

# Judicial Officers' Bulletin

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## Lighting the way forward: respect, responsibility, engagement, diversity, local solutions

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Judicial officers and Aboriginal community members gathered together over the weekend of 16–17 May 2009 for the “Exchanging Ideas” conference, organised by the Judicial Commission’s Ngara Yura Committee.<sup>1</sup> Presenters included the Governor, the Chief Justice of New South Wales, judicial officers and Aboriginal community members. Participants shared stories, enjoyed Aboriginal culture, socialised, and discussed their concerns about Indigenous policy, and social and legal issues.



*The Governor of NSW, her Excellency Professor Marie Bashir AC CVO, with (l-r) the Honourable Justice James Allsop, President of the NSW Court of Appeal, the Honourable Wayne Martin, Chief Justice of Western Australia, his Honour Judge Stephen Norrish QC, Chair, Ngara Yura Committee and Mr Ernie Schmatt PSM, Chief Executive, Judicial Commission of NSW.*

## Introduction

Local elder Kevin Cavanagh, CEO of the Deerubbin Local Aboriginal Land Council, Welcomes to Country the 80 delegates in attendance for the “Exchanging ideas” conference. Officially opening the conference, the Governor of New South

Wales, her Excellency Professor Marie Bashir AC CVO, says that the conference is of international and national importance. Professor Bashir observes that the eyes of the world are on Australia’s treatment of Aboriginal people and when travelling

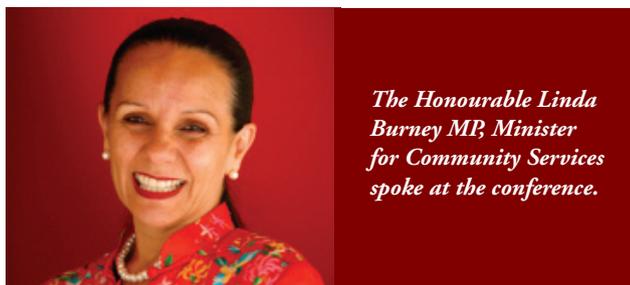


abroad in her official capacity, she is always asked about Indigenous people. The Western Australian Chief Justice, the Honourable Wayne Martin, and the Honourable Stephen Kaye of the Victorian Supreme Court, have travelled interstate to attend. The Governor considers that the weekend gathering “has the potential to light a way forward” in the reconciliation process.

### Information about policy areas: health, education, community services

Lighting a way forward from the consequences of dispossession, alienation and racism will happen in diverse ways. Elders and speakers at the conference agree with the Governor that the focus needs to shift from “what is” (bleakly demonstrated in the crime statistics presented by Dr Don Weatherburn of the Bureau of Crime Statistics and Research) to finding local solutions for local problems. The diversity of Aboriginal people, with over 500 different tribal groups in Australia,<sup>2</sup> alone suggests that the paradigm of a top-down, one-sized fits all approach to problem solving does not work.

The Governor notes that in the key areas of health and education there have been some improvements in recent years. More young Indigenous people are participating in and finishing school. In 2007, Saint Andrew’s Cathedral School opened the Gawura Campus, a dedicated Indigenous school which in 2009 has 39 enrolments and is a brilliant success story.<sup>3</sup> The Indigenous birth rate is rising and more people are identifying as Indigenous. While the overall health picture for Indigenous people is appalling, and the gap between life expectancy for non-Indigenous and Indigenous people remains wider than other equivalent countries (New Zealand, Canada and the United States), some improvements in health outcomes have been noted in a recent Commonwealth government report.<sup>4</sup>



*The Honourable Linda Burney MP, Minister for Community Services spoke at the conference.*

The Honourable Linda Burney, NSW Minister for Community Services, discusses some of the measures the Department of Community Services is taking in response to the Wood inquiry into the State’s child protection system.<sup>5</sup> The government is planning to involve community members in decision making about Aboriginal children, rather than government agencies, following a successful Victorian model. Ms Burney notes that in formulating government policy, the way forward lies in building partnership between communities and government. Both the Minister and Jody Broun, Director

General of the NSW Department of Aboriginal Affairs, agree that the most effective approach for government is to focus on community initiatives which develop over a long period of time and the local people driving them. Ms Burney recommends that delegates read the *Koori Mail*,<sup>6</sup> the fortnightly national Indigenous newspaper which is “full of good news stories”.

