaysia and Indonesia. Since 2006 he has worked for International Development Law Organisations in Kabul teaching local prosecutors. He is predominantly a trial counsel and places great value on a sound knowledge of evidence as an invaluable tool in the armoury of the criminal advocate.

Nicole Spicer
“Confiscation of Assets– has the net been cast too wide? “

Confiscation laws have the effect of extending the consequences of criminal activity well beyond the individual offender.

In both State and Federal Jurisdictions Confiscation of assets legislation has the potential to have enormous impact upon individuals who are believed to be connected with criminal activity, whether they are convicted or not. This is not just the case as is commonly believed in circumstances where the assets sought to be forfeited are ‘proceeds of crime’. Further, the various Confiscation regimes can all readily extend well

beyond property which is 'owned' by the purported offender and include for example property over which they have 'effective control' or which they have disposed of without 'valuable consideration'.

From a police and prosecution perspective, Asset Confiscation proceedings are undoubtedly an invaluable tool in the 'prosecuting arsenal'. Deriving offenders of the financial benefits of their criminal activity must logically make such offending less attractive, and thereby arguably reduce criminal activity.

But are the 'draconian' measures taken by the state, which courts have repeatedly found may be justifiably disproportionate to the offending have the capacity to lead to significant injustices to Accused Persons, but also to other individuals such as husbands/wives and other family members?

The first part of this paper will look in overview at how the various State and Federal Confiscation Schemes operate in practice, with reference to recent Superior Court Decisions.

The second part of the paper will discuss if and how injustices may arise, and in particular whether the protections for persons who are not charged in connection with 'the offending' are adequate.

Finally, I propose a brief discussion about (extraordinary) new amendments to various Confiscation Acts which will result in the automatic forfeiture of ALL of the property of persons convicted of specified offences with very limited exceptions, and consider the potential for significant injustices to occur for both offenders and non-offenders.



Nicole Spicer is an Accredited Criminal Law Specialist and Principal of Spicer Lawyers, Melbourne. Nicole was admitted to practice in 1997 after graduating from Melbourne University with Honours and has practised extensively in criminal law since. Previously a partner at Robert Stary and Associates, Nicole continues to maintain a strong commitment to defending individuals charge with criminal offences, however, has also developed a strong practice in the areas of confiscation law, Sentencing Act compensation matters and civil proceedings arising from criminal matters. Nicole is one of the few lawyers in Victoria who specialises in confiscation law and regularly appears in both the County Court and Supreme Court on behalf of persons whose property has been restrained, or other persons with an interest in restrained property.

David Morters

"The Right to Silence: An Inalienable Right or an Obstruction to Justice"

The right to silence sits with other fundamental principles of common law based criminal justice systems such as the presumption of innocence, proof of guilt beyond reasonable doubt, the right of an accused to test evidence by cross examination and trial by jury as the cornerstones for the insurance of a fair trial. The right is recognised at international level by article 14(3)(g) of the *International Covenant on Civil and Political Rights*. The right of a person to refuse to provide information in response to an allegation of criminal conduct is inalienable. The concept, which first emerged about the 16th century in the face of Star Chamber compulsion, and has developed to incorporate a right to refuse to answer not only in judicial proceedings but also at any stage during the course of investigation of an allegation, reached its highest following decisions from US courts such as *Bram v United States* 168 U.S. 532 (1897) and *Miranda v Arizona* 384 U.S. 436 (1966) and in Australia in decisions of the High Court such as *Sorby v The Commonwealth* (1983) 152 CLR 281, *Hammond v The Commonwealth* (1982) 152 CLR 188 and *Petty and Maiden v The Queen* (1991) 173 CLR 95.

In recent times, both in Australia and internationally, there have been criticisms of the concept as an absolute right. In particular there has been debate about the extent to which a jury should be permitted to draw inferences regarding an accused's election to remain silent. That debate has led to legislative

amendment in several jurisdictions including England, Wales, Northern Ireland, Singapore and more recently NSW. No doubt it is on the agenda for consideration by our own legislature.

