



Dr Charles Perkins AO Annual Memorial Oration 2005

Thursday 27 October 2005

The University of Sydney

By The Honourable James J Spigelman AC

Chief Justice of New South Wales

Charles Perkins and I performed our first significant act of public service, and came to public prominence, at the same time and in collaboration with each other. He as president and I as secretary of Student Action for Aborigines and, as two of four members of the Tour Executive on the 1965 Freedom Ride. This forged a bond that endured throughout Charlie's life and which I still feel. For that reason I am grateful to the Koori Centre of the University of Sydney and, particularly, to the immediate Perkins Family – Eileen, Hetti, Rachel and Adam – for inviting me to present this Oration.

The extent of Aboriginal deprivation and the existence of systematic discrimination was not widely recognised in 1965. The primary contribution of the Freedom Ride was to make these issues front page news, day after day, in a manner that had never occurred before. The hostility, including physical violence, to which we were subjected revealed an ugly side to Australian social relationships of which many Australians were unaware or about which they had not then been concerned to inquire. The Freedom Ride changed that.

More than any other factor it is this catalytic effect which has led to the Freedom Ride being recognised, now at the safe distance of 40 years – a length of time which fills me with more bewilderment than dread – in history and social studies books used throughout Australia. The comprehensive survey by Professor Ann Curthoys in her book *Freedom Ride: A Freedom Rider Remembers* is an entirely accurate and fitting narrative of these events.

The widespread recognition gives Charlie Perkins the central, indeed critical, role: a recognition that is entirely deserved. There were numerous occasions on the Freedom Ride, when Charlie displayed the intelligence, the debating skill, the determination, the passion and the anger which would mark his life.

In Walgett, he engaged in open disputation with the leaders of the RSL Club, a club which refused to permit Aboriginal ex-servicemen – men who had fought for Australia – to become members. In Moree, Charlie led a group of Aboriginal children into the swimming pool from which, by formal resolution of the Council, they had hitherto been excluded. In Kempsey, he sought entry to the municipal swimming pool, informing the officer that he was an Aborigine, only to be told that, again by formal Council resolution, no Aborigine could be admitted to the pool.

Nothing, however, dramatised the position, to the general public, better than the bigoted violence to which we were subjected. At Walgett we had made arrangements to stay in the local church hall. At 9.30pm at night the clergyman threw us out, on the basis of the controversy we had caused in the town during the day. We were followed out of town by a convoy of cars, not knowing who the occupants were. A truck sideswiped the bus a number



of times and eventually forced us off the road luckily, through the skill of the driver, without serious mishap. Our apprehension was considerable as the other cars came off the road and surrounded the bus. As it turned out, these were the local Aborigines who had come out to protect us. Similarly violent incidents occurred in Moree, when a number of us were assaulted – I myself was king hit – and all of us were subject to abuse.

These were dramatic incidents which had an immediate effect on the nature and intensity of the debate about injustices to Aborigines in this country. One of the most significant of the long term effects was, however, the emergence, for the first time in our history, of an Aborigine in a clear leadership role. There was no doubt at the time or since that Charlie Perkins was the leader of, and the spokesman for, the entire group of white students. In this, as in so much else, he was a pioneer for his people and a role model of considerable significance.

The contribution Charlie made at this time was to confront Australia with issues which it would have preferred to ignore. Throughout his life Charlie would continue to confront Australia in this way. He would also, through his involvement in the development of public policy and the creation of institutions, have a major influence on the progress of his people. He was never content with the outcome. He would not be content today.

Nevertheless, there is much that has changed for the better. Not least is the contrast between the position in which Charlie found himself in 1965 as the first Aborigine graduate, or at least the first person to graduate who recognised his aboriginality, with the situation today where there are thousands upon thousands of Aboriginal graduates and students. On the other hand his kidney disease, of which I well remember he was already suffering as a student, and his all too short lifespan, is itself symbolic of our society's greatest failure to the Aboriginal people: the life expectancy of Aborigines is twenty years shorter than that of other Australians. This, as many of you will recall, was the central focal point of the memorable Oration in this series delivered by Noel Pearson in 2001.

There are few areas of Aboriginal policy discourse which are not fraught with controversy. Even the history of Aboriginal/white interaction is not a subject where one can tread without trepidation. I am sure this audience appreciates that my position as Chief Justice requires me to abstain from such controversy. I intend to at least attempt to do so this evening. It is not always possible to predict what some people may regard to be controversial.

The involvement of Aborigines in the criminal justice system is one of the focal points of debate. That is a matter about which I can make some observations.