Finding local solutions for local problems is the subject of the conference’s keynote address. Professor Larissa Behrendt and senior research fellow Ruth McCausland of the Jumbunna Indigenous House of Learning at the University of Technology outline their study of two remote communities at Wilcannia and Menindee and the factors contributing to their contrasting crime rates.<sup>7</sup> Menindee has a far lower crime rate than Wilcannia, even though the two communities are similar demographically and geographically. The study aims to identify whether any particular characteristics or strategies have had a positive impact on crime rates. Based on interviews with community members, the study has identified various factors which contribute to Menindee’s lower crime rate including better employment prospects; a better sense of community pride; good community relationships; and community policing as opposed to the over-presence of police in Wilcannia. Many ideas for reducing crime have emerged from the study including the provision of drying out shelters and non-alcohol focussed social outlets; mentoring and traineeships for high school students; local skills and training programmes; and non-custodial sentencing options that magistrates can refer offenders to. The results of the study will be published on the Jumbunna Indigenous House of Learning’s website in due course.<sup>8</sup>

### Cross-cultural understanding

One of the conference’s objectives is to promote cross-cultural understanding.<sup>9</sup> Sustaining Aboriginal culture, “the world’s oldest living continuous culture”,<sup>10</sup> should be seen as integral to the way forward, says Lydia Miller, Executive Director of the Aboriginal and Torres Strait Islander Arts Board. Ms Miller offers Patrick Dodson’s definition of traditional culture and customary law as “an all encompassing



*Thulli Dreaming Dancers entertained the delegates with a traditional welcome dance and respect dance. The dancers are pictured with his Honour Judge Stephen Norrish QC, Mr Ernie Schmatt PSM, Ms Tammy Wright, Aboriginal Project Officer at the Judicial Commission.*

reality". The Indigenous arts and crafts industry is one of Australia's fastest growing export earning sectors. It benefits Australia nationally and contributes economic, social and cultural capital back into Aboriginal communities. In 2007, a Senate report into the sustainability of the Indigenous arts and crafts sector acknowledged the sector's crucial role in promoting economic growth and prosperity amidst poverty and economic disadvantage.<sup>11</sup>

The impact of poverty and disadvantage is personalised by the inspiring Roy Ah-See. Roy tells us about his childhood, growing up on the Nanima Reserve near Wellington in rural New South Wales, one of eight children to a single mother.



*Two inspiring speakers: Mr Roy Ah-See, councillor on the NSW Aboriginal Land Council and the Honourable JJ Spigelman AC, Chief Justice of NSW.*

He recalls fighting with his brothers for the last two Weetbixes in a box full of mice and cockroach faeces. He speaks movingly about how the lack of a loving father figure has affected his relationships. Like many unemployed Indigenous youth, Roy turned to alcohol and drugs to combat boredom ("I didn't know that men are supposed to get a job") and had brushes with the law. Roy states that his life turned around "when I started taking responsibility for myself and stopped feeling sorry for myself". He has now been "seven years clean", is a father of four, and a leader and positive role model in his community, serving as an elected councillor for the Sydney Newcastle Region on the NSW Aboriginal Land Council. In 2008, Roy was nominated to present a paper in New York to the United Nations 7th Session of the Permanent Forum on Indigenous Issues. Roy emphasises the need for positive male

role models and mentors for young Indigenous men, something he desperately lacked as a young man.

The power and impact of Indigenous leadership is illustrated by the Chief Justice of New South Wales, the Honourable JJ Spigelman AC, in his conference dinner address. The Chief Justice speaks of his involvement with the Freedom Ride of 1965, led by the late and great Indigenous leader, Charles Perkins. The Chief Justice, then a student at Sydney University, was part of the Student Action for Aborigines group which organised a bus tour of rural New South Wales. The tour drew both Australia's and the world's attention to the plight of Aboriginal people and the discrimination and racism endemic in these towns and had a seismic effect on the public's consciousness.<sup>12</sup> The Chief Justice recalls the hostility they encountered culminating in a convoy of cars running their bus off the road outside Walgett. Throughout the tour, Charles Perkins steadfastly led the group to confront segregation and racism in the towns and he retained a prominent leadership role for the rest of his life. The Chief Justice laments Charles Perkins' premature death in 2000, noting his many achievements in public life notwithstanding his serious health problems.