The purpose of this paper is to review the various arguments for and against any changes to the right as it is currently recognised. To what extent is it fair or necessary in a criminal justice system based on an obligation of full disclosure by the accuser. What consequences have resulted in those jurisdictions which have made amendments to the right. To what extent were such amendments necessary or were there sufficient provisions in place such as requirements with respect to service of alibi notices and service of expert reports that adequately addressed the criticism that an absolute right to silence is an obstacle to the achievement of justice. If amendments are to be made what form can they take to ensure that a right to a fair trial is preserved.

The paper will draw on the various submissions that were made in response to proposed changes to the law in the UK and Australia, studies that have been conducted in response to those changes predominantly in the UK, decisions in which courts have expressed opinions about the workability of the provisions and articles that have been written both in support of and against the need for change.

David Morters is a senior crown prosecutor in the Darwin office of the NT DPP. He has been a prosecutor for nearly twenty years and has prosecuted in the ACT, Queensland and NSW. He has a particular interest in the investigation and prosecution of fraud related matters having obtained a Masters in Forensic Accounting. His passions are cycling, skiing and surfing.

Sandra Wendlandt

“Diverting justice: Diversion for adults in the NT: drawing on the experience of New Zealand, Canada and South Africa, and parts of Europe”

Diversion for adults does not exist in the Northern Territory but strong arguments exist as to why it should. Indigenous people, adults and youth, remain overrepresented in the justice system in the NT. At the same time sentencing options are disproportionately weighted in favour of mandatory regimes and very little exists in terms of restorative, therapeutic, community focused responses. Such options arguably can supplement and strengthen the justice system and make it more relevant for people who pass through its doors. This is particularly so for people who have been charged for the first time with a minor offence. Many innovative ideas and practice have emerged in the criminal justice sectors in New Zealand, Canada and South Africa, as well as parts of Europe, countries which are aimed at increasing restorative therapeutic practices in sentencing and bolster their well-established diversion programs for first time offenders.

New Zealand and Canada are pertinent examples, sharing with Australia (and the NT) a (post)colonial history that cannot be divested from the way in which the legal system operates. South Africa, emerging from the divisiveness of apartheid, the segregation of communities and the struggles of competing systems, also shares similarities in this regard. All countries face challenge of remoteness of some communities, limited resources, and over presentation of indigenous people in the justice system.

These three countries have introduced initiatives which are founded on restorative, therapeutic approaches to justice that are cost effective, aim to reduce recidivism and restore the community. For instance, in New Zealand diversion is not limited to first time offenders, and people can undergo diversion with police many times, nor is it limited to what might be classified as minor offences. It is also legislated. New Zealand also has a growing engagement with the Maori community in the justice sector: from Kiwi liaison officers, community justice panels in the community to holding court in Maori. Restorative justice conferences are now also legislated. In Canada, the default position of prosecution is to consider legislated ‘alternative measures’ for a wide range of offences, and in some cases, is not limited to first time offenders. Courts that are designed specifically for indigenous people are also longstanding in Canada, and include peacemaking circles and unique courts and court referral systems where participation in such courts

ultimately (often) results in the withdrawal of charges altogether. In South Africa, a young democracy with a strong civil society involvement in justice and conflict, diversion for youth and adults has been operating, initially informally, through the social sector for decades. Their approach to the development of diversion is novel and has emerged through community practice rather than political or legal avenues.

Restorative justice is invariably linked to diversion, and many countries such as Germany, Belgium, the UK and the Netherlands are at the forefront of research and practice in this field, including policy makers and academics. There is need to be conscious of the complex relationship between restorative justice and the legal system, what each system facilitates and how 'success' is measured: by rates of reoffending, by frequency of offending, by indicators from community, by approvals from victims, by measures of anticipated costs.

