Family Response to the Murders in Bowraville - Post-hearing response
Diana Eades,
27 May, 2014

Question on notice:
p18: *Please take on notice producing examples of where there is such a jury direction in other jurisdictions and consider whether you think we should recommend to the Attorney General or the Judicial Commission in New South Wales the adoption of a similar jury direction.*

1. The jury direction being referred to:

Sometimes referred to as "Mildren directions" or "Mildren-style directions", these directions are "designed to assist a jury assessing the evidence of Aboriginal witnesses and/or an Aboriginal accused's record of interview. This is achieved by drawing the jury's attention to the possibility that sociolinguistic features of an Aboriginal witness' evidence may lead to misunderstandings" (Fryer-Smith 2008: #7.4.1).

Mildren (1997: 14) points out that the directions "would obviously have to be moulded to the circumstances of the case". And an important feature of the directions is the explicit warning of variation in the ways that Aboriginal people use English, as well as the frequent use of modifying expressions such as "many Aboriginal people", "often", and "may". That is, the directions should be impossible to apply in a categorical manner, and jurors should be explicitly reminded that it is their "function to decide which evidence [they] accept, and which evidence [they] reject" (Mildren 1997: 21; CJC 1996: A9).

2. Background

These jury directions originated with Justice Dean Mildren (Northern Territory Supreme Court), who wrote about it in his 1997 *Criminal Law Journal* paper (Mildren 1997). A version of the directions was also published as an Appendix to that paper (paper including Appendix attached).

In 1995, the Criminal Justice Commission in Queensland asked Mildren J and myself to prepare a pro forma set of directions to be given to juries in Queensland cases involving witnesses who are speakers of Aboriginal English (published in CJC 1996 p A9-11, see also Mildren 1997, 1999).

These directions have also been published in Queensland Supreme Court's 2005 *Equal Treatment Benchbook* (Appendix B in chapter 9) and discussed in the NSW and WA equivalents (Judicial Commission of New South Wales 2009 and Fryer-Smith 2008).

3. Jurisdictions where Mildren-style directions are used

Northern Territory

I have been advised by Justice Mildren (May 2014) that the direction is still used by judges in the NT, in some (but not all) cases involving Aboriginal witnesses.

Western Australia

I understand that the directions are used in some cases involving Aboriginal witnesses, but have been unable to get up-to-date information.

Queensland

Despite the 1996 recommendation of the Queensland Criminal Justice Commission (CJC 1996: and Queensland Supreme Court *Equal Treatment Benchbook*, I understand that the direction is not widely used in Queensland (see Lauchs 2010: 17). However, Justice Mildren (personal communication, May 2014) advised me that it has been used by the resident judge in Cairns.

other jurisdictions:

I am unaware of the use of such directions in other jurisdictions.

4. Judicial consideration of Mildren-style directions

To my knowledge there is one case which deals with Mildren-style directions, but not as binding authority: *Stack v State of WA* (2004) 29 WAR 526. The Aboriginal Benchbook for Western Australia Courts (Fryer-Smith 2008: #7.9) summarised the relevant part of that decision:

[START OF QUOTATION FROM FRYER-SMITH 2008: #7.9]

Case: *Stack v the State of Western Australia* (2004) 29 WAR 526

Facts: the Aboriginal applicant, a resident of Perth, had been charged with wilful murder and unlawful wounding. Five Aboriginal witnesses were to be called. At the commencement of the trial the trial judge had given Mildren directions to the jury. In his final directions, the trial judge had referred again to the Mildren directions given at the commencement of the trial. He stated that whether any of the matters canvassed in those directions was relevant to the evidence of any of the Aboriginal witnesses was solely a matter for the jury to decide. The applicant was convicted and later sought leave to appeal on the ground inter alia that the trial judge had erred in respect of his final directions to the jury.

The appeal succeeded on other grounds (see #7.5.9 [of Benchbook]). However, each member of the Court of Criminal Appeal commented upon the fact that the trial judge had given Mildren directions. Murray J commented that it was "undesirable and unfortunate that his Honour made the preliminary observations he did without any substratum of fact properly proved before the jury in the ordinary way":

> "What was said by the Judge was calculated to cause the jury, in their evaluation of the credibility of such witnesses, to approach a consideration of their evidence sympathetically, making allowances for cultural differences which might or might not have been having an impact on the testimony given by the witnesses. The potential for unfairness to the applicant is manifest, in my respectful opinion." [1]

Murray J observed that the trial judge, in his closing remarks, had done no more than to invite the jury to consider whether the matters referred to in his Mildren directions had to be taken into account in assessing the witnesses' credibility. As the trial judge had "properly" left the matter in the hands of the jury, Murray J dismissed the application for leave to appeal.

