

### **Professional Admissions**

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2016 Admitted in the Supreme Court of Nauru  
2015 Called to the bar in New South Wales  
2013 Admitted to the role of practitioners in High Court of Australia  
2008 Admitted as legal practitioner in Supreme Court of New South Wales

### **Education**

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2003 – 2007 Bachelor of Arts and Laws (Hons), The University of Sydney  
and The University of Leiden, The Netherlands

### **Work History**

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#### Councils and Committees

2016 to present Appointed by Attorney-General as Member of the New South  
Wales Sentencing Council

#### Law Faculty, University of New South Wales

2015 Sessional academic, "Court Process, Evidence and Proof"

#### Aboriginal Legal Service (NSW/ACT) Ltd - Western Region

2013-2014 Principal Legal Officer, Western Region  
2012-2015 Trial Advocate, Western Region  
2012 Managing Solicitor, Dubbo  
2009-2011 Solicitor, Dubbo and Broken Hill

#### Supreme Court of New South Wales

2008-2009 Tipstaff to Justice Graham Barr

#### Redfern Legal Centre

2006-2009 Volunteer legal assistant and solicitor

## **Notable Cases**

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### **Stuart v Minister for Transport [2025] NSWSC 39**

The Court found in favour of Rising Tide activist Ms Stuart, who successfully, and at very short notice, challenged the Transport Minister's excessive marine exclusion zone in Newcastle Harbour. The Court held that a Notice sought to be issued by the Minister of Transport which purported to exclude vessels and people on the waters of Newcastle Harbour was invalid because it exceeded the Minister's statutory powers. If valid, the effect of the Notice would have been to prevent lawful protest activity. The Court held that section 12 of the *Marine Safety Act 1998* (NSW) allows restrictions only when it is necessary to regulate and facilitate special events on any particular waters, not to effectively ban such a special event.

The exclusion zone contained in the Notice issued by the Minister was *ultra vires* because the effect of the Notice, was, "paradoxically, to exclude (rather than facilitate) the particular special event in relation to which the Notice was issued": at 40. The Court applied the principle of legality, which requires clear language to be used in legislation if a person is to be deprived of a fundamental right. Justice McNaughton agreed with the submissions for Ms Stuart that "because the provision impinges upon freedom of movement, freedom to gather and assemble, and criminal liability is attached to a failure to comply with a direction relating to an exclusion zone, the preferred construction [of section 12] would be one which involves the least interference with those fundamental freedoms": at [47]-[48].

The Court declared that the Notice was invalid and of no legal effect because it exceeded the powers granted under the *Marine Safety Act* and made an order in the nature of certiorari quashing the Notice. As a result of the decision, the planned Rising Tide climate protest events went ahead in Newcastle.

### **Kvelde v State of New South Wales [2023] NSWSC 1560** (led by S Free SC)

The Court considered the constitutional validity of s214A *Crimes Act 1900* (NSW), a new provision which sought to regulate conduct near or in relation to major facilities such as train stations. In particular the Court found that subsection 214A(1)(c), so far as the provision concerns the closure of part of a major facility and subs 214A(1)(d) which proscribed conduct causing a person or persons to be redirected near a major facility impermissibly infringe the implied freedom of political communication contrary to the Commonwealth Constitution.

The Court determined that environmental protests do constitute political communication on which the efficacy of electoral accountability for the exercise of legislative and executive power within the constitutionally proscribed national system of representative and responsible government depends, and that the nature of the burden is demonstrated by the impugned provisions directly targeting protest activities.

Whilst the purpose of the impugned provisions was legitimate, and they had a rational connect to that purpose of deterring disruption, the impugned provisions failed at the stage of 'reasonable necessity'. The Court found that there was an alternative that may be reasonably expected to have imposed a significantly lesser burden upon the implied freedom and still achieved Parliament's purpose to the same or a similar effect.