A proposal for diversion in the NT is possible (and really can be for both indigenous and non-indigenous), and necessarily, it must require indigenous involvement as to its make-up and design. There are steps defence lawyers, community corrections and prosecution can take within existing legal framework to instigate diversionary type practices for appropriate low level cases, although any restorative justice style conferencing would best be run by groups other than police. Legislative change is needed to ensure longevity.



Sandra Wendlandt is a criminal lawyer with the North Australian Aboriginal Justice Agency. Sandra completed a Bachelor of Laws (Hons), Bachelor of Arts (Hons) and Graduate Diploma of Modern Language (German) at the University of Melbourne. She has also completed a Master of Laws with the United Nations Interregional Crime and Justice Research Institute in Italy. Sandra has worked as a lawyer with Robert Stary Lawyers, Project Officer (Community Legal Education) with the North Melbourne Legal Service, Project Officer (Human Security) for Oxfam Australia, Research Assistant at Peking University in Beijing and for an NGO in Bangladesh. In 2014 Sandra was awarded the Justice James Muirhead Churchill Fellowship to travel to New Zealand, Canada, Belgium, Germany and South Africa. The aim of her Fellowship was to explore alternative and culturally specific programs which aimed to divert Indigenous first time offenders from the criminal justice system.

Justice Graham Hiley (NT Supreme Court) **"Ethics and Etiquette"**

The main focus of the paper will be the appropriate conduct for lawyers appearing in court. All counsel have obligations to the court, to their client and to others including their opponent. Some, for example prosecutors and counsel appearing for model litigants, and counsel appearing for clients with limited mental or intellectual capacity, have additional duties. Breaches of obligations can have varying consequences including personal consequences such as suspension, disbarment or costs penalties, and more often, an adverse outcome for the client.



Upon graduating from Sydney University with a Bachelor of Laws and Bachelor of Arts, Graham Hiley worked as a solicitor with the firm presently known as Mallesons. During this time, he also completed his National Service as a legal officer with the Australian Army. Graham was called to the Bar in 1978 and was a founding member of the Northern Territory Bar Association. He was appointed Queen's Counsel in the Northern Territory in 1987 and Queensland in 1993, where he lived and practised until 2012. Graham was an active member of the Australian Army Legal Corps for 20 years, attaining the rank of Lieutenant Colonel. Prior to his appointment as a Justice of the Supreme Court of the Northern Territory in 2013, he

held various appointments including President of the Northern Territory Law Society, President of the Northern Territory Bar Association, Deputy Chair of the Lands Acquisition Tribunal, Chair of the Planning Appeals Committee, Member of the [former] Legal Practitioners Complaints Committee, Chair of the Community Living Areas Tribunal and Lecturer at the [former] Northern Territory University.

Beth Morrisroe

“Preventative Detention an Alcohol Policy in the Northern Territory”

The preventative detention of people in the Northern Territory under the Alcohol Mandatory Treatment regime has been challenged in court (RP v AMTT (2013) NTLC). The presentation reviews the case and includes an analysis of the arguments raised in the appeal and their implications, including the impact that the case has had on subsequent appeals. The presentation will also consider the *Alcohol Protection Orders Act (2013)* in the context of the Royal Commission into Aboriginal Deaths in Custody and the disproportionate impact of the legislation on vulnerable persons suffering from alcoholism.

Beth is a criminal lawyer with the Central Australian Aboriginal Legal Aid Service. Beth has been practicing in criminal law since 2010 in the ACT, NSW and the NT. She holds a Bachelor of Laws (Hons) from the University of Canberra and a Master of Laws (International Law) from the Australian National University. Beth has a particular interest in issues facing indigenous people who come before the criminal courts. She ran the first appeal in the NT against the Alcohol Mandatory Treatment legislation and was successful on the grounds of a denial of natural justice.

Russell Goldflam

[2014] NTLimR: NTCCA Digest (Unauthorised) in Limerick Form

A digest in limerick form of 2014 judgments of the Court of Criminal Appeal of the Northern Territory and the Court of Appeal of the Northern Territory concerning criminal law.