Steytler J held that the trial judge had very properly and specifically told the jury that whether or not the issues which he had remarked upon bore

[1] 2004) 29 WAR 526 at [19] per Murray J.

upon the evidence of any particular witness and if so, in what way and to what extent, was for them to assess. His Honour considered that the giving of Mildren directions might be appropriate in certain cases, but noted that in the instant case the applicant was an urban dweller.

Templeman J, having allowed the appeal on other grounds, did not express a concluded view in respect of this particular ground of appeal. However, his Honour considered that it had been inappropriate for the trial judge to have given the Mildren directions. Templeman J expressed the view that a trial judge should not anticipate evidence which might be given, or the manner in which it might be given. In giving the Mildren directions, the trial judge had failed to comply with s 638 *Criminal Code* which provides that judicial comment about the evidence should not be made until after the prosecution and defence have closed their respective cases. The trial judge did not identify the evidence to which his initial observations might have related, and therefore he was not making observations on the evidence, but on Aboriginal witnesses in general. Templeman J expressed doubt that the trial judge's non-compliance with s638 *Criminal Code* had been cured by his directions to the effect that it was for the jury to decide matters of fact, including whether and how his observations bore upon the evidence of any particular witness in the case.

Note: Section 638 *Criminal Code* has been repealed, but s 112 of the *Criminal Procedure Act 2004* (WA) (CPA) is in similar terms. Section 112 CPA provides that a trial judge may make any observations about the evidence that the judge thinks necessary in the interests of justice, after the prosecution and defence have given final addresses to the jury.

[END OF QUOTATION FROM FRYER-SMITH 2008: #7.9]

5. Possible Mildren-style directions for NSW

5.1. Reason for recommendation

In my view, some form of Mildren-style directions, prepared for NSW, should be used in relevant cases in this state. As I explained in my submission to the Inquiry, the experiences of some of the Bowraville Aboriginal witnesses in the 2006 trial (for the murder of Evelyn Greenup) provided examples where it is possible that lack of understanding about differences in communication could unfairly influence assessment of a witness's reliability and/or credibility. For example, during this trial, I observed that Aboriginal use of silence was accommodated by lawyers: witnesses were on several occasions given time to answer questions, and there were silences of more than one second between the question and its answer. However, given the widespread reaction in western Anglo conversations around the world, including Australia, that silence in answer to a question can mean evasion, it would have been important for jurors to be advised that silence does not typically have this meaning in Aboriginal conversations. The silences that were allowed for Aboriginal witnesses in this trial would have served to assist them to give their answers. However, these silences had the real potential of causing the jurors, who were not informed about cultural differences in the use and interpretation of silence, to assess these witnesses as not entirely trustworthy or reliable.

Other features of Aboriginal communication style which also have the potential to impact unfairly on jurors' assessment of a witness's credibility and reliability include gratuitous concurrence (or sociolinguistic reasons why Aboriginal

witnesses may be particularly suggestible), the way in which specific information is given, and eye contact. These issues have been dealt with in my submission to this Inquiry, (see especially Appendix B) and are dealt with in my research over decades (see e.g. Eades 2013).

5.2. NSW *Equality before the Law* benchbook

The NSW *Equality before the Law* Benchbook (p2310) points out the importance of alerting the jury to "relevant cultural differences" in cases involving Indigenous witnesses. In my view, this can be accomplished by a version of the Mildren directions. The NSW Benchbook also says this should happen … "early in the proceedings":

> If appropriate, alert the jury to the fact that any assessment they make based on an Indigenous person's communication style must, if it is to be fair, take into account any relevant cultural differences. This may need to be noted early in the proceedings rather than waiting until you give your final directions to them — otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them.

5.3. NSW Law Reform Commission (NSWLRC) 2012 report #136

In its 2012 report on jury directions, the NSW Law Reform Commission (NSWLRC) was reluctant to make any decision about directions concerning communication with Aboriginal witnesses. On this issue it took the position that "the content of directions that may be required in the NSW context should be the subject of further consideration by the Judicial Commission, involving consultation with NSW Indigenous and other communities and experts in the fields of culture and linguistics of relevance to those individual communities" (#5.133).

