DEADLY CONNECTIONS
COMMUNITY AND JUSTICE SERVICES

Submission to the Australian Law Reform Commission on the Review of Judicial Impartiality

5 July 2021

Deadly Connections Community and Justice Services Limited
PO Box 6166,
Marrickville South NSW 2204
W: www.deadlyconnections.org.au

About Deadly Connections

Who we are

Deadly Connections Community & Justice Services (Deadly Connections) was established in September 2018 as a specialist Aboriginal Community Led Not For Profit Organisation. This was in response to direct community concerns around the lack of culturally responsive, community driven, grass roots, innovative solutions to address the over-representation of First Nations people, families and communities in both the child protection and justice systems.

Our Truth

First Nations people of Australia are grossly over-represented in the child protection and justice systems. This involvement perpetuates a cycle of intergenerational grief, loss, trauma and disadvantage. True lived experience, culture, healing, self-determination and a deep community connection must be the heart and soul of all work with First Nations people and communities.

Our Purpose

Deadly Connections positively disrupts intergenerational disadvantage, grief, loss, trauma by providing holistic, culturally responsive interventions and services to First Nations people and communities, particularly those who have been impacted by the child protection and/or justice systems.

Our Vision

To break cycles of disadvantage, trauma, child protection and justice involvement so First Nations people of Australia can thrive not just survive.

Our Work

- We place culture, healing, true lived experience, deep community connections and self-determination at the centre of all we do;
- We embody and embed holistic, community-based, decolonising approaches to connecting First Nations people to their cultural, inner and community strength; and
- We advocate and collaborate to improve justice and child protection systems.

Our Approach

- Life Course – we recognise the connections across all stages and domains in life, intervention and change can occur at any stage of a person's life span
- Decolonising – we challenge the dominance, values and methods of imposed colonial systems, practices and beliefs
- Self-Determination – Aboriginal people, families and communities are experts of their own lives, with solutions to the challenges we face and their own agents for change
- Healing Centred Engagement – a holistic healing model that adopts culture, spirituality, community action and collective healing.

Contact

Carly Stanley – CEO and Founder
Deadly Connections Community and Justice Services
E: carly@deadlyconnections.org.au

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Recommendations

In response to the consultation proposals and consultation questions:

CONSULTATION PROPOSAL 18

Each Commonwealth court (excluding the High Court) should circulate annually a list of core judicial education courses or other training that judges are encouraged to attend at specified stages of their judicial career, and ensure sufficient time is set aside for judges to attend them. Core courses in the early stages of every judicial career should comprehensively cover (i) the psychology of decision-making, (ii) diversity, intersectionality, and comprehensive cultural competency, and, specifically (iii) cultural competency in relation to Aboriginal and Torres Strait Islander peoples.

We support this proposal. To strengthen its intention, we suggest that the High Court should be included in its scope given that it adjudicates on significant issues concerning and affecting First Nations communities and rights. We further propose there should be ***ongoing*** *training and it should encompass 'the psychology and* ***implicit bias in decision making'****. In relation to the latter, this training should give special attention to unconscious biases arising from the social/cultural standpoint of the judicial officer.*

CONSULTATION QUESTION 19

What more should be done to map, coordinate, monitor, and develop ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, and to ensure that the specific needs of each Commonwealth court are met? Which bodies should be involved in this process?

A First Nations Advisory Committee within the Federal Court should be established to oversee this work (for similar examples within NSW see the Ngara Yura Program of the NSW Judicial Commission). The mapping and evaluation should be conducted in collaboration with First Nations organisations who specialise in professional cultural competence training in the justice sector, such as Deadly Connections and We Al-li. This Advisory Committee should also work to broadly incorporate cultural competency programs within the federal judiciary.

CONSULTATION QUESTION 21 What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?

Public litigation funding should be available to provide for appeals for First Nations people who perceive racial bias in their federal court hearing. This includes where there is implicit bias such as the reliance on stereotypes or adverse assumptions because the person belongs to a First Nations community.

To build trust, a First Nations Advisory Committee should be set up within the Federal Court (see response to Qn 19) to propose a program of engagement with First Nations communities and organisations and cultural competency training. The advisory committee should include key First Nations justice organisations, such as Deadly Connections, the National Aboriginal and Torres Strait Islander Legal Services, First Peoples Disability Network, SNAICC, National Family Violence Prevention Legal Service and the National Native Title Council.

CONSULTATION QUESTION 25 What other data relevant to judicial impartiality and bias (if any) should the Commonwealth courts, or other bodies, collect, and for what purposes?

Commonwealth courts should work with First Nations organisations and researchers to collect data on perceptions of bias by First Nations court users and their lawyers and understake an implicit bias analysis of judicial remarks. This information should be used to inform cultural competence programs and bias training.

Introduction

Deadly Connections welcomes the opportunity to contribute to the Australian Law Reform Commission's Review of Judicial Impartiality. As an Aboriginal community controlled and led organisation who professionally supports justice-involved Aboriginal peoples and families, we intimately understand the adverse impacts of systemic bias on our communities.

The Australian Law Reform Commission's Consultation Paper and Background Papers acknowledges the systemic and ongoing issues impacting impartiality and perceptions of judicial bias. The impacts of these issues are most pronounced for First Nations peoples. Deadly Connections sets out solution-focussed recommendations, specifically addressing the issues raised by Consultation Questions 18, 19, 21 and 25, regarding the steps to be taken to ensure that implicit social biases and a lack of cultural competency do not negatively impact on judicial impartiality.

