‘Lost in Transnation’ - The story of the missing parcel and litigants’ experiences in early colonial Sydney

NSW Justices Association Annual Conference

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1. My speech today is about a contradiction, an inequality before the law that emerged at the outset of the colony of New South Wales, that First Nations People could not serve as witnesses in a court case. They could not testify against persons charged with committing crimes against them, including massacres. This prohibition was not removed for nearly a century. In Australia, as in the United Kingdom from which we inherit our legal system, we place great pride in the concept of the ‘rule of law’ and ‘equality before the law’. However, from the outset of the colony, the rights of First Nations People before a court were not the same as a free settler, or even a convict.

2. Today, I do not propose to discuss the morality of the inequality of treatment of First Nations People in court proceedings in the early colony, a matter which we all know to be contrary to the values we hold. Likewise, this is not intended to be a scholarly dissertation analysing legislation and the lawbooks. Today is about learning from our past and engaging in the exercise of truthful storytelling, a commodity in which courts, at every level of the judicial hierarchy, trade, admittedly a rare commodity at times, if you listen to some of the unscrupulous characters who have given evidence in proceedings over which I have presided. Discussing and sharing the stories our past is part of the journey towards meaningful reconciliation, and a core tenet of the Uluru Statement from the Heart. Truthful storytelling is one of the key denominators which strengthens bonds between generations. The recent debate in our nation about whether to insert a recognition through a Voice to Parliament has brought to the forefront a number of issues about which people are extremely passionate and has demonstrated that we have a long way to go in learning about Australia’s past.

3. My speech today will occur in a few parts. I will begin by discussing the state of the colony in mid-1788. This is a common way we learn about the origins of New South Wales and Australia. I will then touch upon what the well-known Australian historian Professor Henry Reynolds referred to as *‘The Other Side of the Frontier’*, Gadigal Sydney and what happened in those first

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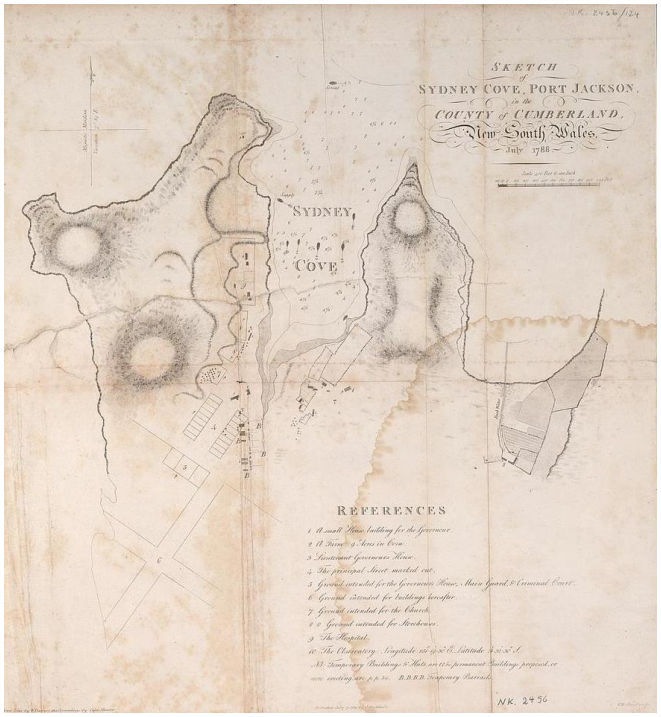
few months after British arrival. I will then move onto the early judiciary, and how the fledgling colony operated a legal state, even if it was, at times, marked by inequality. This will lead me to a discussion of the first civil case in New South Wales, that of *Cable v Sinclair*[2], and the establishment of the legal principle of equality for all colonists. Finally, I will briefly touch upon the differences and inequality experienced by First Nations People in colonial New South Wales.

Old Sydney Town and the Destruction of Warrane

4. We all know the story of when the First Fleet arrived in Sydney Cove in 1788. I need not repeat that here. We also know what life was like for convicts. Similarly, I will omit that. The Gadigal people, who were the first that the colonists encountered in Sydney Cove, knew the area as Warrane[3]. However, as we all know, their land was co-opted and so little remains of their cultural heritage implanted on the landscape.