**Jackmain (a pseudonym) v The Queen & Anor [2020] HCATrans 149** (led by T Game SC); and **Jackmain (a pseudonym) v R [2020] NSWCCA 150; 102 NSWLR 847; 381 ALR 140; 284 A Crim R 483; 354 FLR 40** (led by K Richardson SC); **R v RB; Attorney-General (NSW) as Intervenor [2019] NSWDC 368** (counsel for the accused)

This case concerned the exclusion of evidence of false allegations of sexual assault by a complainant; the constitutional validity of s 293 *Criminal Procedure Act 1986* (NSW) which has the effect of excluding the evidence; and the scope of the trial court's power to permanently stay proceedings that amount to an "affront to justice". The trial judge refused to permanently stay the proceedings holding that the Court had no power to do so. The matter went on appeal to the CCA.

The accused faced charges of sexual assault and assault occasioning actual bodily harm following complaint made by his former partner. The accused sought to adduce evidence that the complainant had made false allegations of sexual assault on 12 previous occasions. The accused appealed from the decision of the District Court on a number of grounds, including that section 293(3) did not render the false complaint evidence inadmissible, and, in the alternative, that the exception to the application of s 293(3) contained in s 293(4)(a) applied. In the further alternative, the accused contended that s 293 was invalid. Finally, the accused submitted that, if the operation of s 293 could not be avoided, the proceeding should be permanently stayed.

The CCA dismissed the appeal, holding that the false complaint evidence fell within s 293(3), as it implied that the complainant had not taken part in sexual activity which she claimed occurred, for different reasons; and that the exception in s293(4) was not satisfied; and that s 293 was not invalid for infringing the implied limitation on State legislative power in circumstances where the Court reserved a power to stay the proceedings. The CCA refused to permanently stay the proceedings but left open a further application for a permanent stay before the trial judge.

The accused sought special leave on grounds asserting error that s293(3) *Criminal Procedure Act 1986* (NSW) rendered false complaint evidence inadmissible; error in failing to hold s 293(3) invalid; and error in failing to permanently stay the proceedings.

In refusing special leave, the High Court considered that the ground asserting error that s293(3) *Criminal Procedure Act 1986* (NSW) rendered false complaint evidence inadmissible to have some merit but refused special leave to avoid fragmentation of the criminal proceedings. The accused was ultimately acquitted at the subsequent trial in the District Court.

**Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force) [2020] NSWCA 160; 102 NSWLR 900; 283 A Crim R 197** (led by D Toomey SC); and **Commissioner of Police (NSW) v Gibson [2020] NSWSC 953**

Mr Gibson unsuccessfully sought on behalf of David Dungay's family to hold a public assembly in Sydney to protest against Aboriginal deaths in custody and demand justice for David Dungay Jnr, who had died in Long Bay Correctional Centre saying "I can't breathe" as corrective services officers restrained him. The appeal considered the statutory limitation of appeals under the *Summary Offences Act 1988* (NSW) and whether the Supreme Court had jurisdiction to entertain an application by the Commissioner of Police to prohibit a proposed public assembly in circumstances where the Commissioner was alleged not to have complied with the procedure provided for by s25(2) *Summary Offences Act 1988* (NSW). The case at first instance also involved consideration of the implied constitutional freedom of political communication and whether s 25 *Summary Offences Act 1988* (NSW) required reading down so as not to infringe the freedom.

**Commissioner of Police v Gray [2020] NSWSC 867**

The Court refused the Commissioner of Police's application against activist Taylah Gray for an order under s 25 *Summary Offences Act 1988* (NSW) prohibiting a Black Lives Matter protest in Newcastle. Adamson J held that the "importance of free speech as exemplified by public political gatherings does not need to be established. It is regarded as a hallmark of a democratic society"; and "[t]he timing of the protest is also of significance. Ms Gray's evidence is that the momentum generated by the death of George Floyd has provided an opportunity for those who wish to effect social change in Australia to make their voices heard. To deprive such groups of the opportunity to demonstrate in an authorised public assembly would inevitably lead to resentment and alienation if the public risk concerns did not warrant it."