Barbara Etter APM

“Miscarriages of Justice: What have we Learned (or Not Learned!) 30 Years on from Chamberlain?”

In 2010, Ms Susan Neill-Fraser was convicted of murdering her long-time partner, Mr Bob Chappell, in the yacht *Four Winds*, moored off Sandy Bay Hobart, on Australia Day 2009. On the morning of 27 January 2009, the yacht was found sinking and there was no sign of Mr Chappell. Indeed, his body has never been found. The Court acknowledged that this case was an entirely circumstantial one. In fact, there was no body, no weapon, no eyewitnesses, no admissions or confession and no forensic science linking Ms Neill-Fraser to the crime. The Crown case contended that the victim had been hit from behind in the saloon of the vessel with a wrench or stabbed by a screwdriver. No weapon was ever presented to the court as an exhibit. The DNA of a homeless girl found on the deck of the yacht was suggested by the DPP to have come in on the bottom of someone's shoe. An appeal to the Tasmanian Court of Criminal Appeal failed as did an application for special leave to appeal to the High Court.

Ms Neill-Fraser continues to vehemently protest her innocence. The paper will outline some startling new developments in the case, including new independent expert evidence on the DNA evidence in the case. The question posed is whether forensic science, many years on from Chamberlain and Splatt, is still experiencing similar issues given what appear to be serious, and possibly systemic, issues in the interpretation and presentation of presumptive testing results concerning luminol. The issue of forensic standards and their implementation and enforcement will also be covered.

The paper will outline the reluctance of the system to admit that it may have made a mistake and the legal and cultural challenges in overturning a wrongful conviction. The importance of engaging productively with the media, legal champions and academics will also be covered.

The paper will talk about the much needed reform that is required to ensure the prevention of future miscarriage of justice cases as well as the value of initiatives such as Innocence Projects, further right to appeal legislation and the establishment of a Criminal Cases Review Commission in Australia, as in the UK. Such initiatives will be invaluable in “Curing Injustice”.

Finally, the paper will cover the landmark Henry Keogh decision in SA in late 2014 and developments in Tasmania in relation to the introduction of further right to appeal legislation.



Barbara is the Principal of Better Consulting, a boutique legal practice based in Hobart which specialises in post-conviction reviews, coronial matters and possible miscarriage of justice cases. She has 30 years of distinguished police service and in 2008 was awarded the Australian Police Medal in the Australia Day Honours list. Barbara holds a Bachelor of Pharmacy, Bachelor of Laws (Hons), a Master of Laws, an MBA and a Diploma from the Australian Institute of Company Directors, Company Directors Course. She is a Fellow of the Australian Institute of Company Directors, a Fellow of the Australasian College of Biomedical Scientists, a Fellow of the Australasian Institute of Policing, a Fellow at Charles Darwin University and an Adjunct Professor at Edith Cowan University. Barbara has worked as Director of the [former] Australasian Centre for Policing Research, Assistant Commissioner and

Acting Deputy Commissioner of WA Police and CEO of the Tasmanian Integrity Commission. She has also undertaken secondments with the NSW Ombudsman’s Office and the NT Attorney-General’s Department. In 2006, Barbara won the WA Telstra Businesswoman of the Year and was inducted into the Australian Businesswomen’s Network Hall of Fame in 2014.

Eve Ash

“JUSTICE HUNTERS: A strategy for change”

Eve’s presentation will introduce the case study about Sue Neill-Fraser and will cover the challenges making the feature documentary *Shadow of Doubt*, which investigates this wrongful conviction. Eve spent four years researching and talking with family and friends, the police and lawyers. She wanted to understand why a jury would be convinced beyond reasonable doubt that Sue was guilty when there was so much doubt. Too many people are driven by a desire to judge and convict vs solve crimes and discover the truth, as Eve found out first hand when investigating and filming the Sue Neill-Fraser case, then working with lawyer and former Asst Police Commissioner, Barbara Etter. Why are people so eager to judge, even in speculative circumstantial cases? And then go on to stand by their work when it is found to be erroneous? What is the psychology behind this?