5. The Tank Stream was a vital tributary that ran from swampy high ground located within the area now bounded by Market, Park, Elizabeth and Pitt Streets through a small, closed valley and into Circular Quay. It was fed and filtered from the seepages of mosses and undergrowth that provided the spongy cover of its porous sandstone base. A vast array of tree species shaded and protected the waterway. The Tank Stream was a vital source of freshwater for the Gadigal people and the colonists who inhabited that land and found similar uses for it, including by later using it as an open sewer. The first colonists cleared the trees and underbrush, loosening the topsoil which kept the mosses, ferns and undergrowth moist. A small log bridge was built over the Stream, giving us Bridge Street. By 1790, the creek had become polluted. New dwellings were banned in the catchment area and tanks were built near Bridge Street to retain what little water still flowed, giving us the name, the Tank Stream. In 1804, Governor Philip King declared a green belt, but to no avail. By 1826, Tank Stream had ceased to be used as a water supply. It is now an underground storm water drain, taking away the excess rainwater from Sydney's streets.

[2] [1788] NSWKR 7; [1788] NSWSupC 7.
[3] Pronounced War-rang.



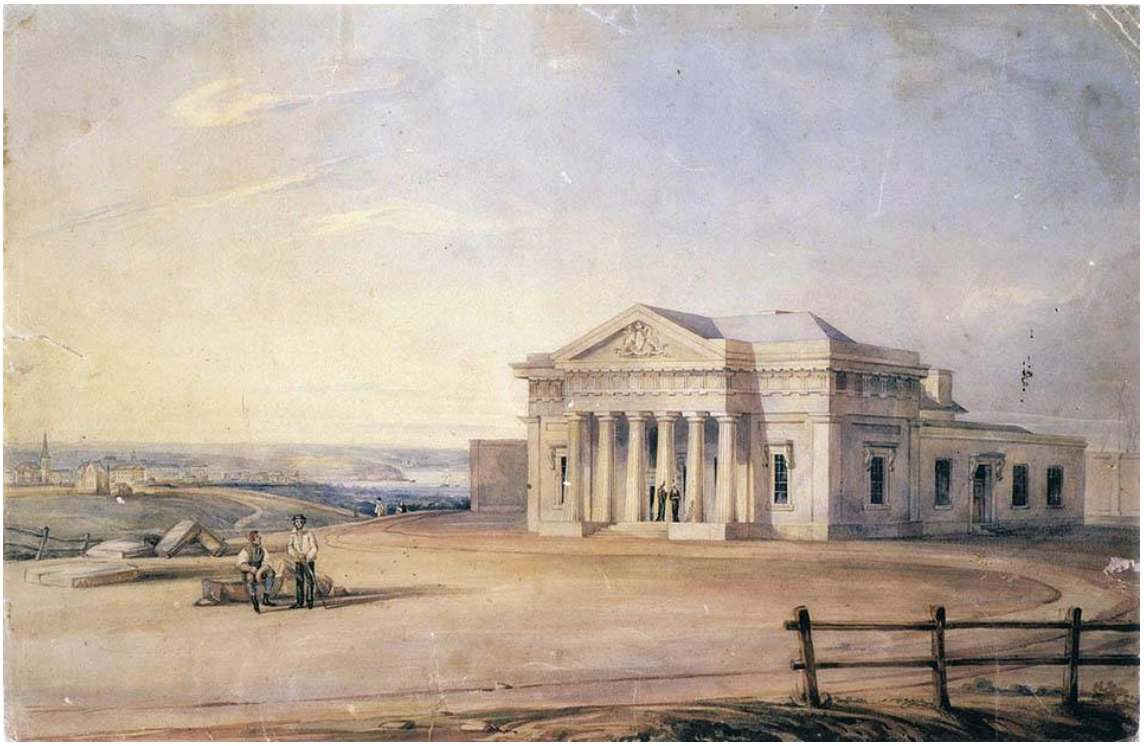
Sketch of Sydney Cove, July 1788, National Library of Australia

6. Governor Arthur Phillip invested much time in devising a plan for the development of Sydney. Almost none of that plan came to fruition, including naming our city 'New Albion', and not the accidental name it borrowed by the Cove. Phillip's grand plan incorporated a town centre set in a grid pattern on the western hillside (in the map above) where the Tank Stream entered the cove. A plan drawn by Lieutenant William Dawes shows a main street running in a south-easterly direction from the eastern shoreline of Sydney Cove where the Tank Stream entered the cove, to the top of the rise where York and Jamison Streets now meet. This street, running through the centre of the grid, was to be a grand avenue which, from a downward perspective, would give a panoramic view across the waters of Sydney Cove to Bennelong Point. Apart from Lang Street, none of the streets in Phillip's plan eventuated. Instead, a rough path trodden down by convicts taking water from the stream to the hospital became the colony's main thoroughfare and, after a succession of name changes, widenings and realignments, became George Street.