Judicial impartiality and neutrality are intended to be foundational principles of the legal system. For First Nations peoples, however, the law and the broader legal system has been used to enact significant injustices on First Nations peoples, and justify unequal treatment. Against this background, there is clear evidence of continuing racial bias in judicial decision-making, whether it take the form of explicit or implicit bias. The prevalence of racial bias throughout the justice system raises the need for explicit considerations of race for the system to produce substantive equality.

There are a number of points at which key decisions are made concerning First Nations people coming into contact with the justice system. At each of these stages, racial bias may surface for the various decisionmakers in criminal (e.g. police), family (e.g. child protection case workers) and civil (e.g. social security bureaucrats) matters. The collective and interrelated impact of racial bias, integegrated over time for each person and across all First Nations peoples is significant. Even small biases at each stage may aggregate into a substantial effect.[1] This effect results in direct harm to the individual and the broader First Nations community perceptions of the legal system and judiciary. Broader systems change at each level of interaction between First Nations people and the legal system remains necessary, however the significant power of the judiciary to address and correct injustices occurring at those earlier stages of interactions, and serve as a catalyst for change in the prevalence of racial bias, make the opportunities for judicial reform significant and necessary.

[1] Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1210 (2009) at 1202.

1. The failure to address systemic and ongoing issues impacting judicial impartiality and perceptions of judicial bias have a significant impact on First Nations communities

Criminal law proceedings

It is well-established that First Nations peoples are overrepresented in prisons compared to non-Indigenous peoples. At 30 June 2020, Aboriginal and Torres Strait Islanders made up 29% of the total prison population in Australia. This represents 2,285 prisoners per 100,000 Aboriginal Torres Strait Islander adults, compared to a rate of 202 prisoners per 100,000 in the general Australian adult population. Aboriginal and Torres Strait Islanders comprise 5% of federal prisoners.[2]

First Nations people also experience the flow-on consequences of incarceration, such as poor mental and physical health, destruction of connection to community and family, intergenerational trauma, high levels of deaths in custody and a distrust of the justice system. This distrust is felt by our communities in all levels of the justice system, from interactions with police through to the highest courts in the country. Our lore has been eroded by a legal system in which First Nations peoples remain as outsiders and subject to ongoing structural and institutional racism.

We support the recognition in the ALRC JI6 Background Paper, that understanding structural discrimination and biases within society and the legal system are 'crucial' factors in understanding the overrepresentation of First Nations peoples in prisons.[3]

Family law proceedings

Challenges faced by First Nations people in the courts are often exacerbated in family law matters due to a mistrust of and poor response from government agencies, fear of children being removed as well as fear and shame surrounding the Family Court system.[4] This manifests in a disproportionately low level of access to the family law system by First Nations peoples compared with population statistics and in contrast to the overrepresentation in child protection proceedings. From the accessible data, less than 2% of applications in the Family Court are made by First Nations peoples:

[2] Australian Bureau of Statistics, 2020.
[3] Background Paper JI6, *Cognitive and Social Biases in Judicial Decision-Making*, 13.
[4] ALRC Review of the Family Law System, Submission by the Wirringa Baiya Aboriginal Women's Legal Centre, 2018.

Applications for final orders in the Family Court of Australia by Aboriginal or Torres Strait Islander status

	2005–06	2006–07	2007–08	2008–09	2009–10	2010–11*	2015–16
Not Aboriginal or Torres Strait Islander	10,926	7685	4424	3800	3649	2901	2990
Aboriginal or Torres Strait Islander (self-identified)	255	146	52	38	55	28	49
Total % Aboriginal or Torres Strait Islander	2.3	1.9	1.2	1.0	1.5	1.0	1.6

** Note: Statistics for 2010–11 do not include June 2011. For a short period statistics on Indigenous status were also not kept.* 5

Through our work, we have acquired a large body knowledge of the lived experiences of our Aboriginal clients and communities, which identifies that First Nations peoples' access to justice in the family courts is inhibited. This knowledge is validated by independent research commissioned by the Chief Justices of the Family and Federal Circuit Courts, which makes three significant points. First, there is a disparity in access to justice through low levels of representation of First Nations peoples in the Family Court figures. Second, survey results demonstrate a significantly higher level of negativity on the part of First Nations peoples in terms of how their case was managed, determination of the child's best interests and bias in the court process. Third, the majority of First Nations participants believed the court did not properly consider the cultural needs of their children, and 47 per cent did not believe the court displayed respect and understanding regarding cultural issues.[6]

The merging of the Federal Circuit Court and Family Court has been widely criticised for effectively removing the more specialised Family Court division and its legal assistance and support services.[7] It additionally means that it is difficult for judicial officers to develop a deep understanding of the unique implications for Aboriginal families in family court matters.[8]

CONSULTATION PROPOSAL 18 Each Commonwealth court (excluding the High Court) should circulate annually a list of core judicial education courses or other training that judges are encouraged to attend at specified stages of their judicial career, and ensure sufficient time is set aside for judges to attend them. Core courses in the early stages of every judicial career should comprehensively cover (i) the psychology of decision-making, (ii) diversity, intersectionality, and comprehensive cultural competency, and, specifically (iii) cultural competency in relation to Aboriginal and Torres Strait Islander peoples.

