

Documents relating to the  
conviction of Susan Neill-Fraser  
tabled by M. Gaffney MLC  
15 NOV 2022

WICKERS  
ALCIENE



I ACCUSE (I'ACCUSE to quote Emile Zola in 1898) the Law Society of Tasmania of failing, or refusing, to examine specific details I provided on September 27th, which establish that Mrs Neill-Fraser's conviction for murder should have been overturned because of the mistakes & omissions of a number of Tasmanian Legal Practitioners.

Then President, Simon Gates, in a Mercury article on August 23<sup>rd</sup> expressed concern that sustained criticisms risk "undermining public confidence in our criminal justice system", stressed that people should "consider the evidence as a whole" and ended with the wish that "all Tasmanians have access to adequate legal representation when they encounter the justice system."

I fully support these views of the Society of which I was a proud member for most of the years since my Admission to the Bar in 1967. For some of those years I voluntarily paid to remain a member. My experience included being a Crown Law Officer for over 30 years, signing thousands of Indictments, prosecuting 100's of trials including about 30 murder trials & High Court appearances.

As requested by Simon, I have read the entire 1,550 page trial transcript, the 2012 Appeal Court decision, the 18 page High Court transcript, the 544 para November 2021 Appeal Court decision, the decision of Justice Brett & several other things; several more than once.

I challenge the Law Society who voluntarily entered this debate to show me that I am wrong or have the courage to say that they agree with me. They have left it to Simon to communicate with me. All I can get from him is that he has a lot of things to read & has "peeked" at my, 9 page, letter. Simon worried about wasted millions on a Commission of Inquiry. Law Society examination should cost nothing. My letter set out everything in an easy-to-follow manner. As I have said to Simon & the Executive Director-if they can show that I am wrong, I'll be delighted & sleep easier.

A summary of my letter (which I am happy to supply in full) is that:-

1 Problems arose from the outset because of the failure of the DPP, Mr Ellis, to fulfill his obligation to disclose 3, potentially decisive, pieces of evidence:-

A) That FSST had an electropherogram of the area of Ms Vass's DNA sample [Item 20] which showed "an unambiguous single source", "no significant evidence of stochastic variation", high "allele peak heights" & "molecular weight loci" & that the deposit was strongly inconsistent with a touch scenario.

B) That forensic scientist, Carl Grosser, who was called as a witness, had told a Detective that Item 20 was unlikely to be a walked on sample, &

C) That Ms Vass was on 26/01/2009 living at Mara House, a Colony 47 residence in Forster St, New Town for females under 20 & was shown in their records as has having informed them that she was staying the night at "Sam's place", giving an address in Mt Nelson, which address Police had found non-existent.

Mr Ellis clearly seems to have failed this duty because of a strong belief that the issue was irrelevant & that accordingly he'd not looked into it. At p.608 he said he'd asked Mr Gunson "if this is in issue?" & having been told that the defence wanted called Ms Vass, who had refused to make a statement, he said he would, but went on to say "there's no reason to think she's able to provide an explanation (for her DNA being on the boat), frankly, you know, she could have spat, someone walked on it & it came off their shoes".

In his Closing Address p.1408 in 2 of about 30 references to "red herrings" he said very forcibly- "Meaghan Vass a red herring, a red herring; should not have been, I suggest, pursued".

He also claimed that the DNA sample could have been transferred on the foot of a person who had "acquired it anywhere in Hobart."

Mr Ellis, the Judge & Mr Gunson seemed to have been unaware that the evidence of Forensic Scientist, Ms D. McHoul p.672 that sample 20 was 260mm x 210mm meant that it was about 26 x 21 cm or 10 1/4 x 8 1/4 inches; the width of an A4 sheet of paper & much wider than any footprint.

The above facts including the opinions that it could not be a "walked on" sample & the fact that if you have something under your shoe it just does not just walk onto just one spot led to a new DPP in the 2021 proceedings abandoning the "walked on" theory so strongly put by Mr Ellis for a 'might have trespassed on the boat' theory. That, if correct, meant that Ms Vass committed perjury.

Bizarrely, much of the evidence in C) came out in cross-examination but then Mr Ellis successfully objected to it being led through cross examination of the Detective notwithstanding that it was admissible through anybody who had seen the Mara record; a copy of which I suggest should have been in the Crown court Papers. The Judge then directed the jury to ignore that evidence.

The Judge even added p.766 (in the jury's absence) "it all sounds very intriguing but I don't see a great deal of relevance at this point if it were established that Meghan Vass was at a particular place in the metropolitan area on the night in question or that she was not at a particular place...on the night in question."

I remind my legal colleagues that we are talking of this very large bodily fluid deposit at a murder scene the evening of which Ms Vass claimed to not remember, but which coincided with this potential signpost of the non-existent Mt Nelson address.

And, Simon referred all to the decision of Wood J in late 2021.

I refer him to these passages from her judgement:-

-para 84-the prosecution has a duty to the Court to disclose all material relevant to an accused's defence, it can include an obligation to make enquiries...& it may extend to material known to the Police but not known to the prosecutor,

- at para 80 she quoted from Sir Garfield Barwick in Ratten's case- Defence Counsel is entitled to assume that the prosecution will disclose relevant evidence & material.

Judge Pearce @ para 522 added- "compliance with the prosecution duty of full disclosure is a fundamentally important aspect of a fair criminal trial."

2. The Judge told the jury just after lunch at p.1530 of his Summing Up that stretched from p 1491-1532 – "Now if Meaghan Vass was homeless in the northern suburbs one of the possibilities that I'd suggest you ought to be considering is whether she'd spat-it's not a delicate subject, but had urinated or something like that somewhere where a Policeman had trodden & then that officer had walked onto the deck or got into the car & driven to the boat & walked onto the deck. Is it possible that that's the mechanism by which her DNA got there & that she wasn't there?"

A quick check reveals scientific facts such as "urine does contain small amounts of DNA but not nearly as much as saliva" & "DNA "deteriorates more quickly in urine making it difficult to extract."