Thomas Watling, View of Sydney Cove, 1794-1796, State Library of New South Wales

Primum Judiciarium

7. When the planning was underway for establishing a colony on the eastern coast of Australia, the British Government knew that a judicial system would be needed – one with broad jurisdiction given the difficulty in sending people back to London for trial. To that end, in 1787, the Imperial Parliament passed *New South Wales Courts Act 1787* (Imp), which created the Court of Criminal Jurisdiction. The Court was to be constituted by the Deputy Judge Advocate (simply known as the Judge Advocate) and six military officers. The Judge Advocate presided over the Court, while also being a member of its jury, a rather odd proposition in today's terms. There were no formal indictments, rather simple statements were read out in court. Lawyers were not permitted, however, for the first years of the colony, there were none anyway. The Court did not have a permanent home, nor did it have regular sittings. It only sat *ad hoc* upon the Governor's command. The sentences imposed by the Court ranged from fines to imprisonment to the death penalty. However, the prisoners never had money to pay fines, nor was there a gaol - so two of the three sentencing options were avoided. Rather, flogging was a common sentence and the Governor's warrant was required for any execution.

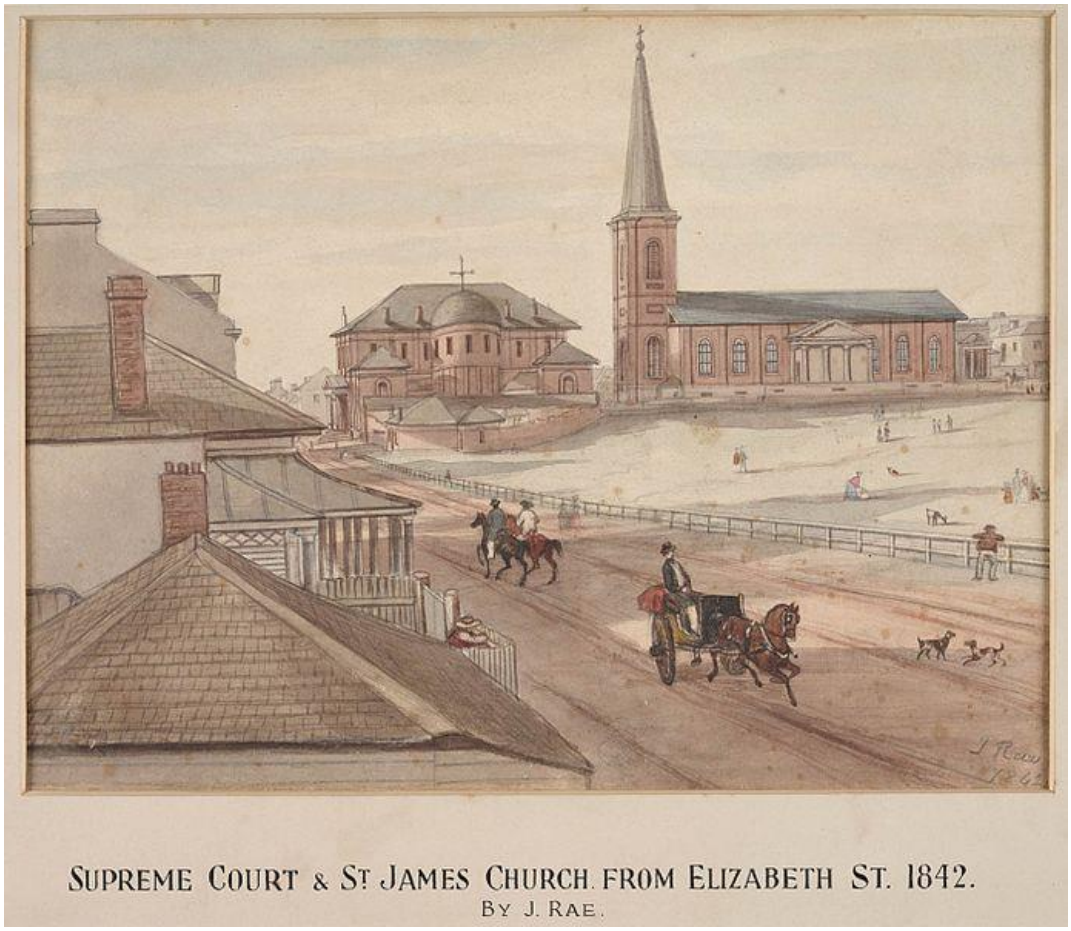


Frederick Garling, Court House, Darlinghurst, c.1840, State Library of New South Wales