We support this proposal. To strengthen its intention, we suggest that the High Court should be included in its scope given that it adjudicates on significant issues concerning and affecting First

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[5] Reconciliation Action Plan, Family Court of Australia 2018-2020 http://www.familycourt.gov.au/wps/wcm/connect/7cfd8839-0ebf-44c7-8ee0-e9c1490a7c41/FCoA_RAP_2018-2020_web.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-7cfd8839-0ebf-44c7-8ee0-e9c1490a7c41-mf8IvV7

[6] Stephen Ralph, 'Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice' (Report, Family Court of Australia and Federal Magistrates Court of Australia, 1 October 2011) 10 [http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/reports/2011/indigenous-australians-and-family-law-litigation]

[7] See https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2021a/21bd042

[8] See https://nit.com.au/standalone-family-court-system-abolished/; https://www.abc.net.au/news/2021-02-18/family-court-merger-federal-circuit-court-reactions/13168506.

*Nations communities and rights. We further propose there should be **ongoing** training and it should encompass 'the psychology and **implicit bias in decision making'**. In relation to the latter, this training should give special attention to unconscious biases arising from the social/cultural standpoint of the judicial officer.*

CONSULTATION QUESTION 19 What more should be done to map, coordinate, monitor, and develop ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, and to ensure that the specific needs of each Commonwealth court are met? Which bodies should be involved in this process?

A First Nations Advisory Committee within the Federal Court should be established to oversee this work (for similar examples within NSW see the Ngara Yura Program of the NSW Judicial Commission). The mapping and evaluation should be conducted in collaboration with First Nations organisations who specialise in professional cultural competence training in the justice sector, such as Deadly Connections and We Al-li. This Advisory Committee should also work to broadly incorporate cultural competency programs within the federal judiciary.

A number of principles should guide the development of training:

- Training on Aboriginal and Torres Strait Islander cultural competency should be trauma-aware and led by qualified and experienced Aboriginal and Torres Strait Islander controlled organisations or individuals. Participation in intensive training on these topics should be considered a priority (or otherwise demonstrated) before a judicial officer sits on a specialised list dealing with a high proportion of Aboriginal and Torres Strait Islander people, such as the Native Title list in the Federal Court or Indigenous lists in the Family Court. More broadly, the Judicial College of Victoria identified the need for cultural competence education in its submission to the ALRC Inquiry into Indigenous Incarceration Rates (2017).[9]
- It should be incumbant on judicial officers to do a range of activities, including on-country cultural immersion [10], and probono work with Aboriginal organisations to instil judicial officers with a sense of the grounded work of frontline organisations and the needs and circumstances of their clients.
- Training should also encompass implicit bias training so judicial officers can identify their own bias that arises from their social/cultural standpoint.[11]

2. Building and delivering effective cultural competency education and training programs to address judicial bias

Appropriately designed and delivered cultural competency and safety training and education is essential in limiting the impacts of judicial bias and promoting access to justice for First Nations peoples. This forms a basis for the consideration of an individual's personal circumstances in sentencing and bail applications. A judiciary that is culturally competent, including having an understanding of First Nations families, child-rearing practices and kinship, and the centrality of culture, is important for the determination of the best interests of First Nations children in the family

[9] See https://www.alrc.gov.au/wp-content/uploads/2019/08/102._the_judicial_college_of_victoria.pdf.
[10] Vanessa Cavanagh and Eleni Marchetti, 'Judicial Indigenous cross-cultural training: what is available, how good is it and can it be improved?' (2016) 19(2) *Faculty of Social Sciences – Papers, 52.*
[11] See https://onlinelibrary.wiley.com/doi/epdf/10.1111/1742-6723.13691.

law jurisdiction and the interpretation and application of specific provisions of the Family Law Act relating to the cultural needs of First Nations children.

Current cultural competency procedures are insufficient,[12] and the length, participation and content of current programs vary across jurisdictions. The short time frame of many education courses renders the training ineffective in allowing participants to develop a genuine understanding of the historical and contextual issues for First Nations peoples, and therefore does not effectively influence behavioural or attitudinal change. Robert Bean criticises short workshops as 'largely ineffective in developing practical skills and professional competence'.[13] Longer cultural immersion visits or ongoing work with Aboriginal organisations may provide a more sustained understanding of the experiences of First Nations people to counterbalance any assumed biases in the judging process.[14] Notably, a review of the benchbooks and practice notes available for the federal courts did not reveal any practical guidance available to judges or lawyers around identifying relevant cultural information for First Nations parties.

Currently, only Victoria and South Australia have compulsory cultural awareness training for judges,[15] however there still remain significant deficits in this competency training as there is no examination or evaluation process to outcomes of judicial understanding or behavioural change.[16] There is also no national standard against which cultural awareness training can be assessed.[17]

2.1 Cultural Competency education and training should be trauma-aware and led by Aboriginal and Torres Strait Islander controlled organisations

To operate effectively, all cultural competency education must be First Nations-led, designed and delivered. This education must be grounded in the lived experiences of First Nations peoples, in particular, those who have been most impacted by the legal system. The centering of trauma-aware practice and an understanding of the deep impacts of trauma inflicted and perpetuated by the Australian legal system is foundational to effecting change in judicial decision-making that can flow on to reduced perceptions of impartiality.

Cultural competency education must include the ongoing impacts of invasion and colonisation, intergenerational trauma, experiences within all levels of the legal system and the contemporary experiences of urban, regional and remote communities, such as racism and discrimination. We also submit that this education must also include the strengths of First Nations peoples and communities, particularly around self-determination and the significant contributions made by our Aboriginal community controlled sector.