5.4. My recommendation

I urge this committee to recommend to the Attorney General or the Judicial Commission the adoption of Mildren-style directions.

In my submission to the Inquiry I mentioned the difficulty which could arise in the legal/judicial acceptance of the idea of such directions. This is that I believe that the major obstacle preventing serious consideration in this state is the widespread, but mistaken, view that Aboriginal people here are somehow not sufficiently distinct from other Australians. This view misunderstands the extent to which Aboriginal culture continues in NSW, and how it can influence communication, particularly when it involves Aboriginal people who have not had the chance to develop much bicultural ability. Related to this point, I believe that Steytler J's (obiter dicta) suggestion in the WA *Stack* case that the Mildren-style directions were not relevant to an Aboriginal witness who is "an urban dweller" misunderstand the nature of contemporary Aboriginal cultures, and the reality that Aboriginal ways of communicating are still being used by some people in cities. (But my comment here should not be taken to express a view about this particular witness in the *Stack* case, whose language I have not heard or examined, and about which I have not formed any opinion).

Thus, in NSW, the use of Mildren-style jury directions is likely to be a challenging issue, while ever there is a widepsread lack of understanding about

Aboriginal culture, and about the fact that while many Aboriginal people in NSW are bicultural, there are many who are not. Further, these issues related to bicultural ability should be briefy explained in NSW jury directions, as for example in my suggested directions in the 2006 Bowraville murder trial (submitted to the Inquiry as Appendix B of my written submission).

While I am not legally trained, I am aware that the legal issues can be complex. But in my view, this does not mean they should be ignored: a point highlighted by the experience of Bowraville Aboriginal people over many years in the legal process. I suggest that the Judicial Commission – perhaps with the assistance of the National Judicial College of Australia – could investigate this issue, and should draw on the relevant expertise and long experience of Justice Dean Mildren, Justice of the Northern Territory Supreme Court from 1991-2013, and currently Acting Judge. It would also be relevant to consult with the judiciary in Western Australia, where I understand this issue is also being explored, and where the Aboriginal population includes more diversity than in the Northern Territory. (Thus in some of the southern urban and rural areas of WA, there are Aboriginal people and communities which are quite similar in culture and language usage to many in NSW).

Perhaps a working group comprising legal, sociolinguistic and Aboriginal experts could start with the currently available versions of Mildren-style directions (which overlap to a considerable degree) and consider how they would need to be modified to be suitable for NSW, and what kinds of measures need to be taken to ensure that judicial officers and lawyers understand the directions and the reasons for their use.

Attachment:

Mildren, D 1997. Redressing the imbalance against Aboriginals in the Criminal Justice System. *Criminal Law Journal* 21(1): 7–22. Includes example of directions.

Other versions of Mildren-style directions are found in

(i) CJC (Criminal Justice Commission). 1996. *Aboriginal Witnesses in Queensland's Criminal Courts*. Brisbane: Criminal Justice Commission. pages A9-11.

(ii) the WA *Stack* decision discussed in Section 4 above. The Mildren-style directions given by the trial judge are appended to the decision.

(iii) Queensland Supreme Court. 2005 *Equal Treatment Benchbook*. Chapter 9, Appendix B.

(iv) Appendix B of my submission to the Inquiry (copy of my suggested jury directions in the 2006 trial for the murder of Evelyn Greenup).

Other references

Eades, D. 2013. *Aboriginal Ways of Using English*. Canberra: Aboriginal Studies Press.

Fryer-Smith, S. 2008. *Aboriginal Cultural Awareness Benchbook for Western Australian Courts*. 2nd edition. Perth: Australian Institute of Judicial Administration.

Judicial Commission of New South Wales 2009 *Equality before the Law Benchbook*. Sydney: Judicial Commission of New South Wales.

Lauchs, Mark 2010 Rights Versus Reality: The difficulty of providing "access to English" in Queensland courts. Report published by Faculty of Law, Queensland University of Technology, Brisbane.

Mildren, D. 1999. Redressing the imbalance: Aboriginal people in the criminal justice system. *Forensic Linguistics* 6(1): 137-160.