8. The First Charter of Justice, in respect of which letters patent were issued by King George III in 1787, created the Court of Civil Jurisdiction. The Court was constituted by the Judge Advocate and two persons appointed by the Governor. The Judge Advocate was the presiding officer and could hear and determine, summarily, actions related to land, houses, debt, contract and most other common law or equity related matters to any value. It is in this court that the two protagonists of our story, Henry and Susannah Kable, filed their civil case, the first civil case in New South Wales. This court too had no permanent home, and sat irregularly.

9. The Court of Civil Jurisdiction was found to be wanting, however, as no qualified judge ever served on its bench. The Court was abolished in 1814 with the proclamation of the Second Charter of Justice, which also created three new civil courts, each with an increasing jurisdiction: the Lieutenant Governor's Court, the Governor's Court, and the Supreme Court of Civil Judicature. The latter went by the shorthand of 'the Supreme Court'. This Court was presided over by Judge Jeffrey Bent, and two magistrates appointed by the Governor.

10. In 1815, the Bigge Inquiry, conducted by English judge and royal commissioner, John Thomas Bigge, recommended a more independent legal system be established, under the Attorney General and not under the direct influence of the Governor. This came to fruition in 1823, when the Third Charter of Justice abolished the Court of Criminal Jurisdiction and the Supreme Court of Civil Judicature and created the Supreme Court of New South Wales, with criminal and civil jurisdiction. This is the same Supreme Court that sits at Queen's Square today.



John Rae, Supreme Court and St James' Church, 1842, State Library of New South Wales

Convicts, Theft and the Lost Parcel

11. I now turn to the case of *Cable v Sinclair*[4], a case which established an early form of colonial equality under the law, although as I remarked earlier, only for the European colonisers. This case is significant because it established not only that convicts were able to access the courts to adjudicate their civil disputes but that they could also actually win their cases.

12. Henry Kable was a convict from Norfolk, England, who, in 1783, at the age of 19, was convicted of armed robbery and sentenced to death. His father and brother, co-conspirators in the same crime, were both hanged. However, there was a reprieve and Henry's sentence was commuted to transportation to America for a term of 14 years. Susannah Holmes was convicted in 1784, at the age of 20, for theft from her employer and was sentenced to hang. There was, similarly, a reprieve granted and her sentence was commuted to transportation to America for a term of 14 years.

13. Many of you may have guessed that the 1780s was not a decade in which transportation to America would be likely. The American War of Independence and the establishment of the