This educational background is essential to a foundation of understanding of the systemic and background factors affecting First Nations people.

In addition to the knowledge requirements, any education must include the acquiring of practical competence in working with First Nations parties in the courtroom and cultural safety practices.

[12] Vanessa Cavanagh and Eleni Marchetti, 'Judicial Indigenous cross-cultural training: what is available, how good is it and can it be improved?' (2016) 19(2) *Faculty of Social Sciences – Papers* 45, 53.
[13] Ibid.
[14] Ibid 53.
[15] Ibid 54.
[16] Ibid 53.
[17] Ibid 57

2.2 Cultural Competency Education should be mandatory, ongoing and assessed

We agree with the proposal in Consultation Question 18, however, further say that participation in ongoing education courses must be mandatory rather than 'encouraged'. Participation in intensive training on these topics should be considered mandatory and a priority (or otherwise demonstrated) before a judge sits on a specialised list dealing with a high proportion of Aboriginal and Torres Strait Islander people, such as the Native Title list in the Federal Court or Indigenous lists in the Family Court. Judges should be expected to have a functional understanding of the cultural context in which these issues are taking place and how to work effectively with First Nations parties in their courtroom.

Assessment of the development of greater insight and understanding must be incorporated to ensure the efficacy of any education. Mandatory, ongoing and assessed training ensures that judges are meeting a minimum level of general cultural competency.

2.3 Cultural Competency education and training should address implicit biases

Implicit biases occur outside of conscious awareness but can still influence behaviour.[18] Overcoming the impact of these biases first requires understanding the ways in which they manifest. Studies in a healthcare context have shown a relationship between implicit bias and clinical decision-making, which may lead to worse outcomes for patient care.[19] This impact was particularly prevalent in time-pressured situations, where assumptions and patterned thinking allowed practitioners to take 'cognitive shortcuts'.[20] Training and education programs should be built around self-reflective practice and observation, facilitating the identification and addressing of implicity biases.

Recommendations

Implement the following measures:

- *Mandatory cultural competency training for all judges and courtroom staff, designed and led by First Nations people;*
- *Mandatory assessment processes to ensure a minimum standard of completion; and*
- *Mandatory community-involvement aspects of the training, with a specific focus on involvement between the judiciary and First Nations communities.*

CONSULTATION QUESTION 21
What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?

[18] Implicit bias towards Aboriginal andTorres Strait Islander patients within Australianemergency departments, Quigley, Hutton et al, Emergency Medicine Australasia 2021 33, 9-18, 9.
[19] Ibid 10.
[20] Ibid 14.

3. Public litigation funding for appeals on racial bias grounds

Public litigation funding should be available to provide for appeals for First Nations people who perceive racial bias in their federal court hearing. This includes where there is implicit bias such as the reliance on stereotypes or adverse assumptions because the person belongs to a First Nations community. Without accessible funding, First Nations people will continue to be limited in pursing redress for perceived judicial racial bias.

The use of racial profiling as the basis for an appeal on grounds of apprehended bias has been successful in Canada in *R v Brown*.[21] In *R v Brown*, the Ontario Court of Appeal found that the evidence of the trial judge's conduct throughout the trial, taken as whole, supported a finding of a reasonable apprehension of racial bias against the African-Canadian accused. The decision has been referred to as a landmark case and used in justice education, demonstrating the broader impact of appeals based on apprehended bias and race.[22]

4. Establish a First Nations Advisory Committee

A First Nations Advisory Committee should be set up within the Federal Court (see response to Qn 19) to propose a program of engagement with First Nations communities and organisations and cultural competency training. This First Nations-guided program would facilitate trust building between the federal court and First Nations communities. The advisory committee should include key First Nations justice organisations, such as Deadly Connections, the National Aboriginal and Torres Strait Islander Legal Services, First Peoples Disability Network, SNAICC, National Family Violence Prevention Legal Service and the National Native Title Council.

Specific initiatives listed below should be developed by this First Nations Advisory Committee:

- Specialised First Nations courts (e.g. care circles such as in NSW – see below) designed by First Nations peoples.
- Specialised court lists, that provide for more time, input and perspectives from First Nations people in family matters and civil matters (e.g. racial discrimination, or appeals from the Administrative Appeals Tribunal).
- Increasing the number of First Nations peoples in the judiciary and legal profession, including by creating pathways other than from the bar.
- Bugmy justice reports in order to shed light on the particular experiences of First Nations individuals, their families and community background so as to preclude decisions being made with reference to unconscious bias about First Nations cultures or simply a lack of knowledge that contributes to inappropriate decisioin making and outcomes. These reports should be available for family and criminal court matters as well as relevant civil matters.
- Mandatory consideration of Aboriginality in criminal matters and incorporated in the Commonwealth Criminal Code – similar to provision s 718.2(e) of the Canada Criminal Code (discussed in 2017 ALRC report).
- There should be specific training on Aboriginal families structures and relationships that is strengths-based. This should be complemented by Bugmy reports. This overcomes the widespread deficit discourse by lawyers in their submissions, which in turn contributions to this approach in judicial decision making.