The Judge also erred on a less fundamental issue re her being homeless in the "northern suburbs." As above she was living in a Colony 47 residence in Forster St, New Town.

3. The 3<sup>rd</sup> matter that should have led to the conviction being overturned was the flagrant incompetence of her Counsel, Mr D. Gunson. Flagrant incompetence is a very high bar. It was breached & a re-trial ordered in the Victorian case of Knowles [1984] VR 751 where the Defence Counsel failed to call an ex-husband & an ex-boyfriend in the murder trial because of his mistaken belief that their evidence of the dead woman's aggressive & violent behaviour when drunk was inadmissible. I set out examples from this trial:-

- i) Not taking the opportunity, in this trial, to accept the standard offer, made in 2 FSST reports to visit by arrangement & discuss the issues with the scientists,
- ii) Failing to establish in cross examination that a "walked on" sample was very unlikely,
- iii) Failing to cross examine Megan Vass as to the names of her companions, associates, people who sometimes gave her transport in early 2009 & of the young male who accompanied her to Court,
- iv) Not exploring with Police whether DNA samples had been sought from such people & checked against several DNA samples on the boat from unknown people,
- v) In a cross examination that lasted only about 2 minutes, being nasty to Ms Vass about an irrelevant matter that opened the door for Mr Ellis to blacken Mrs Neill-Fraser's case with the jury, saying in his Closing Address:-
  - "we've had Meaghan Vass a 16 year old homeless girl, bullied & chased around by Mr Gunson",
  - "treated ferociously, treated ferociously..." &
  - "why was this girl pursued? Why was she bullied & argued with so ferociously?"
- vi) Having thus put his client in this position of possible intense dislike by jurors, saying nothing in his subsequent Address by way of apology, or absolving the accused for his attack on Ms Vass,
- vii) Failing to object to evidence inadmissible in re-examination that Ms Vass had told a detective she "believed she may have been hanging around the Goodwood area" [vicinity of Police Marine].
- viii) Failing to ensure that the evidence in 1C) was before the jury. Someone who had read it could have been called, or the record could have been produced but I expect that Mr Ellis would have co-operated with a Statement of Agreed Facts as often happens these days.
- ix) Failing to request that Ms Vass be recalled following the evidence in vii) being heard by the jury. And as to the evidence in 1 C). I strongly believe that Mr Ellis would have fulfilled his obligation to recall her but if he did not then Mr Gunson should have called her, relying on Police to serve a Summons, and then savagely attacked the prosecution in his Closing Address for a fundamental breach of an Australian justice principle which the Judge must surely have supported.
- x) Failing to refer in his Closing Address to Ms McHoul's evidence of the size of the DNA sample. He said there was a "significant amount of DNA" but the 26 x 21 cm or 10.25 x 8.25 inches diameter seemed to be beyond him. Its size surely required something like vomiting or substantial bleeding.
- xi) Failing to refer in his Closing Address to the evidence of the deceased's sister, Mrs Sanchez, who stayed with them regularly & was doing so at the time that "they seemed supportive & devoted," particularly after Mr Ellis had made forceful references to the ending of the relationship.
- xii) Failing to mention in his Closing the sorrow & stress his client may well be suffering due to the loss of her partner & the real culprit being undetected,
- xiii) Failing to call evidence from family &/or friends of the close &/or loving relationship that has oft since been claimed, particularly after the Crown had called several witnesses to the contrary,
- xiv) Failing to check as to urine DNA & then request the Judge to recall the jury & correct his error, And, although I don't purport to know the details-
- xv) Apparently agreeing that a jury inspection of the boat was unwarranted.

In her extensive 2021 Judgment to which Simon Gates referred us all, Wood J made a series of excuses for some of Mr Gunson's failings: -

Para 207 - he "was very experienced & would have been alert to secondary transfer",

Para 210 - "there may have been a tactical reason why this general probing & exploration of the DNA profile was not done",

Para 210- "the strategy may have been not to seek additional information in case it brought to the prosecution's attention evidence unfavourable to the defence",

Para 210- it may have been thought that resources were not warranted (as the report was helpful),

& Para 216-his decision to decline the Judge's offer to delay his cross examination of Mr Grosser (so he could check re transmission evidence) "may have been because of a strategic advantage in

appearing to the jury to be unfazed by new evidence & being seen to be robust".  
I suggest that Mr Gunson, who I appeared against in several trials, the man who loved to say "I enjoy pulling the wings off butterflies," was simply out of his depth.

4. The injustice caused by the above serious errors should have ended at the 2011 Appeal.  
Why didn't her Appeal lawyers raise the above failures of prosecutorial disclosure obligations & Mr Gunson's incompetence?

They Appealed several aspects of the Judge's Summing Up but why not my point 2?  
Each of these 3 mistakes alone were, I suggest, sufficient to overturn the conviction.  
Did they read the whole transcript? They certainly should have.  
I suggest that they should also have gone to FSST & found the electropherogram.

5. Yet another Tasmanian lawyer, now a member of State Cabinet, brought the 2012 Application to the High Court for special leave to Appeal. Let's get clear what that & the 2022 hearing involved.  
Each was before 2 Judges, took minutes only & concluded with them ruling that no point of law had been raised that was worthy of consideration by the Full Court.

I direct the same questions to her. Did she thoroughly read & consider all the transcript?  
Surely lodging a murder Appeal, especially to the High Court, requires great diligence.  
The Tasmanian Appeal Court has power to itself add Appeal points & sometimes does. The Court was aware of the paucity of the questioning of Ms Vass, Chief Justice Crawford noting in 2012 at para 87 that neither Counsel asked anything of her concerning whether she had been in the vicinity of Marieville Esplanade on 26<sup>th</sup> January or any other day & at para 99 that neither had she been asked as to any knowledge of what happened on the boat.  
The Court dealt with an explicit Appeal point as to an application by Mr Gunson to have the Judge recall Ms Vass. At para 95 they said this application was unclear & at 96 that the clear law was that a Judge had no such power.