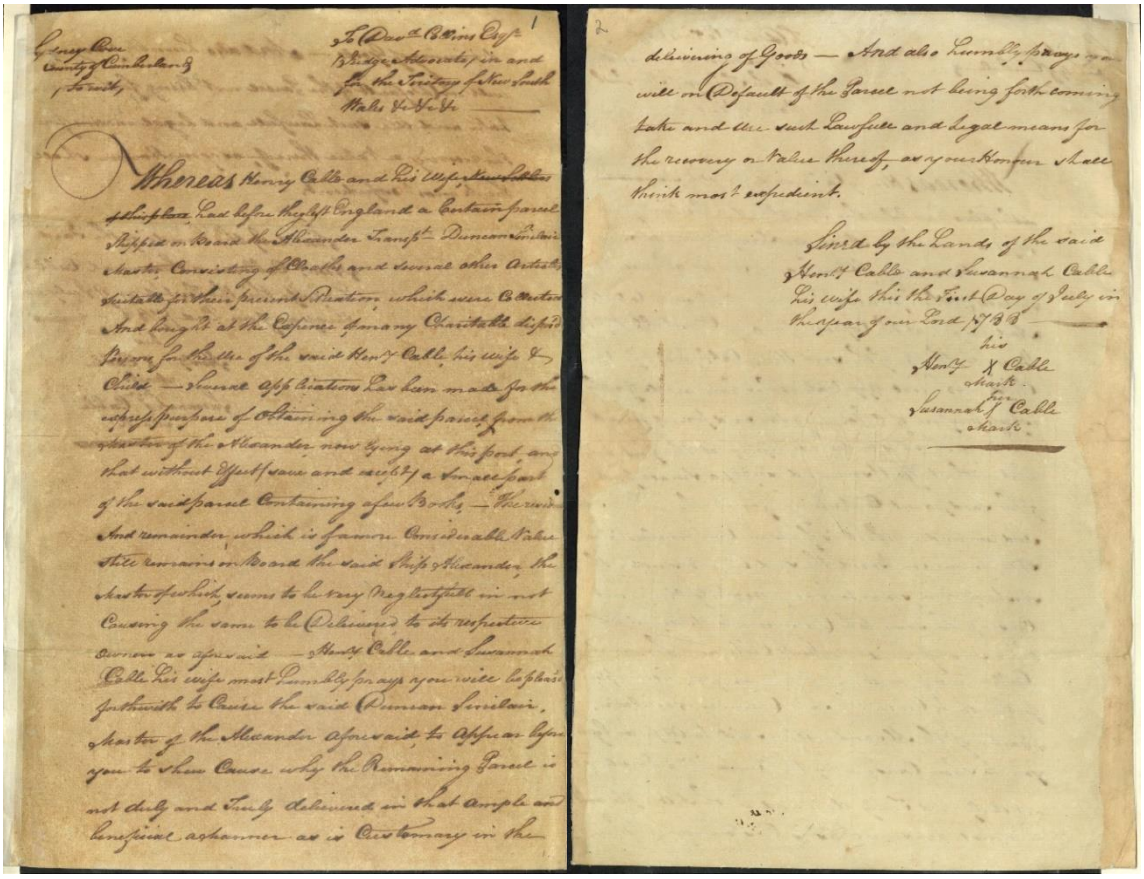
[4] [1788] NSWKR 7; [1788] NSWSupC 7.

United States of America forced the British Government to look for alternative places to send their convicts. While Henry and Susannah were awaiting transportation in Norwich Prison, they had a son, Henry Jr. They attempted to get married, however, as they had been sentenced to death, the law considered them already dead, without legal rights.

14. Henry and Susannah were eventually selected to travel on the First Fleet to New South Wales. There was notable public support for the young family in Britain, with a parcel of clothes and linen donated by the Norfolk community, to the sum of £20. This parcel was placed in the care of Captain Duncan Sinclair, master of the cargo ship *Alexander*. However, upon arrival in Sydney in January 1788, Henry and Susannah attempted to claim their property, but it could not be found. This lost parcel would establish a key legal right for convicts. Henry and Susannah were among the first to be married in the new colony, again a breach of the laws back in Britain.

15. On 1 July 1788, the Kables lodged a civil claim in the NSW Court of Civil Jurisdiction, the first case of this Court. The warrant for the lawsuit, the statement of claim, was addressed to Mr David Collins Esq, the Judge Advocate for New South Wales. The warrant, as indicted by the markings of an 'X' by each of the Kables names, was written by someone else, as the 'X' marks someone as illiterate. Not only does this show that convicts could file claims against free settlers or a ship's company, but that illiterate convicts could do the same. Given the prejudice towards convicts and those who could not read or write, this was a promising step that the statement of claim was lodged and heard in court. Given that convicts were considered 'dead to the law' in Britain and unable to file any civil cases, it was not known the Kables case would even be heard. The colonial authorities, that is the Governor, Arthur Phillip, and the Judge Advocate, David Collins, thought it necessary to adopt British law in the distant context of New South Wales.

16. The statement of claim does not refer to Henry and Susannah as convicts. Rather, it initially refers to them as 'new settlers of this place', although this appears crossed out. Why and when it was crossed out is unknown, but it could be speculated that it was written and crossed out intentionally to make the case for them as settlers, just like those not serving a sentence of transportation. Regardless, the case was heard against the powerful master of the *Alexander*, Captain Sinclair. Sinclair was required in court to explain why the lost parcel had not been delivered to the Kables. He could not provide an explanation and the Court ordered him to compensate the Kables to the sum of £15. While this may not have been as much as the parcel was worth, it was money that the penniless and illiterate Kables could put to good use.