### Judicial discretion, values and attitudes

"The problem with the law" observes District Court judge John Nicholson SC, "is that it looks backwards". Criminal law doesn't light the way forward: it represents the end of the line for Indigenous offenders who have invariably experienced social and economic disadvantage. Some judicial officers express concern that in their sentencing task, the exercise of their discretion may take into account an Indigenous offender's disadvantaged background, but this must be synthesised with many other competing relevant considerations.<sup>13</sup> Justice Peter Hidden is concerned that when sentencing Indigenous offenders, the courts "are losing sight of the wisdom of *Fernando*". In the 1992 decision of *R v Fernando*,<sup>14</sup> Wood J set out eight principles which acknowledged the particular disadvantage suffered by Aborigines by reason of their socio-economic circumstances. Subsequent decisions of the Court of Criminal Appeal have refined their application. In *R v Ah-See*<sup>15</sup> for example, the court held that the mitigating effect of being an Aboriginal person loses much of its force where the offender has committed similar serious offences in the past. In *R v Newman*, the court held that the *Fernando* principles must be understood in their context: "It is not every case of



*Delegates exchanging ideas include District Court judge John Nicholson SC, Dr Bob Morgan, academic and Chair of the Darkinjung Aboriginal Lands Council, Ms Lydia Miller, Executive Director of the Aboriginal and Torres Strait Islander Arts Board and her Honour Magistrate Pat O'Shane AM.*

deprivation and disadvantage suffered by an offender of Aboriginal race or ancestry that requires, or even justifies, the special approach adopted in that case.”<sup>16</sup> Justice Hidden notes that the recommendations of the Royal Commission into Aboriginal Deaths in Custody have not been fully implemented. Justice Hidden also submits that there is a need to develop general principles of sentencing to recognise the historical and current circumstances of disadvantage, dispossession, discrimination and disempowerment of Indigenous people.

As has often been observed, the purposes of sentencing point in different directions.<sup>17</sup> This paradox is explored by Professor Chris Cunneen of the University of New South Wales who questions whether the traditional goals of sentencing enunciated in s 3 of the *Crimes (Sentencing Procedure) Act 1999* have much purchase for Indigenous people. Professor Cunneen suggests that the efficacy of “deterrence” is compromised by the fact that familiarity with incarceration stretches back several generations. He questions whether “retribution” can work as a legitimate sentencing goal if incarceration lacks moral authority for Indigenous offenders and given that imprisonment has not solved problems of offending in Aboriginal communities. High rates of reoffending and limited resources to fund programmes indicate that “rehabilitation” as a workable sentencing goal is seriously flawed. Professor Cunneen discusses his work with the Murri Courts in Queensland which provide an opportunity for judicial engagement with Aboriginal communities and where traditional sentencing goals are being achieved through different processes.

A lack of resources also compromises the principle that imprisonment is a sanction of last resort.<sup>18</sup> John McKenzie, principal legal officer for the Aboriginal Legal Service (NSW/ACT) discusses the chronic lack of community-based sentencing options in regional and remote New South Wales.<sup>19</sup> Proportionally, more Aboriginal people live outside the major metropolitan areas than in the cities in New South Wales.<sup>20</sup> In regional and remote areas of the State, there are significantly fewer community-based sentencing options for the courts to utilise than in the major centres.<sup>21</sup> Research conducted by the Bureau of Crime Statistics and Research last year found that while offenders in regional and remote areas are not treated more harshly than their metropolitan counterparts, the study suggested that the courts may be compensating for the lack of community-based sentencing options by being more sparing in their use of imprisonment.<sup>22</sup> John McKenzie points to anecdotal evidence that rural magistrates would not send a particular offender to prison if there were a suitable non-custodial option.

Father Frank Brennan AO agrees that unless dedicated resources provide effective alternatives to custody, the rhetoric is empty:

“With limited resources, our jurisprudence of sentencing will sound very hollow, no matter how attuned we be to Aboriginal perspectives on politics, history, emotional stress and all its causes. Your judicial independence demands

that you consider all factors including the political and historical before you invoke prison as the last resort. The judicial system will retain only the legitimacy accorded it by the tireless leaders like Percy Neal<sup>23</sup> being able to look back and declare that they were given a fair go.”

An important initiative emerging in the wake of the Royal Commission into Aboriginal Deaths in Custody has been the growth of specialist Indigenous courts in all State local court jurisdictions except for Tasmania.<sup>24</sup> While the courts differ procedurally from State to State, common features are the participation of Elders in the sentencing process and the provision of cultural information to the sentencing magistrate. Magistrates Doug Dick and Kate Auty observe that the circle courts provide a process for connection by Aboriginal people with the legal system previously denied them, and are a way for judicial officers to engage with Indigenous people and their communities. An Australian Institute of Criminology study in 2004 concluded that Indigenous courts have the capacity to “change the attitudes of judicial officers, other legal officials and Indigenous participants ... and may indeed be signalling the way of the future”.<sup>25</sup> While a 2008 Bureau of Crime Statistics and Research study found that circle sentencing has not reduced recidivism,<sup>26</sup> Magistrate Kate Auty responds that a statistical analysis of the effectiveness of circle sentencing misses the point.<sup>27</sup> Circle courts promote engagement and community development and Kate Auty gives a moving illustration of a young woman who had passed through the Circle Court process in Western Australia who honoured the orders made as a result, and gained enough confidence in the system to engage it to assist her in relation to other personal problems. The process had engendered in her a new respect for a system for which Aboriginal people hold little respect.