Fourteen years after the report of the 1991 Royal Commission into Aboriginal Deaths in Custody, which made 339 recommendations aimed at reducing the number of Aboriginal people coming into contact with the criminal justice system, the proportion of Aborigines in our prisons has increased. On recent calculations although Aborigines comprise something like two percent of the New South Wales population, they constitute almost one-fifth of adult male prisoners, approximately one-third of women prisoners and over two-fifths of juveniles in detention¹.

These incarceration statistics reflect social deprivation. It is not, however, possible to ignore, whatever the causes, that there are significant differences between the Aboriginal population



and the general population in terms of the probability of offending. On one study Aboriginal persons are five times more likely than the New South Wales average to commit a murder, three times more likely to be an offender in a sexual assault, five times more likely to be implicated in multiple offender sexual assault, five times more likely to commit robbery, six times more likely to be involved in assault, seven times more likely to be an offender in break enter offences and eight times more likely to be an offender in an incident involving grievous bodily harm.

What requires emphasis is a fact that is often ignored. The overwhelming majority of the victims of these crimes are other Aborigines. Aborigines are more than three times more likely than the New South Wales average to be the victim of a murder, three times more likely to be the victim of a sexual assault, three times more likely to be the victim of an assault, five times more likely to be a victim of a domestic violence related assault and also five times more likely to be a victim of an assault occasioning grievous bodily harm².

It is a mark of the poverty in the Aboriginal community that there is one category in which Aborigines are considerably less likely to be victims. The study to which I have referred indicates that the average member of the New South Wales community is six times more likely to be the victim of a robbery than an Aborigine.

I repeat, the overwhelming majority of victims of serious crime committed by Aborigines are other Aborigines.

This audience is well aware of the vicious cycle of poverty and substance abuse which leads to anti-social behaviour of various kinds and which, in turn, reinforces the poverty and addiction. Nevertheless, if we wish to reduce the over-representation of Aborigines, particularly young Aboriginal men, in the prison population, the overwhelmingly most important thing that we have to do is to reduce levels of Aboriginal offending, particularly repeat offending³.

To achieve this task the law has a significant but limited role to play. The primary means are to be found in our social, economic, health and education policies.

The New South Wales Government has adopted a ten year plan called The New South Wales Aboriginal Justice Plan which is aspirational but which identifies a range of policy changes, including objectives for reform of the criminal justice system. The authors of the study, as indicated by the fact that the plan is a ten year plan, expect that fundamental change can only occur in the long term. Nevertheless it is a task, that those of us engaged in the legal system must commit ourselves to achieving. In deciding to do so we must recognise that the principal beneficiaries of any decline in serious criminal conduct by Aboriginal offenders will be other members of the Aboriginal community.

There is, and has been for as long as anyone can remember, a debate amongst all involved in the criminal justice system about the efficacy of criminal sentences. There are many different opinions, based on a considerable body of conflicting research and experience, which question the efficacy of sentences in terms of deterrence. One thing that is clear is, whatever the rights and wrongs of that general debate, our sentencing and rehabilitation processes for Aboriginal offenders is not achieving the objective of deterrence. The re-offending rate is



high. For too many young Aboriginal men, a prison term seems to have become a right of passage. New ways of doing things were clearly called for and are being adopted.

I wish to indicate my strong support for the system of circle sentencing, an idea which we picked up from the Canadians. It appears from the early results that this has been an extraordinarily successful initiative. It was tested on a trial basis in Nowra under the dedicated guidance of Magistrate Doug Dick⁴. It has now been extended to a number of other centres, with the prospect that it will become even more widely available as the great amount of preparation work required to ensure an effective system is undertaken in more and more places.

There is a good deal of evidence now that sentences which carry the support of the elders of the local Aboriginal community have a much greater impact on the individual offender than any sentence imposed by a white magistrate. The sense of shame imposed by the process itself appears to be much more effective, particularly in reducing recidivism. Furthermore, notwithstanding some scepticism at the outset in many of the communities, the victims appear to leave the process with a high level of satisfaction about both the process and the result. There does not appear to be any sense that the ultimate sentences are systematically inadequate. More significantly, the direct face to face discussions between the victim and the offender provides a kind of closure that usual court procedures do not afford.

To a very large extent the system depends on the existence of local Aboriginal leadership which is accepted by offenders. It may not be a system that can work where it is most needed, that is to say where the Aboriginal community is breaking down. On the other hand, the system itself empowers the Aboriginal leaders of the region in a way that is palpable and has a real influence on the lives of Aboriginal offenders, particularly younger offenders, as most who become involved in circle courts appear to be. The degree of acceptance is manifested in the comment of one of the elders to Magistrate Dick: “This is not white man’s law anymore, it’s the peoples’ law”⁵.

In terms of the topics on which I was asked to address you this evening – Vision, Leadership and Future –circle sentencing is both a manifestation of vision and of leadership, occurring in such a way as to reinforce the position of Aboriginal community leaders. The apparent success with respect to rates of re-offending, together with the widespread acceptance by victims of the process and its outcomes, is a very real ray of hope in an otherwise bleak landscape of criminal offending by young Aborigines.