Warrant, Cable v Sinclair, 1788, State Archives Collection: Court of Civil Jurisdiction; NRS-2656, Rough minutes of proceedings, 1788-1809. [2/8147] pp 1-2

17. Later in life, Henry Kable would become a constable of police, and later chief constable, in the new colony, before being dismissed for smuggling pigs. He became a prominent businessman, particularly in the shipbuilding industry and upon his death, was survived by 10 children. The Kables continue to have many descendants across Australia. Indeed, Angus Robertson, our Assistant Policy Officer in the Chief Magistrate's Office, to whom I am eternally grateful for assisting me with this speech, is descended from Henry and Susannah's eldest daughter Diana Teale, who was the second European to be born in New South Wales and was the first to live to maturity and have children of her own.

18. This case established two things of vital importance to the fledgling colony. First, it established that convicts, while they were serving a sentence of imprisonment and forced labour, were not considered 'dead to the law'. Convicts were able to access the benefits of the legal society which were available to others. That is not to say that their claims were considered as worthy or their testimony as reliable – a considerable amount of prejudice persisted for many decades. They were, however, at least able to access this form of justice and were not legally barred as they were back in Britain.

19. Secondly, this case which occurred without a courthouse or a formal bench, established that the New South Wales colonial authorities were willing to deviate from Imperial laws, where they felt it necessary for the efficient discharge of justice and for community confidence in the system. A small colony far from its origins would have to bend the strictures of the metropole if it was to survive.

Exclusion and Discrimination in the Courtroom

20. With convicts able to participate in the legal system in the same manner as free settlers – except as solicitors, which had its fluctuations between the early Governors – there remained a key separation in the rights in a courtroom in New South Wales. Permit me for a few moments to draw upon the recent work of three dedicated researchers from the 'Towards Truth Project' who recently wrote about uncovering the truth of our legal history[5] and who undertook an examination of the ways First Nations People were treated by the early NSW courts. The rules of evidence applicable in the Courts of Criminal Jurisdiction and Civil Jurisdiction did not explicitly prevent First Nations People from giving evidence, however, regular interpretations of the law had that effect. In 1799, a British man was charged with the murder of Aboriginal man Willie Cuthie. Cuthie's Aboriginal wife asked to act as a witness in court. However, her evidence was disallowed because she was deemed "incapacitated from giving such testimony as could be admissible in law". The British man was later found not guilty.

21. First Nations People were viewed as incapable of taking a religious oath, which excluded their evidence from the justice system. Aboriginal witnesses were disallowed from giving their account in a legal institution designed to afford natural justice to all. In 1805, Judge Advocate Richard Atkins expressed the view that "the evidence of [p]ersons not bound by any moral or religious tye [sic] can never be considered or construed as legal evidence". This was widely cited by his contemporaries. Its application can likely be seen in the trials of *R v Luttrell*[6] in 1810 and *R v Hawker*[7] in 1822, where white colonists were tried for violent acts against Aboriginal victims, but no Aboriginal witnesses gave evidence in the proceedings.

22. The NSW Attorney General recognised the injustice and inefficiency of this exclusion in Parliament in 1824, where he described the judiciary's stance as "one of the greatest practical absurdities ever committed by the Courts". Parliament attempted to change the law after the Myall Creek Massacre in 1838, where white colonialists murdered at least 28 Aboriginal people.

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5 Uncovering the truth of our legal history, Anna Harding, Project Director, Towards Truth Project; Corey Smith, Co-ordinator, Towards Truth Project; Oliver Williams, Research Assistant, Towards Truth Project; NSW Law Society Journal, Oct 2023.

6 *R v Luttrell* (1810) NSW Sel Cas (Kercher) 419.

7 *R v Hawker* (1822) NSW Sel Cas (Kercher) 719.

The Aboriginal Native Witnesses Bill introduced into NSW Parliament would have allowed First Nations People to give evidence in court after making an affirmation or declaration that they would tell the truth. The Bill passed NSW Parliament, but the Imperial Parliament rejected it on the basis that "to admit, in a criminal case, the evidence of a witness acknowledged to be ignorant of the existence of a God, or a future state, would be contrary to the principles of British jurisprudence".