**Raul Bassi v Commissioner of Police (NSW) [2020] NSWCA 109; (2020) 283 A Crim R 186**

Appeal allowed against decision of Supreme Court to prohibit a Black Lives Matter public assembly under the *Summary Offences Act 1988* (NSW). Declaration granted that the assembly is an authorised public assembly. Decision given minutes before tens of thousands of people marched in Sydney as part of the Black Lives Matter protest.

**BP v State of New South Wales [2019] NSWCA 223** (led by S Prince SC)

Application for leave to appeal against interim supervision orders made under the *Terrorism (High Risk Offenders) Act 2017* (NSW) revoked.

**Republic of Nauru v Batsiua [2018] NRSC 46; Criminal Case 12 of 2017** and **Republic of Nauru v Batsiua [2018] NRSC 37; Criminal Case 12 of 2017**

Defence of opposition Members of Parliament and others arising out of anti-government protest. This case concerns the right of indigent accused to a fair trial including to be legally represented at the expense of the Republic where the interests of justice require; and the necessary recourse to a permanent stay in circumstances where conduct of the government constitutes "a shameful affront to the rule of law in Nauru".

Muecke J's commission was subsequently terminated by the Republic of Nauru, the judgments overturned and the defendants were convicted by a newly installed trial judge Fatiaki CJ, following what was widely regarded as a sham trial, without legal representation.

**Cecil v Director of Public Prosecutions (Nauru); Kepae v Director of Public Prosecutions (Nauru); Jeremiah v Director of Public Prosecutions (Nauru) [2017] HCA 46** (led by B Walker SC)

Sentence appeal to the High Court of Australia from the Supreme Court of Nauru pursuant to a treaty. In upholding the appeals and quashing the sentences, the High Court confirmed the scope of an appeal against sentence by the prosecutor and the appropriate principles that apply.

**Lewis v Sergeant Riley [2017] NSWCA 272** (led by S Prince)

This case concerned statutory interpretation in relation to whether an avenue of appeal to the District Court is available from the determination of a forensic procedure application in the Local Court. Court held that the avenue of appeal to the District Court is available, in addition to an appeal to the Supreme Court. Appeal upheld.

**W4 v Detective Senior Constable Ayscough [2016] NSWSC 1106**

Appeal from a Magistrate's decision to make a forensic procedure order against a young adult, an untested registrable person. Appeal allowed. Order set aside. Matter remitted.

**JP v Director of Public Prosecutions (NSW) [2015] NSWSC 1669** (led by B Rigg SC)

This case concerned the admissibility and reliability of fingerprint evidence sought to be lead by the prosecutor of a partial print in criminal proceedings. Appeal dismissed.

**R v Joseph Baker (unreported per Huggett DCJ, NSWDC, 9.3.15)** (solicitor advocate)

Robbery in company for trial. Pre-trial admissibility argument to exclude unlawfully obtained admissions (the sole evidence capable of establishing identity at the scene). Evidence excluded as a result of findings of unlawful arrest and breaches of the protections for vulnerable persons in custody under the *LEPRA* regime. Proceedings terminated as a result.

**R v Shane Michael Knight (unreported per Lerve DCJ, NSWDC, 24.4.14)** (solicitor advocate)

Specially aggravated break, enter and commit serious indictable offence for trial. Pre-trial admissibility argument to exclude improperly obtained DNA evidence (the sole evidence of identification) as a result of numerous breaches of the forensic procedure legislation. Evidence excluded. Accused discharged as a result.

**RH v Director of Public Prosecutions (NSW) [2014] NSWCA 305** (solicitor)

This case concerned the legal presumption that a child between 10 and 14 years is not criminally responsible and the objective test required to rebut the presumption. It also dealt with the applicable appellate procedure on a finding of error and the discretion to remit a matter to the trial court. Appeal allowed. Conviction set aside. Matter not remitted for further hearing.