I have been asked to make some observations about the future. In many ways, given the difficulty I have in discussing controversial subjects, speculating about the future is perhaps the easiest thing for me to do. There was a saying common in the former Soviet Union: “Predicting the future is quite straight forward, it’s the past that keeps changing”.

Within the limitations that my office imposes upon me, I wish to make a few observations about the future course of the reconciliation process.

Policies which have encouraged the assimilation of individual Aborigines into the white community, including particularly policies involving removal of children from their parents, have been the focus of much attention. It has long been known that many persons who are at least in part of Aboriginal origin have successfully passed as white over the course, now, of



almost two centuries. Sexual contact began at the very outset of white settlement, because of the shortage of white women in the bush. It has continued in many other ways, to the extent that few families from the bush have not had such contact.

Throughout Australia there is a considerable body of anecdotal evidence about particular forebears who behaved in a manner consistent with being of Aboriginal or part Aboriginal origin. I refer to stories of grandfathers who avoided the sun as much as possible and grandmothers who caked white powder on their faces. Many family trees have points at which the origins of a particular forebear are simply left blank. These are all tell tale signs of Aboriginal origin. Henry Reynolds, in his most recent book, *Nowhere People*, published this year, has come to identify, for the first time in his career as a historian of the Aboriginal people, his own Aboriginal heritage that had been suppressed by his father and grandmother. The surprise of his discovery would be replicated in tens of thousands of Australian families.

The extent to which assimilation has occurred over the course of almost two centuries, often as a result of deliberate government policy, has received prominence in the reconciliation debate. However, that attention has tended to focus, to the detriment of the reconciliation process, on matters that involved the separation of Aboriginal persons from the broader community, rather than on matters which integrate Aborigines with the broader community. Past assimilation has been treated as divisive and only divisive. It is more complicated than that.

Let me state one undeniable fact. Millions of Australians have an Aboriginal ancestor. This should be recognised as an important bond.

There was a strong sense of racism involved in the suppression in thousands upon thousands of Australian families of the Aboriginal origins of one or more of their forebears. For most of our history this has been regarded as a matter to be suppressed. It appears to me that the process of reconciliation would be advanced by a wider recognition across the broad Australian community that millions of Australians have Aboriginal ancestors.

We have been through this process before. For most of our history respectable Australian families tried to hide their convict origins. Indeed as early as 1841 the judges of the Supreme Court declared invalid legislation for a census which would ask persons to identify whether they were of convict origin or not⁶.

The dominant attitude in the nineteenth century to emancipated convicts and to their progeny, frequently referred to as “the shame of Botany Bay”, was based in part on the idea of tainted blood being inherited. This is also the foundation of much racist thought. The sense that convict origin, however remote, was not respectable, a matter of great significance in the Victorian era, remained a factor in Australian society at least until World War II. Since then identifying one’s convict origins has become a matter of some pride. I do not think it is impossible for us to hope that the same can occur with respect to the Aboriginal origins of many Australians.

Identifying Aboriginal ancestors will be a matter of great difficulty. This is not a matter on which persons kept records at the time. Most were trying to hide the fact. Nevertheless, there is an ability for persons interested in their family’s tree to identify the signs of Aboriginality in many cases. To the extent that I am correct, and that millions of Australians



have Aboriginal ancestors, the reconciliation process will be substantially advanced if persons of whom that is true take steps to identify those origins and take pride in finding them. The reconciliation process cannot succeed if it is based, contrary to historical fact, solely on maintaining a rigid and categorical distinction between black and white. It will succeed if a significant proportion of those Australians, of whom it is true, take pride in acknowledging their roots in both communities.

¹ See *NSW Aboriginal Justice Plan: Beyond Justice 2004-2014* NSW Aboriginal Justice Advisory Council 2006, p6.

² See Jacqueline Fitzgerald and Don Weatherburn "Aboriginal Victimisation and Offending: The Picture from Police Records" NSW Bureau of Crime Statistics and Research, *Bureau Brief*, December 2001.

³ See Don Weatherburn *Law and Order in Australia: Rhetoric and Reality* Federation Press, Sydney 2004 especially pp220-221.

⁴ See Doug Dick "Certain Sentencing of Aboriginal Offenders: Victims Have a Say" (2004) 7 *Judicial Review* 57.

⁵ Ibid p72.

⁶ See J B Hirst, *Convict Society and Its Enemies* George Allan & Unwin, Sydney 1983 at p119, J M Bennett, *Sir James Dowling: Second Chief Justice of New South Wales*, Federation Press, Sydney 2001 at p121.