

## First Nations and the NSW Bar

by Anthony Cheshire SC

The 2016 Census of Population and Housing, released by the Australian Bureau of Statistics, recorded 216,176 Aboriginal and Torres Strait Islander people in New South Wales, being 2.9 per cent of the state population. There are 2,364 recorded practising barristers in New South Wales, so that to be consistent with the overall population there should be at least 68 First Nations barristers in New South Wales. Unfortunately that is not the case, neither in New South Wales nor nationally.

This problem has been recognised in the legal profession for some time. In the December 1996/January 1997 edition of the

Northern Territory Law Society magazine 'Balance' a piece was published on the very low retention rate of Aboriginal and Torres Strait Islander law graduates. Fiona Hussin, the Aboriginal Pre-Law Program Co-ordinator at the Northern Territory University told Balance that even if Aboriginal students did have access to law studies, the social factors, cultural factors and inappropriate curricula conspired to make completion very difficult.

In 2011 Phillip Rodgers-Falk published a paper on the attrition rates of Aboriginal and Torres Strait Islander law students in Australian law schools. The figures he presented disclosed a tertiary education system in which

concerted efforts were leading to increased enrolments in law, but those enrolments were not being converted into completed study. He reported that although there were no first year enrolments by Aboriginal or Torres Strait Islander students in any law schools in Australia in 1970, the number had risen to 92 by 2009, although there was only a 45% completion rate.

Mr Rodgers-Falk identified similar failings to Ms Hussin that continued to lead to low retention rates, but he recognised as a positive factor an emerging and increasing level of support from within the legal profession.

In the late 1990s, a number of barristers in New South Wales took action to address this problem of underrepresentation at the Bar. At that time, there was only one First Nations barrister at the New South Wales Bar, a situation which was described as *pretty dismal*. That led to the Bar Association establishing the Indigenous Barristers' Trust - The Mum Shirl Fund on 6 August 2001.

Shirley Colleen Smith AM MBE (1924-1998) was a Wiradjuri woman who dedicated her life to welfare services. She visited many Aboriginal prisoners in gaol, which led to her being given the name Mum Shirl. She raised over 60 foster children and was involved in setting up the Aboriginal Legal Service in 1971 and also the Aboriginal Medical Service, the Aboriginal Black Theatre, the Aboriginal Tent Embassy, the Aboriginal Children's service, the Aboriginal Housing Company and the Detoxification Centre. It was fitting that the trust be named after her.

The recitals of the Trust Deed were as follows:

a) It is recognised by the body of members of the New South Wales Bar Association that Indigenous persons seeking to make a career at the New South Wales Bar are frequently in circumstances of poverty, suffering or misfortune, both financially and culturally, which constitute a significant obstacle to the pursuit of their chosen career.

b) The body of members of the New South Wales Bar Association consider that it is in the interests both of Australians generally and of all Indigenous persons for the number of such persons practising at the New South Wales Bar to increase.

c) For the purposes of facilitating the pursuit of the practice of the law by Indigenous persons and in order to make provision for the objects set out in this deed, the settlor wishes to create the trusts hereinafter set out and thereby to establish a Trust Fund, with a physical presence at the offices of the New South Wales Bar Association, which will be

a public benevolent institution for the relief of such poverty, suffering, helplessness, misfortune or other disability of indigenous persons as may constitute an obstacle in the way of their being able to practice at the New South Wales Bar.

d) For the purpose of giving effect to such desire the settlor has, upon the execution of this Deed, transferred to the trustees the sum of Ten Dollars (\$10) (hereinafter referred to as 'the Settled Property').

The settlor was Justice Ruth McColl, then president of the New South Wales Bar Association; and the original Trustees were three barristers (Mullenjaiwakka, Bret Walker SC (as president of the Bar Association) and Chris Ronalds AO SC) and one solicitor (Daniel Gilbert). The current Trustees are Arthur Moses SC (as president of the Bar Association), Justice Michael Slattery, Chris Ronalds AO SC and Tony McAvoy SC.

It was anticipated that monies would be raised for the trust through fundraising from members of the Bar and so an application was made for deductible gift recipient status. Unfortunately this was refused by the Tax Office, which led to a successful challenge to that decision in the Federal Court (*Trustees of the Indigenous Barristers Trust - Mum Shirl Fund v Commissioner of Taxation* (2002) 127 FCR 63).