As circle courts have shown, engaging with Indigenous people will lead to a transformation of judicial values and attitudes. Dr Bob Morgan, Chair of the Darkinjung Local Aboriginal Lands Council, emphasises that cultural awareness alone will not change judicial attitudes and that for Aboriginal people, looking to the future is the path to progress, not dwelling on the past. Dr Morgan suggests that judicial officers follow the Canadian experience where judges live in Indigenous communities for a time and participate in ceremony.

## Conclusion

The Judicial Commission gratefully acknowledges the support of the National Judicial College of Australia which provided financial support for the weekend. The hard work of the Ngara Yura Committee and other officers of the Judicial Commission are also gratefully acknowledged.

Selected papers presented at the conference will be made available through the Judicial Information Research System (JIRS).<sup>28</sup> The Ngara Yura Committee is committed to developing and disseminating the many positive ideas to “light the way forward” which have emerged from the conference.

## Exchanging ideas

Many ideas “to light the way forward” were articulated over the course of the weekend by delegates. Some of these include:

- The availability of field officers and local elders in mainstream court proceedings.
- The need for judicial officers to have access to local information about non-custodial sentencing options and Aboriginal community organisations.
- Affirmative action is required for Indigenous lawyers to be appointed to the bench.
- Judicial officers consider the escalating impact of fines.
- Judicial officers consider the impact of licence cancellations on offenders living in remote and regional areas.
- The need to place greater emphasis on healing rather than punishment.
- Greater involvement of Aboriginal people in all aspects of the justice system, law enforcement and corrections.

Some practical ideas when judicial officers are in court include:

- Consider a Welcome to Country at the beginning of court session. This should be undertaken by a senior member of the local Aboriginal community.
- Consider an Acknowledgement of Country at the commencement of the court session. For example, the judicial officer can say: “I would like to show my respect and acknowledge the Traditional Custodians of the Land, of Elders past and present, on which this court sits.”
- Consider appropriate communication when dealing with Aboriginal parties: see the article by Dr Diana Eades, “Communicating with Aboriginal people in NSW” (2008) 20 *Judicial Officers’ Bulletin* 85.



*Ms Tammy Wright, Aboriginal Project Officer at the Judicial Commission of NSW.*



*Professor Larissa Behrendt, Director of Research, Jumbunna Indigenous House of Learning, University of Technology Sydney, presenting the keynote address.*



*The Ngara Yura Committee with her Excellency, the Governor of NSW, (l-r) his Honour Magistrate Doug Dick, her Honour Judge Helen Syme, his Honour Judge Stephen Norrish QC (Chair), Mr Ernie Schmatt PSM, his Honour Judge John Nicholson SC, Mr Terry Chenery, Ms Ruth Windeler.*



*Aboriginal actor and dancer Matt Shields and Tammy Wright perform extracts from a play by Richard Frankland "Conversations with the Dead". Richard, a filmmaker, musician, writer and activist, was an investigator with the Royal Commission into Aboriginal Deaths in Custody. This play explores the effect the Royal Commission investigations had on him.*