Shadow of Doubt raises important questions about the way the crime was investigated, problems with witnesses, how the media was used to shape perceptions, and the shocking mistakes and omissions.

It is anticipated that the documentary, *Shadow of Doubt*, will be screened in full at an opportune time during the Conference.



Eve Ash is an Author, Psychologist, Film Producer and founder of SEVEN DIMENSIONS. Eve has produced over 700 videos on management, communication, best practice, health and legal issues, winning over 160 international awards. Her multi-award winning feature *Shadow of Doubt* about the wrongful conviction of Sue Neill-Fraser in Tasmania was screened on Foxtel

Ci. Eve has served on various Boards and Committees and is a national winner of a Telstra Businesswomens award. Her books *Rewrite Your Life!* And *Rewrite Your Relationships!* are published by Penguin Books. She is currently working on a new series: Justice Hunters.

Sue Oliver (Stipendiary Magistrate) and Jared Sharp

“WHEN THE VULNERABLE OFFEND: Does the Northern Territory Youth Justice System deliver justice for vulnerable young offenders or their victims?”

This paper will consider the complexities of a youth justice system that is required to deal with young people with a range of vulnerabilities. These include abuse, neglect, violence, foetal alcohol spectrum disorder, autism spectrum disorders or acquired brain injury. The paper will focus on ‘cross-over kids’, those young offenders who known in the child protection system and young people from remote communities.

The paper will look at why a separate youth justice system is required, including a system that operates outside the court system and that youth courts do not simply operate as a court for “young adults.” It will consider why “traditional sentencing approaches” do not work to change offending behaviour, and how the system can in some cases further marginalise already damaged young people. Case studies will be provided from Central Australia and the Top End.

Thirdly, the paper calls for a new approach, based on individualised case management. The paper will look at how judicial case supervision and expert case workers can support vulnerable young people to help them and their families develop the skills and resilience to reduce their prospects of future offending behaviour and as a consequence provide better justice outcomes for the young offender and victims.

Sue Oliver was appointed Stipendiary Magistrate of the Court of Summary Jurisdiction, Northern Territory, in 2006. She holds a Bachelor of Laws from the University of Adelaide and Master of Laws from the college of William and Mary, Virginia, USA. Sue has practised law in a variety of public and private sectors including spending her early years with the former North Australian Aboriginal Legal Aid Service (now NAAJA). Sue was a legal academic for 15 years with the predecessor institutions of the Charles Darwin University and was a foundation member and Dean of the Faculty of Law and Inaugural Dean of the Faculty of Law, Business and Arts. Immediately prior to her appointment to the Bench, Sue was Director of Legal Policy and Acting Executive Director of Legal Services in the Territory’s [former] Department of Justice. Sue has spent over 35 years in the Northern Territory and has been involved in various bodies, including the Family Planning Association, the YWCA, the International Legal Services Advisory Council, Commissioner for the Northern Territory Legal Aid Commission, the Law Society Northern Territory and Board member of the Australian Women Lawyers.



Jared Sharp is the Manager of Law and Justice Projects, North Australian Aboriginal Justice Agency. Law and Justice Projects work to address systemic gaps in the justice system, such as by leading justice reform, supporting Aboriginal people in custody to reintegrate back into the community, and assisting Aboriginal people and communities to engage with the legal system. Jared has practiced as a criminal lawyer in the Northern Territory and WA in both the adult and youth jurisdictions and is a nationally accredited mediator. He was a member of the NT Youth Justice Review Panel, Youth Justice Framework Committee and was a 2013 Churchill Fellow.