[21] R. v. Brown 64 O.R. (3d) 161 [2003] O.J. No. 1251

[22] See https://www.theglobeandmail.com/report-on-business/racial-profiling-case-one-for-history-books/article4128064/; and https://ojen.ca/wp-content/uploads/Brown-English.pdf

5. Increase First Nations representation & specialised courts

5.1 Specialised First Nations courts and court lists

The JI-6 paper acknowledges that First Nations people are dissatisfied with the fairness of court proceedings.[23] The JI-6 paper recognises that these experiences are a consequence of poor cultural competency from judges and court staff, alongside the structural and explicit biases which exist in the justice system against First Nations people.[24]

Judges play an essential role in shaping the experiences of First Nations peoples within courtrooms. Specialised First Nations courts, designed by First Nations peoples, and an increase in the number of First Nations peoples in the judiciary and legal profession are necessary in adequately responding in a culturally safe way.

There are existing models and proposals that can be drawn upon and expanded to assist in building the trust and confidence of First Nations peoples within the legal system through leadership in the design and operation of specialist courts and court lists.

In the Commonwealth Courts, we refer to the Federal Circuit Court's specialist Indigenous list, with the access to support from First Nations-led community services in relation to drug and alcohol, mental health or family violence issues. Such lists should also exist in Federal criminal courts.

In a step further, we suggest more culturally appropriate court settings. This could draw on the experience of the Marram-Ngala Ganbu, the Koori Family Hearing Day run by the Children's Court in Victoria. It is a more culturally appropriate process whereby the physical environment of the court includes paintings by local First Nations artists and young people, and the bar table is replaced by an oval table at which all parties to the matter sit together to discuss.[25] A dedicated Koori Support Officer can assist First Nations court-users to understand the court process and ensure that the magistrate or decision-maker has relevant information, such as an understanding of the extended family network and what support structures are in place for that family.

Indigenous courts also play an important role in keeping in check judicial bias by introducing First Nations perspectives that can challenge unconscious assumptions which reflect dominant stereotypes about the applicant or defendant. In order to elevate individualised justice for First Nations people in courts and to assure a fair hearing,Indigenous courts practices include the participation of Elders, community representatives and, where relevant and appropriate, victims. Specifically in relation to sentencing, the Nunga Court is convened in a courtroom containing oval tables and Indigenous paintings and symbols, whereas the Circle Court model is convened in a room other than a courtroom or in a culturally significant building in the local community. Both models are used in Australia and involve the participation of Elders or community representatives.[26]

In Nowra, NSW, the Aboriginal Care Circle Pilot Program (**Care Circle**) was introduced in an attempt to include Aboriginal people and values into child protection decisions.[27] The Care Circle

[23] Background Paper JI6, *Cognitive and Social Biases in Judicial Decision-Making*, 14.
[24] Ibid.
[25] Victorian Children's Court: Spotligt on justice for Reconciliation Week at https://www.childrenscourt.vic.gov.au/news/spotlight-justice-reconciliation-week.
[26] Marchetti, Elena; Anthony, Thalia --- "Sentencing Indigenous Offenders in Canada, Australia, and New Zealand" [2016] UTSLRS 27; (2016) Oxford Handbooks Online
[27] Ciftci, Sarah; Howard-Wagner, Deirdre – "Integrating Indigenous Justice into Alternative Dispute Resolution Practices: A Case Study of the Aboriginal Care Circle Pilot Program in Nowra' [2012] AuIndigLawRw 14; (2012) 16(2) Australian Indigenous Law Review 81

functions as a combination of family group conferencing and sentencing circles, and two circles will generally be held in each child protection case. All participants have a chance to have their views and voice heard, including a Children's Magistrate, 2-3 community members, the parties and their lawyers, a lawyer for the children, support people such as grandparents or community service providers, and a Project Officer, who is also Aboriginal.[28] At the conclusion of the first Circle, the Magistrate gives directions for a care plan, which is then prepared and discussed at the second Circle. Parents are also given an opportunity to demonstrate any positive steps they have made toward restoration, and community representatives and extended family can contextualise the care plan to ensure that it is appropriate in the particular circumstances.

In relation to Federal courts specifically, the Family Law Council 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' 2016 Final Report, recommended consideration of a pilot of a specialised court hearing process in family law cases. This would involve Aboriginal and Torres Strait Islander families, including through the participation of Elders who can provide cultural advice (Recommendation 16.4). This reiterates the need for judicial officers to have First Nations input in courts to provide a fuller picture of the First Nations individual(s) before the court that is not tained by unconscious assumptions.

5.2 Representation of First Nations peoples in the judiciary

The Consultation Paper recognises that current judicial appointment processes and arrangements for new judges do not equip individual judges, and the judiciary as a whole, with the ability to appropriately manage the challenges that arise from bias and a lack of cross-cultural knowledge.[29] This is the result of courts, particularly criminal courts, being 'substantially the domain of white decision makers'.[30] Diversity and representation within the judiciary is therefore essential to ensure that the judiciary as a whole is equipped to handle these issues. First Nations representation on the judiciary results in fairer and more appropriate outcomes for First Nations people, as First Nations judges bring Indigenous perspectives, strengths-based approaches and a healing and restorative lens to processes and outcomes.[31]

The NSW Parliament Legislative Council Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (**Legislative Council Report**) released its report in April 2021 and included a series of recommendations for the NSW Government. The Legislative Council Report recommended that the NSW Government implement a program to actively employ a greater number of First Nations staff across all areas of the criminal justice system, and that the Attorney General consider appointing significantly more suitably experienced and qualified First Nations people to the judiciary. We urge the Commonwealth Attorney General to do the same.[32] It is an essential step in reconciliation and rebuilding First Nations trust within the legal system.Judicial targets must be applied to ensure that a greater number of First Nations judges are employed across all areas of the Commonwealth courts system.[33]