So, the basis for claiming that the Court should itself have raised incompetence was there.

As the Law Society said, the jury "considered all the evidence adduced." But the inconvenient truth is the jury were not adjudicating a trial run according to the high standards required. 2021 dealt with "fresh & compelling" evidence issues. The above failures were never fully before the Courts.

The Attorney General has informed me that "Tasmania & Australia's highest courts have now considered Mrs Neill-Fraser's case in great detail." As regards the High Court that is, as above, false.  
The Tasmanian Appeal Court has twice spent a lot of time on it but as clearly set out above the failures by lawyers in both Appeals from 2010 meant these errors were never fully considered.  
I suggest that Mrs Neill-Fraser has effectively been in a Catch 22 situation. The evidence that was not before the Court in 2010 was available but not presented to the jury. It was clearly significant but not raised by her Appellate lawyers. She was in 2021 constrained by those inactions.  
And, then there's the matter of the Judge's scientifically incorrect, uncorrected, statement.

These types of issues are unknown to many lawyers, let alone the general public.  
If I'm correct surely the legal profession, particularly those involved in litigation in Tasmania well into the 21<sup>st</sup> Century must speak up for justice as did Emile Zola for Alfred Dreyfus & the Britons who secured Timothy Evans a Royal Pardon in the 1960's about 20 years after his execution.

I've done the ground work. I challenge the Law Society who want confidence in our legal system & all members of our profession- show me where I'm wrong or show fortitude & stand up for justice in our Tasmania by notifying your agreement.

Tony Jacobs, Hobart. November 9<sup>th</sup> 2022; jacobshobart@bigpond.com

MG

The Executive Director,  
The Law Society of Tasmania,  
Dear Luke,

Re Sue Neill-Fraser

I write following the "Talking Point" article by your President, Simon Gates on August 23<sup>rd</sup>. As you may know, I did briefly discuss this with Simon by telephone. I promised him details. I have done what Simon requests-read all 1550 pages of the trial transcript, read the decision of the 2012 Appeal Court, read the 18 page in total, 7/9/2012 High Court hearing & decision, read Mr Justice Brett's decision, read the total 544 para, November 2021 decision & other materials. Quite a few of these I've read more than once. Simon said that the jury found that based on the evidence as a whole there was no rational hypothesis consistent with innocence. But that verdict was based on what they heard & were told.

I suggest that 5 serious matters never before raised show that her conviction in October 2010 should have been immediately overturned. They are:-

1. A misstatement of scientific fact made by the trial Judge on a very serious & pertinent issue toward the conclusion of his Summing Up to the Jury,
2. Flagrant incompetence by the Defence Counsel, Mr D. Gunson,
3. Failure by the prosecution to disclose significant evidence,
4. The failure of the Solicitor(s) lodging her 2011 Appeal to raise these issues, &
5. The failure of the Solicitor lodging her 2012 High Court Appeal to raise these issues & to raise the failure of the Tasmanian Appeal Court in 2012 (TASCCA 2) to, of its own motion, raise these issues.

Further, but relatively brief, details on these matters are:-

1.a) The Judge told the jury just after lunch at p.1530, in a Summing Up that stretched from p.1491-1532- "Now if Megan Vass was homeless in the northern suburbs one of the possibilities that I'd suggest you ought to be considering is whether she'd spat-it's not a delicate subject, but had urinated or something like that somewhere where a Policeman had trodden & then that officer had walked onto the deck or got into the car & driven to the boat & walked onto the deck, is it possible that that's the mechanism by which her DNA got there & that she wasn't there."

b) A quick check reveals scientific facts such as "urine does contain small amounts of DNA but not nearly as much as saliva" & that DNA "deteriorates more quickly in urine making it difficult to extract"

c) On January 30<sup>th</sup> 2009, Ms D. McHoul, an experienced scientist from FSST had visited the boat from which the deceased disappeared late on January 26<sup>th</sup> or early on 27<sup>th</sup>. She took numerous samples, many of which, but possibly not all, were later scientifically analyzed. DNA from Mr Chappell (the deceased) was located at multiple sites. DNA from an unknown person, titled "E" (item 20) was also located.

c) i) I note in passing that Ms McHoul seems not to have said at what time on the 30<sup>th</sup> she collected the samples. From my experience, it was likely to have been morning, meaning the time gap referred to considerably in the 2021 hearing was likely to have been about 3 ½ days (3 days + 4 nights); more than the 48 hours after which Mr Jones apparently said that DNA can start to deteriorate but less than the 4 days apparently suggested by the Crown.

d) Carl Grosser, Forensic Scientist said, p.700-1 that there were other DNA samples collected from at least 3 unknown male contributors.

e) On March 15<sup>th</sup> 2010 Ms Megan Vass was arrested for alleged stealing. Her DNA was taken. It matched deposit E.

f) Ms McHoul said of this deposit (pp. 670-2) that it was "about ½ way along the boat"; ' 9.45m from the for'ard end & 9.4m from the bow & on the starboard walkway about 250mm from the rail; that it tested positive for luminol (presence of some blood)', that she circled it & that it was "slightly smaller than 260 x 210 millimeters"

g) That is 26 x 21 centimeters or (for my generation) 10.236 x 8.268 inches; that is the width of an A4 sheet of paper -much wider than any Police Officer's foot wear.

h) The deposit was described by Carl Grosser the analyzing scientist p. 693 as "possibly a large amount of DNA." At p.769 with the jury absent he was quoted as saying it was indicative of "a relatively large amount of DNA which is more likely to come from bodily fluids, blood, saliva, than from a simple contact touching event." He also said 696-7 "I don't think that I've come across DNA that I've known categorically to be carried from from one place to another through spittle or something on the ground." He also made the obvious point that it was possible [& why we are wary for our carpets if there is a dog].