Justice Peter Barr (NT Supreme Court)
“Advocacy – irritating aspects”

Advocacy is irritating if it is not effective

All too often an advocate’s best arguments or submissions are not ‘projected’ as well as they might be, or their positive impact is reduced by irrelevant, unnecessarily contentious or otherwise counter-productive arguments or submissions. Sometimes an advocate fails to effectively deal with damaging facts within the client’s own case, or which are raised by the opposing case.

This presentation will attempt to identify some common and not-so-common advocacy errors, explain their potential negative impact, and suggest how they can be avoided. Practical examples will be provided.



Justice Peter Barr was appointed as a Judge of the Supreme Court of the Northern Territory in September 2010. Before that, he had been practising at the private Bar for 17 years, from 1993. He first came to Darwin to live and work in late 1976. He was an employed solicitor for 2 years before practising for more than 10 years as a solicitor in sole practice. Justice Barr has had first-hand exposure to the workings of many different courts and tribunals over a period of almost 40 years: all tiers of the courts system, military tribunals, and administrative tribunals in town planning and public sector disciplinary matters. He maintains a keen interest in advocacy.

Suzan Cox QC (Director, NTLAC) and Felicity Gerry QC
“UNJUST LABELS: Joint enterprise and Common Purpose”

In 1995 Stephen Odgers, usually a regular at the CLANT conference, warned that the extension of accessorial liability to foresight was “one of the most regressive of the High Court’s judgements in the field of substantive law.” Two decades later, nothing has changed. You could say that Odgers foresaw the inevitable. Suspects are convicted on the basis that they foresaw a principal might do something, without specificity. It could even be foresight of a range of possibilities. Liability is imposed not on an established subjective criminal fault element like intention or recklessness or knowledge but on a possible outcome or risk of a possible outcome. Sadly, the issue of foresight of risk has also infected the Criminal Codes. No State or Territory in Australia has escaped the disease of prosecution ease, although, at least the risk has to be substantial in the NT in relation to murder.

One could argue it is not Australia’s fault since it inherited a piecemeal failure to observe legal principle from the English. In 1950 English law was reasonably clear and had sound foundations. Taking a look at the history & development of the law on accessorial liability, Felicity & Suzan will suggest there is an urgent need for a return to sound legal principle uniformly across Australia.



Suzan Cox QC holds a Bachelor of Arts, Bachelor of Laws and a Master of Laws (Criminal Law). Suzan commenced her legal career, following her admission in 1979, as a defence lawyer in Papua New Guinea, where she worked for over ten years. Following her stint in Papua New Guinea Suzan worked as a Senior Criminal Solicitor with North Australian Aboriginal Legal Aid Service (now NAAJA) and Senior Solicitor with the Northern Territory Legal Aid Commission. Suzan also spent a significant period practising at the Victorian Bar, where she was appointed Queens Counsel in 2002. Suzan has been Director of the Northern Territory Legal Aid Commission since

2002.



Felicity Gerry QC is admitted to the Bar of England and Wales and to the Supreme Court of the Northern Territory. Commentators note her bold style of advocacy and her skill in dealing with young and vulnerable defendants. At the independent Bar, Felicity has prosecuted and defended numerous cases involving major, serious and complex crime, often with an international element. This has included cross-jurisdictional rape, murder by foreign nationals involving evidence obtained from abroad, conspiracy

to import illegal immigrants and international fraud. Her significant trial and appellate experience has also led to an expertise in online offending in the context of online abuse and exploitation, money laundering and online fraud. She has, for example, used data and metadata as evidence in criminal cases. She is currently leading in a joint enterprise murder appeal to the UK Supreme Court. She is co-author of The Sexual Offences Handbook that sets out all the English law, practice and procedure from 1957 to date in this difficult field of law and has a dedicated chapter on indecent images and obscene publications. Since 2013, Felicity has also held a research active post at Charles Darwin University focussing on data and rights, particularly in the context of violence against women and girls and the rule of law online. She coordinates the indigenous justice stream of the legal clinic, lectures in advanced crime and evidence, has a grant funded project on women's health & rights and is Chair of the Research and Research Training Committee in the School of Law. Her research on global human trafficking law recently enabled her to assist transnationally in the case of Mary Jane Veloso who was reprieved from execution in Indonesia.

