

Living in dog years

As the principal legal officer for the western region of the Aboriginal Legal Service (NSW/ACT) Ltd, Felicity Graham sees clients from Bathurst to the back of Bourke. She talks to **JULIE MCCROSSIN** about her passion for the role and the High Court case that could change sentencing trends.

Photography: Laura Friezer

The work at the Aboriginal Legal Service (ALS) in western NSW is so intense that young lawyers talk about getting their experience in “dog years”. Every year out west is worth seven in the city. The pressure of constant court appearances and frequent prison visits can lead to high staff turnover. The scale of the travel alone is formidable.

When I meet Felicity Graham at an ALS staff conference in Sydney, she answers my question about her travel schedule with a tired smile and rapid-fire response.

“Last week I had to come to Sydney. Then I flew to Broken Hill for a couple of days. Then back to Dubbo. Then I drove to Goulburn for about six hours to see a client in jail. Then I drove to Albury to represent a client there. Then I drove back to Dubbo. I regularly drive to Bourke and Bathurst and beyond and our most frequent jail visits are in Wellington,” she says.

Yet after five and a half years with the ALS, and her “dog years” starting to add up, Graham says with conviction, “I am enjoying myself. It’s a wonderful job. What is really exciting is the opportunity to change and reform the system. We represent Aboriginal people, work with Aboriginal people, live in Aboriginal communities and have a unique opportunity to see trends, observe problems and look at how to tackle them in an overall strategic way.”

Graham initially was attracted to criminal law while a student at Sydney University.

“My criminal law lecturer, Peggy Dwyer, who is now a barrister, was working for the Sydney ALS,” she explains. “She used to come in after court and tell us stories about her work and weave real examples into her teaching. I was attracted to the opportunity for advocacy and litigation that was about liberty and making sure the powers and responsibilities of the police are properly exercised according to law.”

After graduation, Graham’s interest in criminal law deepened when she worked as the last tipstaff for Justice Graham Barr in the Supreme Court.

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“One of the key cases I was lucky enough to observe in my 15 months with the judge was the trial of Gordon Wood,” Graham says. “That was a really fascinating time for me to see these advocates at the very top end of the spectrum in criminal defence and prosecution.”

Since that time, Graham, now 29, has worked for the ALS and has been based in Dubbo and Broken Hill.

“I have had opportunities that have thrown me into situations far beyond what my age might otherwise have allowed: management responsibilities for a team of 25 lawyers carrying out criminal defence representation for Aboriginal people, training lawyers, running appellate litigation, running trials in the District Court as the trial advocate, running matters in the Supreme Court and the High Court where I’m instructing senior counsel and am directly involved in writing the arguments, running my own cases, on my feet in court, day in and day out, and cross-examining witnesses – the full spectrum,” she says.

How does she manage the stress and responsibility?

“We have an amazing team of people at the ALS,” she says. “There’s this incredible camaraderie between the lawyers, the field staff and the other support staff, particularly in our western region offices.

“The tight bonds that form are unbreakable and really see you through the tough times. I’ve lived with colleagues the whole time in Dubbo and Broken Hill. You’re at work and you’re at home. You’re discussing your case and helping them with their case. It’s just non-stop.”

Graham’s family is also a source of strength. “There was some trepidation on the part of my parents when I first set out across the sandstone curtain to a career in criminal law,” Graham recalls. “But they have been incredibly supportive. I have four amazing sisters, each a star in their own way – an artist; an inventor and entrepreneur; a senior government adviser; and a nano-physicist and teacher.



My sisters are a great source of support and inspiration.” Graham’s middle name, Kingsbury, is also significant. “I get my middle name from a line of women in my family. It was my grandmother’s middle name and my great grandmother’s maiden name. It gives me a sense of connection to a line of very strong women. After my grandmother passed away, I was given a brooch bearing her initials, two that we share, and I often wear it, particularly if I am anticipating fierce opposition in the courtroom.”

Graham grew up on Sydney’s north shore. “Unlike my clients, I grew up in extremely fortunate surroundings. My grandparents and parents instilled in me a concern for others not so fortunate. But the words of indigenous activist and artist Lilla Watson often come to mind: ‘If you have come here to help me, you are wasting our time. But if you have come because your liberation is bound up with mine, then let us work together.’”

The opportunity at the ALS to advocate for systemic change on strategic issues is a deeply satisfying part of the work for Graham, including investigating policy reforms in other jurisdictions. She nominates sentencing as one of the key priority areas in which they take a multi-pronged approach to advocating for justice.

“Most criminal prosecution matters result in sentence proceedings, so we are grappling with how to achieve equality before the law for Aboriginal offenders,” she explains.