To support the above, the Commonwealth Government should create pathways to support First Nations legal practitioners in entering the judiciary. In Canada, this has involved launching special

[28] Hannam, Hilary, Children's Court of NSW, May 2010 published in Australasian Institute of Judicial Administration
[29] Constulation Paper p 12.
[30] Thalia Anthony, 'Addressing racism embedded within the criminal justice system', *Croakey Health Media* (online, 16 June 2020) <https://www.croakey.org/addressing-racism-embedded-within-the-criminal-justice-system/>.
[31] Ibid.
[32] Legislative Council, 'Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody', April 2021, 179-180.
[33] Ibid.

streams for Indigenous students in law schools and championing diversity as a factor for consideration in the appointment process.[34] In 2012, the United Kingdom's Select Committee on the Consitutition recommended in their 'Report on Judicial Appointments' that appointment panels themselves should be diverse and required to undertake diversity training.[35] The Committee also stated that the Government has a critical responsibility in encouraging applications from all lawyers, not just barristers.

It is also essential for courts to retain First Nations judges, once appointed, by creating a culture of inclusion within the judiciary.

The increase in representation of First Nations peoples in all levels of the Commonwealth courts system, in conjunction with other recommendations outlined, is likely to assist in building the trust and confidence of First Nations peoples through increased cultural safety and competency.

Recommendations

That the Commonwealth Government implement a program to actively employ a greater number of First Nations staff across all areas of the Commonwealth courts system.

That the Commonwealth Attorney General consider appointing significantly more suitably experienced and qualified First Nations people to the judiciary.

6. Bugmy Justice Reports

The JI6 paper recognises the accumulation of institutional discrimination and bias that First Nations people experience in the court system. The paper recognises that this is a crucial cause of the overrepresentation of First Nations people in the national prison population.[36] Currently, sentence assessment reports provide a narrow snapshot and risk assessment of individuals. These reports can be impacted by racial assumptions and stereotypes at the writing stage, which can then go on to impact judicial perception at the risk assessment stage.[37] The use of similar psychological risk assessment reports in Canada has been ruled as inaccurate and invalid for First Nations populations.[38]

A key step to reducing judicial impartiality in sentencing is to require courts and judges to consider the unique circumstances of First Nations offenders and sentence them in a culturally-informed way.

'Bugmy Justice Reports' are a comprehensive document that identifies the unique cultural and historical factors specific to First Nations offenders, which may otherwise contribute to a high-risk assessment. The reports are named after the case of *Bugmy v The Queen*,[39] where the High Court stated that if background information was to be relevant to the offender and sentencing, it was

[34] Kathleen Harris, 'The changing face of Canada's judiciary: more women, more diversity' *CBC News* (online, 5 May 2019) < https://www.cbc.ca/news/politics/judiciary-diversity-appointments-1.5074102>.
[35] Ray Steinwall, 'Addressing cultural diversity in the Australian judiciary', *Diversity Council Australia* (online, 30 April 2014) < https://www.dca.org.au/blog/addressing-cultural-diversity-australian-judiciary>.
[36] Background Paper JI6, *Cognitive and Social Biases in Judicial Decision-Making*, 13.
[37] Thalia Anthony, 'Addressing racism embedded within the criminal justice system', *Croakey Health Media* (online, 16 June 2020) <https://www.croakey.org/addressing-racism-embedded-within-the-criminal-justice-system/>.
[38] Human Rights Law Centre, *Supreme Court of Canada rules use of psychological risk assessment tools on Indigenous offenders illegal* (Webpage, 13 June 2018) < https://www.hrlc.org.au/human-rights-case-summaries/2018/12/17/supreme-court-of-canada-rules-use-of-psychological-risk-assessment-tools-on-indigenous-offenders-illegal>.
[39] (2013) 249 CLR 571.

necessary to have 'material tending to establish that background'.[40] They include background information about the offender's specific circumstances, including sociocultural factors, such as trauma and mental health, and their personal experiences as an individual within the wider First Nations community.[41]

Bugmy Justice Reports have also been strongly recommended by other advocacy bodies in Australia. In 2017, the ALRC recommended in Recommendations 6-2 to 6-6 that sentencing legislation should be reformed to require specific consideration of the unique systemic and background factors affecting First Nations peoples, during the sentencing process.[42] The ALRC recommended that these take the form of 'Indigenous Experience Reports', which perform the same function as Bugmy Justice Reports. Recommendation 6-3 recommends that state and territory governments work with First Nations organisations to develop models for presenting culturally-contextualised information to the court.[43] At minimum, these models should be based on a legislative requirement for judges to consider the unique social and cultural factors of First Nations peoples at sentencing. The compilation of these reports should be judge-ordered.

In Canada, Gladue Reports similarly seek to incorporate an understanding of relevant cultural factors into bail and sentencing decisions, as well as family law matters. The reports assist judges to fulfill their duties under s 718.29(e) of the Canadian Criminal Code, which requires that they consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstance of Aboriginal offenders.[44] The Court in *Ipelee* considered that, rather than being an 'affirmative action' policy or race-based discount in sentencing, the use of Gladue factors was essential to achieving a fit and proper sentence by expanding the scope of relevant factors that ought to be taken into account.[45] The possible application of these reports to family law matters has also been identified.[46]

Deadly Connections have begun rolling out Bugmy Reports within the NSW criminal jurisdiction. These reports are produced by a dedicated writer who undertakes a detailed set of interviews with the defendant and their family while also examining the circumstances of the First Nations community in which the defendant grew up and currently resides. The reports have shed light on issues pertaining to culture, upbringing, family ties, experiences of racism and institutional interventions, strengths and capacities. The reports identify appropriate options for the sentencing courts that are relevant to the individualised experience of the First Nations defendant. The value of these reports has also been recognised in other jurisdictions. Bugmy report programs developing in Victoria (auspiced by Victorian Aboriginal Legal Service) and Queensland (Five Bridges Aboriginal and Torres Strait Islander Community Justice Group). The Deadly Connections Bugmy Reports are perceived by our clients as a holistic and meaningful account of their experiences.