i) The Prosecutor, Mr Ellis, had scoffed at this issue calling it one of 2 big "red herrings" but he certainly did not suggest anything like the Judge did. He described Ms Vass p. 1407 as "bullied & chased around" by Mr Gunson "all because some of her DNA was found in one spot on 4 winds, one spot, one spot only...a 16 y.o. treated ferociously... but the whole thing is such a red herring because (anyone walking on the yacht) could have acquired that anywhere in Hobart". At p.1408 he said "when you're desperate anything will do...(she) suggested "false trails of investigation...Ms Vass, a red herring, a red herring should not have been pursued"

j) Mr Gunson had said pp 1449-1451- the DNA was right near the boat entry point, (thus) logically she was on board & you cannot exclude that as a rational hypothesis; there was a significant amount of DNA; M Vass left it, transference is not credible/not a plausible explanation; more likely she was there with some other(s); you can rationalize a confrontation.

k) The same Judge, now Chief Justice, dealt with a somewhat analogous issue of mistaken fact in the case of Smart [2013 TASCCA 15].  
The deceased had been killed by kicks to his head & by stomping on his head. There were several shoe imprints on his face traceable to the Etnies brand shoes worn by the co-accused, Gardner. And there was one imprint not traceable to Mr Gardner's shoes.  
Mr Gardner's shoes had been seized; Mr Smart's were never located.

l) The prosecutor (me) in the Closing Address had said that the footprint expert had said that this other mark was not consistent with an Etnies shoe. Defence Counsel Mr (now Judge) S. Escourt told the jury that this was not correct & that the witness had said -"that impression could have been made by an Etnie shoe of an unknown size."  
Mr Escourt had read the transcript passage to the jury & referred them to their own copies of it. The Judge had told the jury that Mr Escourt said it had been misstated & said "You remember that & you have got the transcript about this & I don't need to remind you about it."

m) Blow CJ said, para 63 "A miscarriage of justice will occur in such a situation if it is reasonably possible that the misstatement of the evidence might affect the jury's verdict...the

misrepresentation was corrected by Defence Counsel. The jury was given the transcript. They heard the evidence ... All of those facts suggest that there was no reasonable risk that the misrepresentation might have affected the verdict."

He continued para 64- "However we have concluded that the jury ought have entertained a reasonable doubt (re murder). We therefore cannot rule out the possibility that the prosecutor's misrepresentation might have caused or contributed to the verdict... the evidence of the mark on the right cheek was critical...His Honour erred by failing to correct the misstatement, & that may have had an impact on the verdict. We therefore consider that there was a miscarriage of justice."

n) The Judge also factually erred by referring to Ms Vass as being homeless "in the northern suburbs." The clear evidence was that she was then living in Forster St, New Town which is in the Hobart Municipality & about 5 k's from the Police boat yard at Goodwood.

2A. Flagrant incompetence by Defence Counsel is a very high level that, if reached, as Lord Lane of the English Court of Appeal said in R v Ensor 1989, will cause an Appeal Court to "intervene." But that Court did not intervene saying, inter alia, "generally speaking this Court will always proceed upon the basis that what Counsel does is done with the authority of the client..." and "Counsel's carefully considered decision not to apply to sever the charges, even if erroneous, cannot possibly be described as incompetent, let alone flagrantly incompetent advocacy." In Victoria, in R v Miletic [1997] 1 VLR 593. It was held, p.598, that whilst the Courts are "extremely cautious" & cannot lay down "any precise formula", an Appellate Court will intervene "if it is satisfied that something occurred at the trial which has led to a miscarriage of justice. It may be that the material before the Court will demonstrate that there has been such defect of judgement or neglect of duty on the part of trial Counsel that the Court on Appeal is left with the view that justice has miscarried."

In the 1999 case of R v Paddon the Q'ld Appeal Court said you need something in the way of "flagrant incompetence which deprived the accused of a significant possibility of acquittal."

In a later Q'ld case R v McCormick [2000] QCA 522, these 4 points were outlined-

- i) Incompetence the only inference available & compelled by the circumstances,
- ii) Obvious, shocking ineptitude needed, not just an error of judgement, "something in the conduct of the defence which could never be thought by a competent Counsel in the circumstances of the trial to be of any possible advantage to the accused,"
- iii) The decision to adduce evidence which could be advantageous (does) not suffice, &
- iv) Appellants should seek affidavits of support from Solicitor &/or Counsel.

The High Court has said that a forensic decision by Counsel during a trial is not sufficient "if the course taken is explicable on the basis that it could have resulted in a forensic advantage unless that advantage is slight in comparison with the disadvantage resulting from the course in question." TKWJ v R (2002) 212 CLR 124.

The Supreme Court of Victoria did order a retrial in the case of the murder conviction in R v Knowles [1984] VR 751. Because of the failure by the Defence Counsel to call as witnesses both an ex-husband & an ex-partner of the deceased lady as to her becoming aggressive & violent after consuming alcohol. Counsel had incorrectly considered the evidence inadmissible.

At p.771 the Court said Counsel's fundamental error meant "evidence fundamental to (his) defence was not called & that this in the circumstances of this case brought about a miscarriage of justice."

2B. Here Mr Gunson was apparently both Solicitor & Counsel; not unusual in Tasmania.

I don't point to just one action or inaction, but to the combined effect of many. Some of these

were clear after the trial in 2010, others became clear after the 2021 Appeal decision, particularly in the decision of Wood J which outlines much of the available evidence.

Her Honour makes excuses for Mr Gunson's inaction on several occasions:

- para 207, he "was very experienced & would have been alert to secondary transfer",
- para 210, "there may have been a tactical reason why this general probing & exploration of the DNA profile was not done" &
- "the strategy may have been not to seek additional information in case it brought to the prosecution's attention evidence unfavourable to the defence",
- it may have been thought that resources were not warranted (as report helpful to defence), &
- para 21,6 his decision to decline an offer by the Judge to delay his cross-examination of Mr Grosser (so he could check re transmission evidence) may have been because of a strategic advantage in appearing to the jury to be unfazed by new evidence & being seen to be robust. I suggest that he was simply out of his depth.

2C. I've seen him slow to comprehend unusual issues. One such case was R V Brown, about 1990 a murder trial about 15 years after the event which was the first DNA case in Australia, the DNA analysis having been done in England.