In that case, Gyles J dealt with the central issue of whether the trust was a *public benevolent institution* thus:

In my opinion, the undisputed evidence leads to a finding that, at the time the trust was settled, and for the foreseeable future, many, indeed most, indigenous persons in Australia could properly be described as 'disadvantaged' generally and, in particular, in relation to education and the ability to take a place in the business and professional world of Australia. Further, in my opinion, the benefits which can be afforded by the trust are calculated to relieve that disadvantage. It is not to the point to advert to the fact that there are, no doubt, many non-indigenous Australians who suffer similar disadvantages of one sort or another, and that there are many other Australians who do not have the means or motivation to enter a profession, even assuming that they have the intellectual ability to do so. I am satisfied that there are special disadvantages in advancement in life suffered by indigenous Australians. Neither is it to the point to liken the benefits to be offered by this Trust to the giving of unnecessary luxuries to persons suffering from poverty. Whilst, at one level, assisting persons to become

practising barristers may be seen by some as a luxury, I see it as the grant of assistance to persons to take a place in the world which the ability of the person would warrant but which might be denied without the assistance provided in order to overcome economic and social disadvantage.

The manner in which it was anticipated the trust was described in evidence:

The applicant trustees anticipate that in due course there will be fund-raising exercises undertaken, primarily with the membership of the Bar Association to whom the existence of the Fund will be promoted. The existence of the Fund will also be promoted to the faculty staff and students of law schools, in association with their indigenous programs, and with other agencies associated with indigenous law programs and indigenous law graduates. The applicant trustees anticipate that between \$25,000 and \$50,000 should be available annually to provide assistance to applicants who qualify under the terms of the deed and that in due course the applicant trustees will develop protocols and guidelines to assist them in evaluating applications to the Fund for assistance.

Since that time, the trust has operated consistently with those aims and provided financial support to many First Nations lawyers and law students. It has been funded almost exclusively by judges and practising barristers, especially by donations at the time of practising certificate renewals and from the charitable donations of most year's silk appointments. In the last two years, its revenue was \$231,841, made up almost entirely of donations, and grants were made totalling \$215,920. Its net assets have remained stable at around \$500,000.

There are regular donations from the trust, such as to fund law students to attend the annual National Indigenous Legal Conference and junior lawyers to attend advocacy courses and international conferences. There are also donations to meet individual needs, such as emergency or urgent financial assistance, attendance at the College of Law and undertaking specialist advocacy courses. Ronalds AO SC gives as one example a student who was discovered sleeping in a library due to family breakdown and received urgent assistance from the trust to ensure that she was accommodated in a university college.

In 2002, the Bar Association established the Indigenous Barristers' Strategy Working Party with members from the New South Wales Bar, the judiciary and local universities. It was chaired by Chris Ronalds AO SC and three of the nine members identified



as Aboriginal or Torres Strait Islander. Its objectives are as follows:

Further develop & implement the Indigenous Barristers' Strategy approved by the Bar Council

Devise and implement fund raising strategies for the Indigenous Barristers' Trust

Liaise with the Equal Opportunity Committee on issues involving Indigenous barristers

Create further employment opportunities at the NSW Bar for Indigenous law students

Liaise with other agencies to create further employment opportunities for recent Indigenous law graduates to work as solicitors, judges' associates and in other appropriate areas of legal work.

In addition to the financial support from the trust, the Bar Association (in particular through its Working Party) has set up various programmes to assist Indigenous law students and lawyers.

Since the early 2000s, the Bar Association has hosted students attending the Indigenous Pre-Law Course at the University of New South Wales, with those students attending a seminar, meeting barristers and attending court with barristers and judges. In 2013 this was extended to students at universities across the state. In 2014, 33 First Nations law students attended a Share a Judge's Day where they sat in court with judges and also had discussions with them and court staff behind the scenes. This was repeated in 2017 and involved judges from the Federal Court, the Supreme Court and the Land and Environment Court, concluding with a social event.

Since 2005, the Bar Association has run an employment scheme where First Nations students work for one day a week for a barrister or for a group or floor of barristers.

In 2008, the trust funded a students' forum for all First Nations law students across the state and funded travel costs for attendees from regional universities. There was a focus upon career opportunities within the law and in particular at the Bar. The students themselves suggested that they would benefit from having mentors at the Bar and this led in 2009 to the establishment of a First Nations mentoring scheme.

In that scheme, law students are mentored by a practising barrister. Regular contact and mentoring is provided and this has included work experience opportunities, reviewing essays to develop analytical and writing skills, assisting in preparation for mooted competitions, exposure to the legal system and barristers' work and some pastoral care. It has also meant that the mentor has been in a position

to refer the student to the trust for financial assistance should that become necessary and to provide a reference when the student is seeking work as a solicitor. There are currently 22 First Nations law students being mentored by New South Wales barristers. Over 140 students have been mentored in the last 10 years.