“For example, the Canadians have a process, arising from a Supreme Court of Canada decision, called Gladue (after *R v Gladue* [1999] 1 S.C.R. 688), dealing with the requirement of courts to pay particular attention to the circumstances of Aboriginal offenders

in order to achieve a just outcome on sentence.

“A process has developed where the courts can order a Gladue report. It is written about the Aboriginal community from which an offender comes and deals with cultural issues, historical dispossession, loss of culture, loss of language, social exclusion and all the different issues that are the background and context to why someone might ultimately end up in the criminal system.

“There is a focus also on the individual, their family and their particular circumstances. This is a really important approach the Canadians have taken to ensure marginalised indigenous offenders are being dealt with by the courts in a way that achieves equality before the law. We believe it could have application here.”

The successful appeal of Graham’s client William Bugmy before the High Court late last year established a significant principle in relation to sentencing in the Australian context. Bugmy grew up in Wilcannia, a town on the Darling River, 958 kilometres west of Sydney, where 80 per cent of the population is Aboriginal and the life expectancy for a man is 37 years.

Bugmy, 31, has spent most of his life, since the age of just 13, in detention or prison. He saw his mother stabbed by his father many times and witnessed other violence. In the incident that ultimately led to the High Court appeal, Bugmy threw pool balls at three prison officers in Broken Hill jail, blinding one officer in one eye. The assaults occurred after a scheduled and rare family visit could not go ahead.

The *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) decision, which developed initially from a Crown appeal, potentially could have an impact on sentencing for all clients

with a history of social deprivation, but it is particularly significant for Aboriginal people because of their over-representation by all measures of social disadvantage.

Is this the most important case in her career so far?

“Well, going to the High Court is significant,” she says smiling broadly. “I think you wouldn’t have many lawyers denying that it is very significant. I was at the special leave application. Unfortunately, three days before the full hearing I was admitted to hospital and I couldn’t make it. But transcripts were delivered to the hospital bed shortly after and I was definitely there in spirit.

“What *Bugmy* says is that when someone comes before a court to be sentenced, and they come with a personal history of social deprivation, that must be taken into account, even if they have continued to offend for a period of time and even if they are an adult and have grown older.

“What the court clearly identified is that one of the ways that personal history of social deprivation is to be taken into account is in an assessment of the moral culpability of an offender. If you have someone who has grown up learning the language of violence by being exposed to violence in the home, violence in their community – and at a later time they themselves commit an act of violence – that personal history of social deprivation and exposure to violence starts to explain why they have committed an act of violence. And it affects how morally culpable they are for that act.”

“Before the High Court made this decision, there was a raft of cases saying that issues relating to someone’s personal attributes expire in terms of their

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relevance, so you reach a point where the court no longer takes them into account. That has been emphatically set aside by the High Court. The effects of profound deprivation do not diminish over time. They must be given their full weight in sentencing in every case,” Graham explains.

She believes the cycle of social deprivation in towns such as Wilcannia cannot be broken, from a criminal justice perspective, until specialist Children’s Court magistrates and a range of sentencing options are made available in rural and remote NSW.

“There’s a real disparity in terms of the options available to magistrates and judges when sentencing someone who does not live in a city. For example, community service options are not available in towns like Wilcannia, nor are rehabilitation services for drugs and alcohol.

“We call it ‘postcode justice’ because the justice system operates differently according to where you live. There are inadequacies built into the system based on location,” Graham explains.

The reputation of a town such as Wilcannia discourages tourists from stopping to see the sites of an historic community that was once the third largest inland port during the great river-boat era of the nineteenth century. But when you look at a town such as Wilcannia through Graham’s eyes, you see a different, more complex, and beautiful place.

“As junior lawyers, my ALS colleague and I used to get a spot by the Darling River at Wilcannia, set up our swags, make a fire, put our yabby pots in, cook some dinner, read some cases, prepare our cross-examination and role play things,” she remembers.

“In the morning, we’d pack it all up and go into the beautiful, old

Wilcannia Court House, which used to accommodate the magistrate, so there’s a little shower there. We’d put on our suits and represent these amazing people who are really survivors of our poor treatment of Aboriginal communities.”

When I ask Graham what she thinks she’ll be doing in 10 years’ time, she answers quickly. “It could be what I’m doing now, perhaps at the Bar, or I could be an investigative journalist or writer,” she says.

But she is confident the focus of her work will be “shedding light on systemic issues of injustice and telling personal stories to achieve policy change”.

The challenges of legal practice in far western NSW clearly have not diminished this young lawyer’s idealism and commitment to using her skills for marginalised people in our community. **LSJ**