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[40] Ibid [41].

[41] Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Requirement to consider Aboriginality in Australian sentencing courts* (*Report*, 2017) 6.137.

[42] Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Recommendations* 6-2–6-6.

[43] Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Recommendations* 6-3.

[44] Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Part 3.*

[45] *R v Ipeelee* [2012] 1 SCR 433 [75]

[46] Romi Laskin, Expanding the Reach of Gladue: Exploring the Use of Gladue Reports in Child Protection, 2021 26 *Appeal: Review of Current Law and Law Reform* 25, 25.

6.1 Informing judges at sentencing and reducing bias

The JI6 paper states that if judges are aware of their own biases, they may 'take steps to remove their impact from decision-making'. According to Professor Thalia Anthony, 'redressing implicit bias in the courts requires the creation of new narratives and conditions that counter racial assumptions'.[47] At present, Aboriginality and culture is not one of the factors which the court is required to take into account in determining sentencing.[48] Therefore, common law would have to be relied upon so far as is possible consider First Nations people as such.[49] The legislation further requires that "the court must not take into account …any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates."

Bugmy Justice reports aim to bring structural discrimination to the forefront of judicial consideration at sentencing. Bugmy Justice reports are intended to inform courts in the risk assessment process to ensure appropriate, culturally-sensitive sentencing of First Nations offenders, draw attention to the unique racial and cultural factors systemic to First Nations offenders and highlight the impact of offending on First Nations communities. Where appropriate, the reports urge courts to consider alternatives to incarceration. Unlike current sentence assessment reports and risk assessment tools, Bugmy Justice Reports provide a contextualised understanding of the impact of systemic racism on offending, sentencing, and rehabilitation options.[50] They are an essential step towards reducing the severe overrepresentation of First Nations people in custody.

Culturally-informed sentencing is critical in ensuring that First Nations people do not continue to experience disadvantage as a result of institutional bias. The consideration of Bugmy reports at sentencing is an essential first step in reducing the impact of judicial bias on sentencing outcomes for First Nations people. Their implementation is a logical way to address Consultation Question 21, as Bugmy Justice Reports would require judges to actively consider the social bias and disadvantage First Nations people face in the criminal justice system and beyond.

Recommendation

Deadly Connections recommends that the Australian Government amend s 16A Crimes Act 1914 (Cth), s16A; Judiciary Act 1903 (Cth), s68 to make Bugmy Justice Reports a mandatory consideration at sentencing, and require judges to consider the unique social and cultural factors of First Nations offenders.

7. Legislative reform to reduce judicial bias in sentencing and bail determinations

7.1 Current sentencing provisions regarding culture in legislation

In order to mitigate against bias in sentencing decisions that contribute to the over-incarceration of First Nations people, it is essential that sentencing legislation pays special attention to the need to promote non-custodial senteces for First Nations people. As discussed below, this is the motivating

[47] Thalia Anthony, 'Addressing racism embedded within the criminal justice system', *Croakey Health Media* (online, 16 June 2020) <https://www.croakey.org/addressing-racism-embedded-within-the-criminal-justice-system/>.
[48] *Crimes Act 1914* (Cth), s 16.
[49] *Bugmy v The Queen* (2013) 249 CLR 571 set out under section [10-470] Race and ethnicity in Sentencing Bench Book (NSW).
[50] Anna Macklin and Robyn Gilbert, 'Working with Indigenous offenders to end violence' (Research Brief, June 2011)

factor behind such a provision in the Canadian Criminal Code. In addition, the racially discriminatory provisioin in the Commonwealth *Crimes Act 1914* should be repealed immediately. This has received widespread criticism by the legal profession and broader community, including in a recent paper by the Northern Territory Law Reform Committee.[51] The provision is as follows:

> S16A… *(2A) However, the court must not take into account under subsection (1) or (2), other than paragraph (2)(ma), any form of customary law or cultural practice as a reason for:*
>
> > *(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or*
> >
> > *(b) aggravating the seriousness of the criminal behaviour to which the offence relates.*

The Commonwealth should have regard to reform in specific Australian jurisdictions, there are more detailed mechanisms and proecdures arising for cultural differences and/or where the offender is an Aboriginal or Torres Strait Islander person, such as:

- in the ACT, the court must consider the "cultural background…of the offender" if "relevant and known to the court" in sentencing,[52] and may order a pre-sentence report in relation to the offender, which may include the cultural background of the offender,[53] and which must be considered in determining certain conditions of a good behaviour order.[54]
- in Queensland, if the offender is an Aboriginal or Torres Strait Islander person, the court must have regard to, "any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender",[55] which are submitted on the group's own volition or at the request of the prosecution, defence, or the court.[56] The submissions could include "the offender's relationship to the offender's community; any cultural considerations; or any considerations relating to programs and services established for offenders in which the community justice group participates".[57]
- in South Australia, the court has the option to (with the defendant's consent and with the assistance of an Aboriginal and Torres Strait Islander Justice Officer) convene a sentencing conference and take into consideration views expressed at the conference.[58]

As it stands, there is no statutorily mandated consideration of Aboriginality in sentencing procedures in the Commonwealth. In fact, Commonwealth courts are precluded from considering relevant matters. This creates bias because the judicial officer cannot consider the full range of relevant factors to the individual and is therefore making a decision on a limited set of information.