He left the DNA issues solely to his junior.

We had no case without the DNA evidence & I outlined it in my Opening. He never seemed to be able to comprehend that if that evidence was excluded by the Judge, that I'd then file a Nolle Prosequi so there was no harm in my opening on it. He kept loudly interrupting, leading to the jury coming to & fro several times

He certainly had a vengeful streak & any Legal Practitioner raising these issues would surely have had a lifetime foe with considerable influence who "like(d) pulling the wings off butterflies."

If he was appearing against me I'd normally warn civilian witnesses to not be surprised by a nasty personal attack & told them that the vast majority of Defence Counsel were not like that.

2D. I particularise these matters:-

i) Not taking the opportunity to accept the standard offer, twice made in FSST reports, to visit by arrangement & discuss with scientists. The words used included " full notes (including photos) & details of test methods & results of examinations & tests are available to Defence Counsel...FSST provides an impartial service & Defence counsel are encouraged..."

Normally Defence Counsel do not take up this offer but here we had a wholly circumstantial murder trial where suddenly in March 2010 a DNA sample is matched to someone & that someone is refusing to speak to Police or make a statement.

And, where there are 3 unmatched male DNA samples.

The scientists had given evidence at preliminary proceedings but Mr Gunson had not explored such issues.

Mr Max Jones, a Victorian Forensic Scientist did visit FSST in 2014 & found the very strong evidence that was there for Mr Gunson in 2010 - that there was an electropherogram of area 20 (the Vass DNA) which showed "an unambiguous single source"... "no significant evidence of stochastic variation," high "allele peak heights" & "molecular weight loci."

And, that this was "strongly inconsistent" with a "touch" scenario.

Please recall the prosecution submissions & Judge's comments @ cl 1 (a & i).

This was the alleged "fresh" evidence in the 2021 Appeal. Wood J reviewed it (paras 196-203), said that this possibly very significant evidence should have been disclosed but Held that it was not fresh evidence because Mr Gunson could with reasonable diligence have discovered & adduced it.

And, during the trial, Mr Gunson could have requested a visit, particularly pertinent after

undisclosed opinions of Mr Grosser had come out in cross examination of Detective Sinnitt,  
 ii) Failing to establish in cross examination that a DNA sample walked onto a site is likely to be present at multiple places whereas only one detection of Ms Vass' DNA was found on the boat,  
 iii) Not cross- examining Megan Vass about her companions, friends, associates & activities in early 2009 including who at times gave her transport.

I attach her complete evidence pp.633-636. Amazingly only 2 ¼ pages of cross-examination. Ms Vass DOB 14/10/93 was 15 on 26/01/09 & "homeless."

It was disclosed that she was then residing at Mara House, Forster St, New Town run by Colony 47. She could be away for a night but had to advise her alternative address.

I know from a teaching source that she previously lived & attended school in the Channel area, south of Hobart. Police evidence included that she had made, but not kept, an appointment to attend with her mother.

I attended about 15 minutes of her questioning in the March 2021 Appeal. I think I'm correct in saying that each answer was the screamed words "I told you I don't fucking remember."

I left bored & disgusted.

That is the obvious reason why, as referenced by Simon, her Counsel told the Court that he no longer sought to rely on her evidence.

I can assure you that very few civilians want to be witnesses; some become very upset &/or hostile but nearly all do their honest best once in the witness box despite their nerves, etc. As Mr Gunson put in his Closing Address (I j) above), a companion, & an altercation on the yacht with Mr Chappell was a possibility.

She very likely had companions, friends, etc. Evidence (see below-2D viii), given after Ms Vass) was that she'd given a Mt Nelson address for the night of January 26<sup>th</sup>.

I understand that a rough looking man brought her to Court & sat in. Why not ask her his name? Having got those names, he could have asked Police if they'd sought their DNA samples, if not, why not & request an urgent effort to do so.

And, asking her as to drug or alcohol usage by she & such companions.

iv) Not questioning the alleged details of the alleged stealing that led to her arrest & the DNA sample. Was she alone? Was it from a shop/ from a residence/from a vehicle/from a boat?

v) Being unnecessarily nasty to Ms Vass. And, about a completely irrelevant issue.

Ms Vass gave evidence firstly with the jury absent. This is common when there is no statement & enables the Defence to know the witnesses evidence in advance.

Then she said she was "pretty sure" she was staying then at Annie Kenny, Montrose. With the jury back she said (p 634 l42) she was "pretty sure" it was at Stainforth Court. It didn't matter. Chief Justice E.Crawford noted in the 2012 Appeal para 84 that the questioning was unfair as she'd added both times "I can't really remember".

In fact it seems that she was then living at Mara House a woman's shelter for under 20's in Forster St, New Town but had told them she was staying the night @ Mt Nelson.

This attack was used an excuse by Mr Ellis not to later recall Ms Vass at Mr Gunson's request & enabled Mr Ellis to blacken Ms Neill-Fraser's case with the jury by saying in his Closing Address:-

- "we've had Meaghan Vass, a 16 year old homeless girl, bullied & chased around by Mr Gunson"

- "treated ferociously, treated ferociously..." &

- "why was this girl pursued? Why was she bullied & argued with so fiercely?"

vi) Having thus put his client, in this position of possible intense dislike by jurors, saying nothing in his Closing Address by way of apology or absolving Mrs Neill-Fraser for his attack on Ms Vass.

vii) His failure to object to new and possibly inadmissible heresay evidence elicited from Detective Sinnitt in re-examination-p 824, that Ms Vass had told him she "believed she may have been hanging around the Goodwood area [the vicinity of the secured Police marine facility to

where the boat was moved at least 2 days later] at the time of Mr Chappell's disappearance." The evidence may have been admissible under S.66 of the Evidence Act which allows evidence of a representation if that person has been, or is to be, called to give evidence. However I suggest that it was not admissible in re-examination as it did not arise from cross-examination.

And, clearly there seems not to have been the required notification. See 3B & C (below).