The CLANT Players, directed by Rex Wild QC **"The Shearer's Tale *R v McDermott*"**



This is the eleventh in a series of play readings presented to the CLANT's Biennial Bali Conference by the CLANT Play Readers. As usual, the purpose of the play is to entertain, amuse and expose the injustices of the law.

The play this year is based on the book, *The Shearer's Tale* by Tom Molomby SC, of the NSW Bar. The case involves the injustice of the conviction for murder of Fred McDermott in New South Wales in 1947 (and the sentence of death which followed). He was convicted of the murder of William Lavers who disappeared near Grenfell, ten years earlier in 1936. After a Royal Commission in 1951, McDermott was released from prison on the recommendation of the Royal Commissioner on the basis that his trial had miscarried. The Commissioner did not then find him *innocent*.

Fortunately for Fred, the death sentence was commuted to life imprisonment in July 1947 **[It was not hanging over his head - no pun intended - for ten years or more!]**.

In 2004, many years after McDermott's death in 1977, body parts were found near Grenfell that were satisfactorily proved to be those of Lavers. They were found at a location quite inconsistent with the Crown case at trial. A petition to the NSW CCA resulted in the posthumous acquittal of McDermott in 2013. For a good summary of the case read the report at [2013] NSWCCA 102.

Jonathon Hunyor **"Imprison me NT"**

Mandatory sentencing, mandatory alcohol treatment, indefinite detention of serious sex offenders, alcohol protection orders, paperless arrests...in old ways and new, the Northern Territory's love affair with locking people up is blooming.

This paper will look at the array of punitive laws that have been introduced in the Northern Territory to combat complex social problems, including alcohol abuse, 'anti-social behaviour', violence and sexual offending. It will examine the impact of these laws (including their disproportionate impact on Aboriginal people) and how they have shifted power within our system. It will also consider some of their economic and social costs and raise potential questions about the validity of some of the laws



Jonathon Hunyor is the Principal Legal Officer of the North Australian Aboriginal Justice Agency, a position he has held since May 2010. Previously he was the Director of Legal Services at the Australian Human Rights Commission in Sydney and before that a lawyer with the Central Land Council in Alice Springs and a lawyer with the NT Legal Aid Commission in Darwin. Jonathon has published articles in academic and professional journals on a range of topics including criminal law, refugee law, coronial law, native title, discrimination and human rights.

Helena Blundell

"CURING JUSTICE – It's harder than it looks! Solomon Islands: Law and Justice Developments and Challenges – Post RAMSI"

A very brief history of the Regional Assistance Mission to Solomon Islands Intervention July 2003 – July 2013 (RAMSI) including estimated costs, aims and achievements.

Under RAMSI, there were three main civilian development programs; the Law and Justice program; the Machinery of Government program; and the Economic Governance program. These programs were shifted to bilateral aid partners on 1 July 2013 as part of 'transition'.

This presentation will provide an outline of the Law and Justice Program since July 2013 with an emphasis on the civilian programs.

The estimated costs of RAMSI were 2.6 billion dollars of which the Law and Justice Program accounted for 83% or 2.2 billion dollars – so what is there to show for this large financial investment as at December 2014?

- A local police force that remains disarmed, corrupt and dysfunctional at all levels.
- A law and Justice sector that is almost inoperative outside a very few major towns
- An understaffed and floundering judicial system
- Underperforming public legal institutions
- Poor legal professional regulation and standards
- A lack of faith by much of the population in SI's legal system
- A lack of access to basic legal and police assistance in the provinces
- A reasonably functional prison system with an ever increasing prison population
- Archaic, corrupt and inefficient land dispute mechanisms

Practical illustrative examples of the points above will be provided.