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[51] https://justice.nt.gov.au/__data/assets/pdf_file/0011/977546/report-recognition-local-aboriginal-laws-sentencing-bail.pdf
[52] *Crimes (Sentencing) Act 2005* (ACT) s 33
[53] *Crimes (Sentencing) Act 2005* (ACT) ss 40A, 41-42.
[54] See e.g. *Crimes (Sentencing) Act 2005* (ACT) s 89(2) (community service order), 97 (rehabilitation program).
[55] *Penalties and Sentencing Act 1992* (Qld), s 9(2)(p)
[56] Explanatory Note, Penalties and Sentences and Other Acts Amendment Bill 2000.
[57] *Penalties and Sentencing Act 1992* (Qld), s 9(2)(p).
[58] *Sentencing Act 2017* (SA), s 22 (initially inserted into the since repealed *Criminal Law (Sentencing) Act 1988* (SA) s 9C)

7.2 Mandatory consideration of Aboriginality at sentencing

Recommendations from previous parliamentary submissions and procedures adopted in foreign jursictions exemplify the various ways to introduce such a mandatory consideration. The key examples are set out below.

Canadian Criminal Code – a principle and purpose

In 1995, the Canadian Parliament amended the Criminal Code so as to insert s 718.2(e) which states a court imposing a sentence must consider:[59]

> "…*all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders*."

This principle is, and has been applied as, an affirmation of "*the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumatnces, including the status and life experiences, of the person standing before them…and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process…[and] is intended to remedy this failure by directing judges to craft sentences in a amnnaer that is meaningful to Aboriginal peoples*".[60]

Australian Law Reform Commission 2018 analysis – a bail and sentencing consideration

The Australian Law Reform Commission has previously recommended, in its *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* ("**ALRC Report 133**") that "Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples".[61] Recommendation 501 of the ALRC Report 133 applied the same considerations when deciding to grant bail, recommending that state and territory laws should be amended to require bail authorities to take into account the offenders' Aboriginality, including their cultural background, ties to extended family or place, and any other relevant cultural issue or obligation.[62] This has been enacted in the Victorian bail legislation. [63]

Including a mechanism in proceedings, specifically where the offender is an Aboriginal or Torres Strait Islander person, is not a foreign concept in Australian jurisdictions.[64] As discussed above, there are specific procedures that are only available to the courts when the offender is an Aboriginal or Torres Strait Islander person in Queensland and South Australia. This should also be implemented at the federal level.

An Aboriginality consideration is consistent with sentencing paradigms. This consideration would promote the principles of "individualised justice" and "equality before the law'",[65] rather than

[59] Criminal Code, RSC 1985, c C-46 (Canada)
[60] *R v Ipeelee* [2012] 1 SCR 433 [75]
[61] Australian Law Reform Commission (2018) *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)*, 204.
[62] Ibid, 13.
[63] *Bail Act 1977* (Vic), s 3A.
[64] See discussion above, e.g. *Penalties and Sentencing Act 1992* (Qld), s 9(2)(p).
[65] Australian Law Reform Commission (2018) *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)*, 205.

undermining them, but ensuring the court to turn their mind to the unique systemic circumstances of First Nations offenders.

The current legislative mechanisms, such as the general mechanism of considering any relevant factors generally, as well as the potential preparation and consideration of a community justice group, are rife with opportunities to be influenced by heuristics (or mental shortcuts), cognitive biases, and other forms of bias. These mechanisms impose no actual requirements on the judicial officers to consider Aboriginality. An express requirement to consider this factor will better place the courts to analyse the assumptions about the defendant that have been made. At the very least, this duty to enquire would prime courts to think about race. As stated in the background papers, research has indicated that such priming can combat the implicit biases that the courts may share with most lay adults.[66] Such an explicit consideration may also engender further trust in First Nations communities.

Recommendations

Deadly Connections recommends that the Australian Government amend s 16A Crimes Act 1914 (Cth), s16A; Judiciary Act 1903 (Cth), s68 to make the defendant's identity as a First Nations person a mandatory consideration at sentencing, and require judges to consider the unique social and cultural factors of First Nations offenders. This necessarily requires repealing s 16A(2A)

This should also be implemented for bail decisions (s 15AB(1)(b).

CONSULTATION QUESTION 25 What other data relevant to judicial impartiality and bias (if any) should the Commonwealth courts, or other bodies, collect, and for what purposes?

8. Data

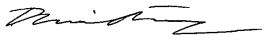
Recommendation

Commonwealth courts should work with First Nations organisations and researchers to collect data on perceptions of bias by First Nations court users and their lawyers and understake an implicit bias analysis of judicial remarks. This information should be used to inform cultural competence programs and bias training.

Carly Stanley (Founder, CEO, Board Member)

Keenan Mundine (Co-Founder, Ambassador, Board Member)

Professor Thalia Anthony (Board Member)



Dated: 6 July 2021

[66] *Background paper JI6 Judicial Impartiality – Cognitive and Social Biases in Judicial Decision-Making* (April 2021), [31].