**Osborne v R [2014] NSWCCA 17** (solicitor)

This case concerned the setting aside of a subpoena to medical authority for personal records of Crown witnesses and whether production of documents to a court was prohibited by a secrecy provision. Interlocutory appeal allowed. Documents produced. Accused found not guilty at trial.

**McKellar v DPP [2014] NSWSC 459** (solicitor)

The case concerned whether an accused was required to be physically present in Local Court proceedings even though legally represented. Court held that a legally represented accused is present for the purpose of hearing the proceedings and may not be convicted as an absent accused in those circumstances. Appeal allowed. Conviction set aside.

**David Louie v Governor, MRRC, Silverwater Correctional Complex (unreported per Hall J, NSWSC, 7.4.14)** (solicitor)

This case concerned the detention in a correctional centre of a person ordered to be detained in a mental health facility. Habeas corpus granted.

**Bugmy v The Queen [2013] HCA 37; 249 CLR 57** (solicitor)

Appeal from a successful prosecution appeal against the inadequacy of sentence. The case concerned whether the effect of social deprivation diminishes with time and re-offending and whether sentencing courts should take into account the unique circumstances of Aboriginal offenders and the high rate of incarceration of Aboriginal Australians. Considered the Canadian Supreme Court approach to sentencing indigenous offenders in *Gladue* and *Ipeelee*. The case also concerned the principles

applicable on a Crown appeal. Appeal allowed. Crown appeal remitted (and ultimately dismissed).

***Gaudie v Local Court of New South Wales and Anor [2013] NSWSC 1425*** (solicitor)  
Appeal from Magistrate's decision refusing to disqualify himself. The case concerned comments made by the Magistrate in a national newspaper concerning the incidence of domestic violence in Aboriginal communities and the plea of not guilty rate for persons represented by the Aboriginal Legal Service. Appeal allowed. Magistrate prohibited from hearing the case on basis of apprehended bias.

***Lawson v Dunlevy [2012] NSWSC 48*** (solicitor)  
Appeal against a condition of bail requiring the accused to submit to alcohol breath-testing by police. The case concerned whether the bail condition was unlawful. Appeal allowed.

### **Inquests & Commissions of Inquiry**

*Inquest into the Deaths of Gabriella Thomas and Tafari Walton, Newcastle, 2021* (counsel for the relatives of Tafari Walton)

*Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Sept 2016 to Sept 2017* (counsel)

From September 2016 to September 2017, I appeared as counsel for the Central Australian Aboriginal Legal Aid Service (CAALAS) and for a number of individual children before the *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*. That inquiry heard from over 200 witnesses during over 10 weeks of formal public hearings as Commissioners the Hon Margaret White AO and Mr Mick Gooda inquired into the treatment of children in youth detention centres and the treatment of children in the care and protection system in the Northern Territory, systemic failings and recommendations for better systems. I worked intensively over the year of the inquiry with a team of solicitors, field officers and with community engagement to represent the interests of affected children in Central Australia.

*Inquest into the Death of Stanley Lord, Sydney, 2014* (solicitor advocate for relatives of Stanley Lord)

*Inquest into the Death of Tony Prince, Dubbo, 2013* (solicitor advocate for relatives of Tony Prince)

*Inquest into the Death of Mark Mason, Dubbo, 2013* (solicitor at Aboriginal Legal Service instructing Ms Dina Yehia SC, as her Honour then was)

### **Podcast, Papers & Publications**

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#### *The Wigs*

A monthly podcast featuring practising barristers interrogating contemporary legal issues in and out of the court room.

Available at: <https://diamantina.com.au/portfolio-item/the-wigs/> or any podcast application.

#### *Papers & Publications*

Many of Felicity's papers and publications are available at [www.criminalcpd.net.au](http://www.criminalcpd.net.au).

A list of Felicity's papers and publications is available on the Black Chambers website.