## Endnotes

- 1 The Ngara Yura Committee members are his Honour Judge Stephen Norrish QC (Chair), his Honour Judge John Nicholson SC, her Honour Judge Helen Syme, his Honour Magistrate Doug Dick, Mr Ernest Schmatt PSM, Chief Executive, Judicial Commission of NSW, Ms Ruth Windeler, Education Director, Judicial Commission of NSW, Mr Terry Chenery, Director, Legal, Land and Culture, NSW Department of Aboriginal Affairs, Ms Megan Davis, Director, Indigenous Law Centre. Ms Tammy Wright is the Aboriginal Project Officer at the Judicial Commission.
- 2 European Network for Indigenous Australian Rights, "History and Heritage", at <http://www.eniar.org/history.html>, accessed 21 May 2009.
- 3 For information about this privately funded programme, see <http://www.abmission.org/programs/indigenous/indigenousecondaryscholarships>.
- 4 For example, there were declines in infant mortality and deaths from circulatory disease: Australian Institute of Health and Welfare, "Aboriginal and Torres Strait Islander health performance framework 2008 report: detailed analyses", at <http://www.aihw.gov.au/publications/index.cfm/title/10664>, accessed 20 May 2009.
- 5 The Hon J Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in New South Wales*, 2008, at <http://www.dpc.nsw.gov.au/publications/news/stories/?a=33796>, accessed 20 May 2009.
- 6 at <http://www.koorimail.com/>.
- 7 L Behrendt and R McCausland, "Wilcannia – Menindee Same Peoples, Different Worlds: lessons for understanding Aboriginal communities", Keynote Address presented at the Judicial Commission Ngara Yura conference, Exchanging Ideas, Parramatta, 16 May 2009.
- 8 at <http://www.jumbunna.uts.edu.au/research/index.html>.
- 9 In accordance with Recommendation 96 of the Royal Commission into Aboriginal Deaths in Custody, 1991.
- 10 P Dodson, "Address to ACTU Congress 2003", at <http://jmm.aaa.net.au/articles/11950.htm>, accessed 21 May 2009.
- 11 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Indigenous Art, *Securing the Future: Australia's Indigenous visual arts and craft sector*, 2007, at [http://www.aph.gov.au/SENATE/committee/ecita\\_cttel/completed\\_inquiries/2004-07/indigenous\\_arts/report/report.pdf](http://www.aph.gov.au/SENATE/committee/ecita_cttel/completed_inquiries/2004-07/indigenous_arts/report/report.pdf), accessed 21 May 2009, p 1.
- 12 For a brief history, see "Freedom Ride, 1965", at <http://indigenousrights.net.au/section.asp?sID=33>, accessed 27 May 2009.
- 13 *Weininger v The Queen* (2003) 212 CLR 629 at [24].
- 14 (1992) 76 A Crim R 58 at 62–63.
- 15 [2004] NSWCCA 202 at [21].
- 16 [2004] NSWCCA 102 per Howie J at [61]. See also *R v Hickey* (NSWCCA, unrep, 27/9/94); *R v Stone* (1995) 84 A Crim R 218 at 221–223; *R v Ceissman* [2001] NSWCCA 73 at [29]–[33]; *R v Pitt* [2001] NSWCCA 156 at [19]–[21]; *R v Morgan* (2003) 57 NSWLR 533. See also NSW Law Reform Commission, *Sentencing: Aboriginal Offenders*, 2000, Sydney and M Flynn, "Fernando and the sentencing of Indigenous offenders", (2004) 16 *Judicial Officers' Bulletin* 67.
- 17 *Veen v The Queen* (No 2) (1988) 164 CLR 465 at 476.
- 18 Section 5(1) *Crimes (Sentencing Procedure) Act* 1999 (NSW); Recommendation 92 of the *Royal Commission Into Aboriginal Deaths in Custody*, 1991.
- 19 For example, periodic detention, home detention, community service orders, good behaviour bonds (supervised and unsupervised), and conditional dismissal of charges and fines.
- 20 1.5% of Sydney's population is Indigenous whereas 3.4% of the regional population is Indigenous: 2006 Census, at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3238.0.55.001Jun%202006?OpenDocument>, accessed 27 May 2009.
- 21 Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations*, NSW Parliament, 2006, Sydney.
- 22 L Snowball, "Does a lack of alternatives to custody increase the risk of a prison sentence?", (2008) 111 *Crime and Justice Bulletin*, Bureau of Crime Statistics and Research.
- 23 *Neal v The Queen* (1982) 149 CLR 305.
- 24 For a good summary, see A Hennessy, "Indigenous Sentencing Practices in Australia", paper presented at the International Society for Reform of the Criminal Law Conference, Brisbane, July 2006 at <http://archive.sclqld.org.au/judgepub/International%20society%20for%20Reform%20of%20the%20Criminal%20Law%20Conference.pdf>, accessed 21 May 2009.
- 25 E Marchetti and K Daly, "Indigenous Courts and Justice Practices in Australia" (2004) 277 *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology.
- 26 J Fitzgerald, "Does circle sentencing reduce Aboriginal offending?" (2008) 115 *Crime and Justice Bulletin*, Bureau of Crime Statistics and Research.
- 27 Following the publication of the BOCSAR study, Dr Don Weatherburn urged the State Government to strengthen its commitment to resourcing the circle courts: "Circle Sentencing Evaluation", Media Release, 16 July 2008, at [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_mr\\_cjb115](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb115), accessed 21 May 2009.
- 28 at <http://jirs.jc.nsw.gov.au/>.