23. In 1876, the NSW Parliament passed the *Evidence Further Amendment Act 1876* (NSW) which allowed any person, including First Nations People, to give evidence without taking an oath. This was nearly 90 years after they were first prohibited from testifying. Part of the drive for this reform was not moral righteousness but, rather, to bolster the evidence of Police cases. Aboriginal trackers working for the Police, more than any other section of the First Nations community, were called upon to give evidence in court after this reform. Often, this was to prosecute First Nations People. However, in spite of the Act, some judges and magistrates continued to rule the evidence of First Nations People as inadmissible.

24. These stories highlight only some of the discrimination under which First Nations People have laboured when intersecting with the justice system and how their prohibition on giving evidence would have allowed colonists who committed acts of violence against First Nations People to escape justice. The corollary of deterrence is encouragement and one cannot help but think that these prohibitions might have had the effect of tacit endorsement of unlawful acts by colonists who were aware that their victims could not testify against them. It is no secret that First Nations communities in New South Wales were subjected to considerable inequity, violence and intergenerational trauma at the hands of colonists.

Where to from here

25. I am pleased to report that the Local Court takes very seriously the challenge of Closing the Gap and reducing the over-representation of First Nations people in the legal system. The Local Court will continue to explore culturally appropriate ways of involving First Nations people in its decision-making processes and to promote strategies designed to ameliorate the structural and systemic inequalities experienced by them.

26. The Local Court and its siblings, the Children's Court and the Coroners Court, continue to improve and expand upon several initiatives such as Circle Sentencing and the Youth Koori Court. Circle Sentencing continues to be available at more courthouses across the State, and we were all delighted with the opening of the new Youth Koori Court in Dubbo earlier this year. The Youth Koori Court is an excellent example of a holistic, strengths-based process which involves

interventions and collaboration amongst professionals with a view to identifying relevant risk factors which impact on a young person's continued involvement with the justice system, and active monitoring of the wide-ranging interventions implemented to address these risk factors. Importantly, First Nations Elders and respected persons are involved and actively participate in the Youth Koori Court process.

27. A very recent development of which we are also proud is the commencement in the Children's Court of the Winha-nga-nha[8] Care and Protection List in Dubbo Children's Court. The Children's Court has co-designed the Winha-nga-nha List in collaboration with the Aboriginal and Torres Strait Islander community in Dubbo and key stakeholders. It provides a culturally competent and safe court process for First Nations families in care and protection proceedings in NSW. Key features of this new list include allocating more court time to listen to families and identify solutions, better scheduling of cases to reduce waiting time at court, greater requirements on the attendance of child protection caseworkers to ensure consistency and accountability on behalf of the Secretary, encouraging the participation of family members, more staff whose ancestral history stems from First Nations People, adapting more informal proceedings with the magistrate sitting in the well of the court during conversations (rather than on the bench), and having greater and earlier Dispute Resolution Conferences. It is the Children's Court's hope that this will pilot a model that could be drawn upon by courts across the State and, in the future, extending these initiatives to other types of proceedings.

28. Similar endeavours are being advanced in the District Court, with the commencement last year of the Walama[9] List Pilot. The aims of the Walama List include a reduction of the risk factors related to reoffending by Aboriginal and Torres Strait Islander offenders and the reduction of their overrepresentation in custody. The Walama List enables Aboriginal and Torres Strait Islander community participation in the court process, embedding cultural narratives and practices in the sentencing process. There is also an element of ongoing monitoring of the court with culturally appropriate and informed therapeutic interventions to assist with needs and risk factors for further offending.

Conclusion

29. In Australia, we like to think of ourselves as a great multicultural nation, where we encourage diversity and appreciate all the benefits it yields. However, successful nationhood is an evolving concept and sharing the stories and lessons of our past provides us with the tools we need to continue to mature, to give perspective to national psyche and to reflect on, and to review, our

[8] Pronounced Wi-nun-ga-na.
[9] Pronounced Wah-la-mah.

laws, our policies, our actions, or inaction, and our values. This can only be achieved through open dialogue and an exchange of ideas and opinions with a view to making our system better and more resilient, a process in which I encourage you to engage.

30. Some of you are community leaders; others are smaller, but no less important, cogs in a much larger machine. However, all of you are dedicated volunteers, having taken the same oaths of office and allegiance as I and my colleagues. Each of you have the approbation of the Attorney General and the judiciary, for which you should be immensely proud.

31. On behalf of the Chief Magistrate, Judge Peter Johnstone, and myself, thank you for your kind invitation to address you again at this year's annual conference and I extend my gratitude to you for all that you do for the judiciary and for the people of New South Wales.