The presentation will also provide observations as to what has not been addressed and some of the reasons for this. In particular the failure to implement systemic changes at both a micro and macro level, the failure to effect changes to address the endemic corruption that undermines all aspects of SI. Some discussion about corruption both in its "pure" sense, but also the reality of ethnic bias – the wantok system. The appropriateness of Western justice models and institutions in a developing country with strong family, tribal and ethnic allegiances and a weak sense of nationhood. The failure to develop any functional system

to resolve land disputes and the role that this continues to play in the economic and social development of the country.



Helena Blundell has a Bachelor of Arts and a Bachelor of Laws awarded by the University of Queensland. She was called to the bar in 2015 and is at Edmund Barton Chambers in Darwin. Helena worked in the Solomon Islands from July 2013 to December 2014 as a Legal Advisor in the Solomon Islands Law and Justice Program. She worked for many years as a criminal barrister and solicitor with the Northern Territory Legal Aid Commission in Darwin and with the North Australian Aboriginal Legal Aid Service as a policy lawyer. She has worked as a Senior Investigation Officer for the Commonwealth Ombudsman in both Sydney and Darwin and with the Ombudsman for the Northern Territory. Helena has been a Member of the Classification Review Board. Helena also spent a number of years as an adventure tour guide in the Top End which was fun but not relevant to her legal career.

Carly Ingles

“Overflow: Why so many women in NT prisons?”

The NT jails are overflowing. And not just with men. Women prisoners are growing fast. In 2005, the Alice Springs Correctional Centre rarely housed women, and only for short periods. In 2015, the Alice Springs Correction Centre Women’s Block is at capacity. Darwin’s female prison population has exploded too. So what is happening? What offences are being committed by women? Are there any trends in offences and offenders? How is the Supreme Court handling this new development? How is ‘battered wife syndrome’ being dealt with in practice? Is Ross on Crime correct when it says *‘Generally, sentences for women are less than for men on equivalent offences’*? How is the Corrections system dealing with these women? What systemic bias exists for women who get caught in the criminal justice system, a system primarily designed to deal with male offenders? This paper approaches these questions starting with a review of women offender’s before the Supreme Court of the Northern Territory over the past 5 years, as well as the most recent jurisprudence regarding the treatment of NT women offenders. It explores where law reform may be needed, what additional services may be required, and what preventative measures might be taken.



Carly Ingles started her career in Melbourne with the Australian Government Solicitor in 2001. Her first project there was Articled Clerk Assisting the Royal Commission into the Building and Construction Industry, during which time she was admitted to practice. This was followed by some years on the commercial law team at AGS. In 2005, Carly made her desert-change to Alice Springs, working firstly as a criminal defence lawyer for the Central Australian Aboriginal Legal Aid Service, and then onto the Northern Territory Legal Aid Commission, where she is part of the Alice Springs criminal law team. Since 2007, Carly has also been a sessional visitor with the Community Visitor Program at the Central Australian Mental Health Service, and more recently, Chair of the Community Visitor Panel for the local

Alcohol Mandatory Treatment Facility.

Felicity Gerry QC

“Treating Drug Traffickers as Human Trafficked Victims”

Human trafficking is a highly lucrative industry that extends to all corners of the globe. The phrases ‘human trafficking’, ‘slavery’ and ‘forced labour’ are used interchangeably but essentially amount to exploitation for profit and power. Developed countries have become the destination for slaves plucked from source

countries and people are trafficked within their own states. These are generally the impoverished, the unempowered, the uneducated and the dispossessed and largely women and girls, particularly in the context of sexual exploitation. Combatting human exploitation makes cooperation between nations imperative.

As a result of the recent death penalty cases the focus of this presentation is on the UK, Australia and Indonesia. It is vital that we identify victims of coercion, manipulation and deception and protect them. This includes non-prosecution and non-punishment of those victims in criminal justice systems.