Tony McAvoy SC estimates that dozens of students who might otherwise have dropped out of their law studies have, with the assistance of the mentoring program, gone on to complete their degree. As he says:

Of the many who have completed their degrees with or without our assistance, we have seen the practice of law come back into favour as a viable and valid career choice.

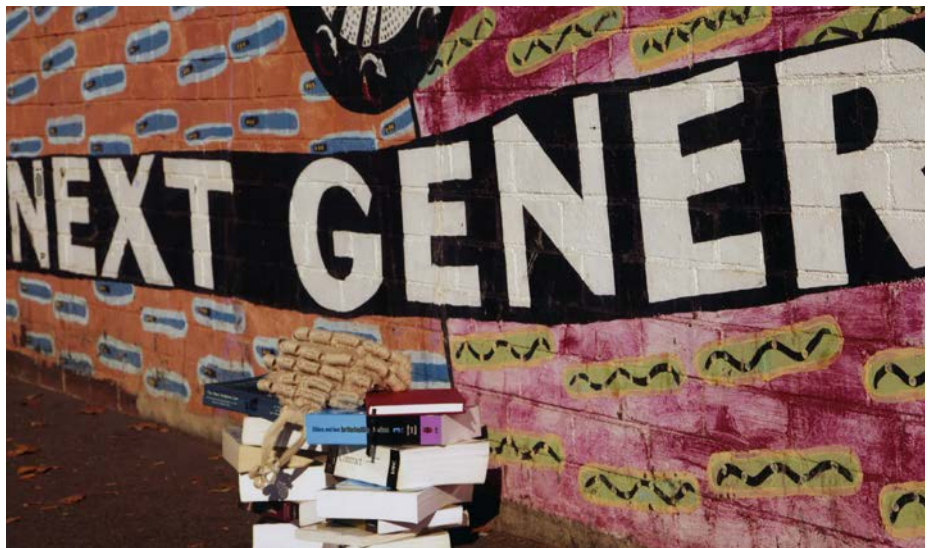
In 2006, at the initiative of the Bar Association, the first National Indigenous Legal Conference was held in Sydney, with financial support being provided by the trust. This is now the premier law conference for First Nations lawyers and law students and has provided

the Association's goals for the future and the way in which those goals can be achieved. That plan has recently been published for 2017-19. The Working Party is then responsible for the further promotion and implementation of the plan.

In January 2018, the president announced the establishment of the First Nations Committee, to be chaired by Tony McAvoy SC. The role of the Working Party has become a sub-committee of this new Committee, which has a wider focus on policy development and the Association's participation in important public debates.

Tony McAvoy SC, Sarah Pritchard SC and Chris Ronalds AO SC are also on the Law Council of Australia's Indigenous Legal Issues Committee, which provides advice to the council and assists in the formulation of policies.

There is no doubt that First Nations people face significant difficulties and disadvantages, not only generally but also specifically in relation to pursuing a career in the law and at the Bar. The Bar Association, in particular



ed the opportunity for the creation of effective national networks. It is now held annually at different locations around Australia,

There are now five First Nations barristers in New South Wales and in 2015 McAvoy SC was the first First Nations barrister in Australia to be appointed as Senior Counsel.

The mentoring programme has also given the Bar Association a better insight into the extent and causes of the attrition rate in First Nations students completing law degrees; and enabled it better to target its efforts.

In January 2013, the Bar Association established a Reconciliation Action Plan, which was described by then president, Phillip Boulten SC, as having the explicit aim of increasing the number of Indigenous barristers at the New South Wales Bar. The plan documents the Bar Association's responsibility to ensure that the New South Wales Bar reflects the values of equity and diversity and sets out the Bar

through the First Nations Committee, continues to offer active support and initiatives with the aim of increasing the number of First Nations barristers at the New South Wales Bar; and the Indigenous Barristers' Trust - The Mum Shirl Fund offers the financial support for those initiatives and for First Nations law students more broadly.

In January 2018, Chris Ronalds SC was made an officer of the General Division of the Order of Australia (AO) for 'distinguished service to the law and the legal profession, particularly in supporting, mentoring and developing the careers of Indigenous lawyers and law students'. As she says:

The picture is slowly improving, but it does require the ongoing support (financial and otherwise) of members of the New South Wales Bar, which has been so generous and long-term to date.