Mr Gunson made no reference to this but Mr Ellis did in his Closing & the trial Judge @1528 recounted evidence of Ms Vass "hanging around the Goodwood area"

viii) His failure to ensure that evidence was before the jury that Ms Vass had told officials at Mara House that she'd be spending January 26<sup>th</sup> 2009 at a non existent address in Mt Nelson. Bizarrely, this evidence was obtained from Detective Sinnitt in cross examination but the Judge later ruled that it breached S. 48 (1) (e) (ii) of the (Uniform) Evidence Act, being inadmissible heresay because the Detective had only an e-mail from Mara House quoting their diary. He directed the jury to ignore that evidence.

Anybody who had read the diary could have given the evidence. As set out in the principles below, a simple request to Mr Ellis should have ensured that that evidence was before the Court. A witness may have been needed but a simple "Agreed Statement of Facts" [a common thing these day] should have sufficed.

I find it hard to think that Mr Ellis would not have obliged but if he did not then Mr Gunson should have called the evidence himself & made a very, very strong submission to the jury in his address about legal propriety & justice-see cl 3B.

ix) After that evidence he should have demanded the recall of Ms Vass as to where she was & with whom on this night when she'd said she intended to stay in Mt Nelson.

And again, if the Crown did not act appropriately, he should have called Ms Vass himself & slammed Mr Ellis in his Closing for breaching fundamental rules of Australian justice.

But I refer to the below details 3B&C re prosecutorial obligation & find it hard to believe that Mr Ellis would not have done so.

Upon her being called she could have been asked the questions re possibly walking on DNA that he'd sought to do @ p.763 after Mr Grosser's evidence.

x) Failing to call evidence from family &/or friends of the close &/or loving relationship between the accused & deceased that has been oft since claimed on tv or in the press, after the Crown had called several witnesses to the contrary.

xi) Failing to refer in his Closing to the evidence of her sister-in-law, Mrs Sanchez from Ecuador @ p.250 that they seemed supportive & devoted. She regularly stayed with them & was at that time. Mr Ellis made forceful references to the alleged end of the relationship & the trial Judge at 1516 referred to the evidence of 3 witnesses that "the relationship was over". At 1518 he attributed to Mrs Sanchez -that the relationship "did not seem to involve any evident hostility."

xii) Failing to mention in his Closing Address the sorrow that his client may well have been suffering since the loss of her partner & that the fact that the real culprit was free.

xiii) Failing to mention in his Closing Address the evidence of the large size of the sample- see 1g). He did say, 1449, that there was "a significant amount of DNA". He said the scientists couldn't say if it was from skin, sweat or spittle.

It's size surely necessitated something like vomiting or substantial bleeding.

And possibly, although I don't pretend to know the details,-

xiii) Apparently agreeing that a jury inspection of the yacht was not warranted.

3A. My experience is relevant to this ground & to this document.

In the late 60's I defended several people in North West & Western Tas Magistrates Courts.

I've been an observer at parts of several trials at the Old Bailey, in several US States & in other Australian States.

I've attended 13 International Law Conferences including 3 of the American Criminology Society & one of the English Criminology Society, several Australian Criminal Law Conferences & Australian Prosecutor's Conferences.

I was a Tasmanian Crown Law Officer for over 30 years, signing probably well over a 1,000 Indictments & prosecuting hundreds of trials including about 30 murder trials (some of which were re-trials following hung juries or convictions being overturned on Appeal).

I appeared before the High Court 6 times, twice in significant matters.

As you may well know I was a member of the Society for most of the years from my Admission in 1967 until I retired in 2020. I chose to voluntarily pay to be a Society member although working at Crown Law.

I had absolutely nothing to do with this matter at the Crown, knowing only what was in the news although I was aware of the cross examination of Ms Vass for a long time & did openly say that I thought incompetence had occurred.

I've had no contact with Mrs Neill-Fraser's support group & don't believe I know any of them.

3B. I've been long aware of a prosecutor's responsibilities. I considered them effectively to be always fair & reasonable.

So, if there was a statement to hand that seemed irrelevant, you nevertheless put it in the Papers & sounded out the Defence Counsel but only called that witness if the Defence wished it.

Sometimes I'd recall a witness because I'd forgotten to ask something or because something not asked now seemed relevant.

Occasionally the Defence would ask me to recall a witness. I always did so without question. I don't think this was ever initiated in open Court. My learned friend for the defence simply asked me.

Occasionally the Defence would ask me to call a person who I'd not heard of in connection with the trial. I'd always question such person & call him/her unless I believed them to be untruthful.

If declining to call such evidence I'd always tell the Judge in Court that if the Defence called that person I would not exercise my right to then give my Final Address after the Defence Counsel.

These days there is a booklet- "Prosecution Policy & Guidelines." I attach 6 pages- PD 1-6.

Note please @ top of 2<sup>nd</sup> page "the primary obligation on a prosecutor is one of fairness", &

-mid 3<sup>rd</sup> page, from Boucher's case as to "all available proof of facts", &

--from 6<sup>th</sup> page re "duty to call all witnesses...necessary for presentation of the whole picture."

In her November 2021 decision Wood J @ para 84 said 'the prosecution has a duty to the Court to disclose all material relevant to an accused's defence, it can include an obligation to make enquiries' & "it may extend to material known to Police but not known to the prosecutor."

At para 79, Her Honour quoted R v Keogh [2014] SASFC - "highlighting the great trust that jurors have in prosecution counsel & forensic science experts."

She continued to quote "I have no doubt that the jurors would have gained the firm impression that they were being told that they could confidentially apply such evidence to the case before them..."

&, para 80 referred to former Australian C J, Sir Garfield Barwick in Ratten's case- "there is an obligation on the prosecution to disclose all relevant evidence to the accused & that there is no obligation on an accused to seek out (such information)." In fact that "Counsel is entitled to assume that the prosecution will disclose to the defence relevant evidence & material..."

In his 2021 decision Pearce J, para 522, said "compliance with the prosecution duty of full disclosure

is a fundamentally important aspect of a fair criminal trial.”

At 1514 the Judge told the jury “the Crown has to bring to Court all the evidence & present it, even if it doesn’t fit in nicely with it’s contentions.”

3C. Here there were, in my opinion, 4 significant things not disclosed, for the simple reason that Mr Ellis did not know about them.

The 1<sup>st</sup> is the above evidence re the electropherogram, see 2D i). This was surely major evidence which, apart from anything else, destroyed Mr Ellis’ strong claims of someone walking the deposit & of anything else being a red-herring.

The 2<sup>nd</sup> is the evidence about the, apparently false, Mt Nelson address & it’s pinpointing of that day. The 3<sup>rd</sup> is the evidence @ 2D vii) re Ms Vass (possibly hanging around Goodwood).

The 4<sup>th</sup> is the fact that Mr Grosser in a conversation with Detective Sinnitt had given details that suggested that E20 was unlikely a walked on sample. Mr Gunson did get part of this evidence before the Court through cross examination of the Detective.

But the jury never heard all the known 2<sup>nd</sup> or 3<sup>rd</sup> (above) evidence nor, of course, the electropherogram evidence.

These failings surely constituted a mistrial.

3D. Associated with both points 2, 3, 4 & 5 was the strange request of Mr Gunson, p763. He said “I would like to make 2 applications to Your Honour” -to recall Megan Vass & Carl Grosser.

As above, it is for the Crown to call it’s witnesses & the Judge only has a role if a party seeks to recall one of it’s witnesses when the Judge’s leave is needed. Mr Ellis did recall a Mr Balding.

As Crawford CJ said in the 2012 Appeal Court decision, para 95, it was unclear what Mr Gunson was seeking.

He continued, para 96 to set out the clear law as set out by the High Court in 1984 in Apostlides’ case, that the Judge has no power to direct a witness be called.

Maybe Mr Gunson just did not know this. Maybe by then things had got nasty between he & Mr Ellis In, & out of, Court & Mr Gunson just tried his luck.

As set out in 2D ix) Mr Gunson could & should have made a request to Mr Ellis (if necessary in open Court) after the evidence re Ms Vass’s possible presence in Goodwood -2D vii).

4. I don’t need to say much here. All these facts apart from the electropherogram were available to the Solicitors lodging the 2011Tasmanian Appeal.

Didn’t they read all the transcript? They certainly should have.

They appealed about several aspects of the Summing Up. What about my point 1?

Why didn’t they raise Mr Gunson’s incompetence & the stark failures of prosecutorial disclosure obligations?

5. Another Legal Practitioner, now a Minister of the Crown, launched the High Court Appeal.

I direct the above questions to her also. Did she thoroughly read, & consider, all the transcript?

The Tasmanian Appeal Court has the power to, and has on occasions, added a ground of appeal on its own motion. The Court was aware of the paucity of the questioning of Ms Vass, the Chief Justice noting @ para 87 that neither Counsel asked anything of her concerning whether she had been in the vicinity of Marieville Esplanade on 26<sup>th</sup> January or any other day & at para 99 that neither was she asked as to any knowledge of what happened on the boat.

The Court dealt with an explicit appeal point as to the prosecutor’s failure to recall Ms Vass or the Judge’s failure to direct. At para 95 they made clear that Mr Gunson’s recall application was unclear before going on in 96 to state the clear law that Judge’s can’t so do.

So a basis for claiming that the Court should have raised incompetence was there.

6. Simon Gates made the point that so many Judges had been involved. Fair enough but I suggest that Mrs Neill-Fraser was met with a Catch 22 situation whichever way she turned after the trial. Crennan J for the High Court after very brief proceedings (about ¼ of an hour) said, p.18, that special leave was sought to Appeal from the prosecutor's failure to recall Ms Vass & continued that it was "not shown that she'd been denied an opportunity to produce evidence on a point of substance which can be shown to have had a significant possibility of affecting the jury's verdict. Accordingly leave is refused". See above as to what could have been done.

After State Parliament, commendably, passed a law allowing "fresh" evidence she was blocked because Mr Gunson had not taken the chance to check as to matters with FSST.

After Mr Ellis' strongly put claims of DNA being walked claims, backed up by the Judge, as above, were effectively destroyed by fuller FSST & DNA evidence, the new DPP pressed in the 2021 hearing, the possibility of Ms Vass having later being on the boat based, it seems, on the brief evidence above @ 2D vii). Evidence which I suggest was wrongly admitted without objection & should, if admitted have clearly warranted the recall of Ms Vass who must, then, have committed perjury. But Mr Gunson did nothing & Ms Neill-Fraser again was locked in by the errors from 2010.

7. In conclusion I note that after reading this year the November 2021 Appeal decision I undertook a much wider reading of the various transcripts & decisions. I concentrated solely on the legal issues not things I know little about like boats. As above, I had no connection with the case at the Crown & do not know any of Mrs Neill-Fraser's support group.

Now the Tas Law Society of which I was proud to be a long term member has asked people to look at all the facts. I challenge the Society to now have a suitably qualified person or persons read this, check my document thoroughly & then speak up.

If they can show that I'm wrong, I'll be delighted & relieved. I've extensively quoted references so the time & cost should not be great. If I'm correct then surely the Society will want to say so.

I'm in a position very much not of my choosing. Obviously with my background I have an interest. I would have been very happy to find that all was just & above board. It clearly was not, and is not. I feel that I have a strong moral obligation to speak up.

I read that she is soon to be paroled. That should not alter the need for a thorough enquiry, at least into the above legal aspects.

Simon said he was worried about the undermining of confidence in our criminal justice system. I don't want that, but things like that were said in the Northern Territory after the Chamberlain verdict & in the UK re Timothy Evans.

Timothy was long dead from execution when he received his Royal Pardon in 1966. Surely Tasmania can do better in this 3<sup>rd</sup> decade of the 2<sup>nd</sup> century of our nation.

Savagely scrutinize my words but if you cannot fault them, please speak up to help correct this injustice, the product of members of our Tasmanian legal family.



Tony Jacobs, 176 Brisbane St, W Hobart 27/09/2022

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P.S. I'm a 1 finger semi computer- ignorant person & apologize for a few setting out errors.

# Neil-Fraser supporters risk undermining

ON August 12, 2022 the High Court of Australia rejected Susan Neil-Fraser's application for Special Leave to appeal the Tasmanian Court of Criminal Appeal's decision not to allow a retrial.

As a general rule, the Law Society does not comment on individual cases. However, where sustained criticism of the judiciary, the prosecution and the police investigation risks undermining public confidence in our criminal justice system, as has occurred in this case, the Law Society

**Sustained criticism of our criminal justice system over the handling of the Susan Neil-Fraser case is unhelpful and a waste of money, writes Simon Gates**

feels compelled to comment. Ms Neil-Fraser's case, or aspects of it, have now been considered by five High Court judges, eight Tasmanian Supreme Court judges and 12 of Ms Neil-Fraser's peers, comprising the jury at the original trial. These 12 were considered all of the evidence adduced at the trial and each were satisfied beyond reasonable doubt that Ms Neil-Fraser's guilt was the only rational conclusion which was open on the whole of the evidence that they accepted as fact.



**Susan Neil-Fraser.**

New legislation was also enacted by parliament, which allowed Ms Neil-Fraser a further opportunity to put fresh and compelling evidence

before the Supreme Court and to seek a retrial. Ms Neil-Fraser availed herself of that legislation and appealed to the Court of Criminal Appeal. That appeal was dismissed by a majority of two out of three judges.

Notably, during the appeal hearing Ms Neil-Fraser's own barrister informed the Court that Ms Neil-Fraser no longer sought to rely on the evidence of Ms Megan Vass given during that hearing, contending that it would not help Ms Neil-Fraser's case.

It is vital that those commenting on the case consider the evidence as a whole - as the jury did, and not just small aspects of it. This will help ensure that any criticism of the case and the criminal justice system is made from an informed position.

A summary of the evidence is contained in Justice Wood's judgment in the 2021 Court of Criminal Appeal decision (<https://www.austlii.edu.au/au/other/austrlii/au/cas/ctas/ctas21/202112.html>) and

# confidence in legal system

the March 6, 2012 Court of Criminal Appeal decision, which is also publicly available on [www.austlii.edu.au](http://www.austlii.edu.au). Much of the evidence considered by the jury has seldom, if ever, been mentioned in recent public commentary on the case.

One of the errors that is often made by those commenting on the case is to assume that if doubt can be cast on one or more pieces of evidence, that therefore means there has been injustice. However, as the Trial Judge told the jury on October 14,

2010:

"The commission of a crime may be proved beyond reasonable doubt by circumstantial evidence provided that:

(A) All the facts and circumstances from which the conclusion of guilt is drawn must be established to the satisfaction of the jury; and

(B) The jury must be satisfied beyond reasonable doubt that the conclusion of guilt is the only rational conclusion which is open on the whole of the evidence that the jury accepts."

The jury found that based on the evidence as a whole there was no rational hypothesis consistent with Ms Neil-Fraser's innocence. It is not enough that people speculate about other possible theories or explanations. Any such hypotheses must be considered in the context of the evidence as a whole. I note the call by Ms Neil-Fraser's supporters for a commission of inquiry. I strongly urge anyone considering supporting such a

call to consider all of the evidence presented at the trial and of the history of this case before the courts. The millions of dollars that would be spent on a commission of inquiry into this case could be spent bolstering Tasmania's insufficient legal aid budget and ensuring that all Tasmanians have access to adequate legal representation when they encounter the justice system.

**Simon Gates is the president of the Law Society of Tasmania.**

Attorney-General  
Minister for Justice  
Minister for Corrections  
Minister for Workplace Safety and Consumer Affairs  
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24 JAN 2022

A. R. Jacobs

Email: [jacobshobart@bigpond.com](mailto:jacobshobart@bigpond.com)

Dear Mr Jacobs

Thank you for your recent email regarding Ms Susan Neill-Fraser.

As you would be aware, the separation of powers is an important cornerstone of our system of government. It is critical that Tasmanian courts hear and decide cases, independent of and without influence from the government of the day. Similarly, the Director of Public Prosecutions exercises his or her functions independent of and without influence from the government of the day.

Ms Neill-Fraser is still represented by her own solicitors and by counsel. It would not be appropriate for me, as Attorney-General, to interfere in or usurp the role of her experienced legal team.

I am sure you will recall that it was our Government who amended the *Criminal Code Act 1924* to allow for a further application to the Court of Criminal Appeal should Ms Neill-Fraser, or her legal team, consider that there is further evidence that is 'fresh and compelling.' These existing legal processes are available to Ms Neill-Fraser and mean that a Commission of Inquiry is not needed nor justified.

Importantly, I note Ms Neill-Fraser has recently made application for special leave to appeal her murder conviction in the High Court. This is also an available next avenue in the legal proceeding, rather than an Inquiry.

For these reasons, and whilst legal proceedings are on foot, it would not be appropriate for me to comment on the specifics of Ms Neill-Fraser's conviction, or engage in any other commentary on the matter.

Yours sincerely

Hon Elise Archer MP  
Attorney-General  
Minister for Justice



Attorney-General  
Minister for Justice  
Minister for Corrections and Rehabilitation  
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13 OCT 2022

Tony Jacobs  
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By email: [jacobshobart@bigpond.com](mailto:jacobshobart@bigpond.com)

Dear Mr Jacobs

Thank you for your letter dated 28 September 2022.

I acknowledge that since our last correspondence, Ms Neill-Fraser has unsuccessfully appealed her murder conviction in the High Court.

Tasmania and Australia's highest courts have each now considered Ms Neill-Fraser's case in great detail.

As you would be aware, it is important that the courts' decisions be respected as a cornerstone of our justice system. To not do so would undermine the rule of law and the judiciary.

Yours sincerely



Hon Elise Archer MP  
Attorney-General  
Minister for Justice

