

Choosing to Challenge

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On 8 March the Association marked International Women's Day 2021 with a panel webinar dedicated to the theme 'Choose to Challenge' and in this column I set out some of the current challenges we face as a Bar.

Over the last twelve months, our community and our Bar have faced unprecedented challenges not of our choosing. From the Black Summer bushfires to the COVID-19 pandemic, to once in a hundred year floods. Our thoughts at this time are with NSW residents and our colleagues in flood-hit parts of the state, including the mid north coast, north-western Sydney and Hawkesbury-Nepean, as they set about the process of recovery and rebuilding.

Despite these hardships, the theme 'Choose to Challenge' is a powerful reminder that while there are things beyond our control, we control how we respond.

In choosing what we challenge as an Association, we are guided by the Association's new Strategic Plan 2021-25 and I commend it to members. The Plan encapsulates our vision of justice, independence, leadership and service. It sets out our Association's mission to assist us to:

- a. Serve the administration of justice and the community;
- b. Lead in the law and access to justice;
- c. Deliver independent advice and quality service;
- d. Support the profession with expert, flexible and efficient services.

Importantly, it also articulates our shared values of excellence, integrity, respect, candour, collegiality, dedication and humanity.

We cannot hope to faithfully serve the administration of justice, our community or each other, if we do not lead by example in choosing to challenge.

As a Bar, we choose to challenge injustice in its many guises. Each of us has a role to play in setting the standard we expect of our profession and our justice system – as well as supporting each other to achieve it.

This edition of *Bar News* is dedicated specifically to criminal law and inquests. The excellent articles in this special edition are but a small sample of the insights and law reform advocacy of our members to seek to better the law and promote the



administration of justice for all. I thank the authors and members of the Criminal Law and *Bar News* Committee for their efforts in putting this publication together.

Our Criminal Law Committee, and our Inquests & Inquiries Committee in its first year of operation, have made important contributions to this ongoing leadership.

Access to Justice

More generally, this year the Association has continued to advocate for access to justice, including through representations calling for adequate funding of the NSW Courts and NSW registries of the Federal Courts, the family law system and family violence service providers, and the legal assistance sector. Our court systems, including the Local Court and the NSW registries of the Family Court and Federal Circuit Court, are facing crippling delays and significant under-resourcing and under-funding. This undeniably impacts on both the speed and the quality of justice experienced by those in need of the courts services.

Informed by our membership, the Association will continue to advocate for just, timely and affordable access to justice for all people, regardless of wealth or popularity.

The Walama Court must be fully implemented

As a Bar, we also choose to challenge inequality before the law.

Regrettably, recent reforms to adult sentencing have not to date seen any decrease in the proportion of adult First Nations persons in custody. The rates of overrepresentation of First Nations peoples

in custody in NSW either remain steady or continue to grow.

At 28 June 2020, First Nations peoples represented 26.1% of the total inmates in NSW. As at 14 March 2021, First Nations peoples represented 27.1% of total inmates. Since June 2020 to March 2021, the percentage of male First Nations inmates has risen from 25.6% to 26.6%. The percentage of female First Nations inmates remained constant at 34.1%.

The commencement of a Walama Court pilot independently by the District Court of NSW is to be applauded and is no doubt a welcome start towards addressing substantive inequality for these adults. Yet an overwhelming case, including on economic grounds, remains for the Walama Court to be fully and unequivocally implemented by government - as it has for the Koori Court for children, which has been operating successfully for years and indeed has recently been expanded by government.

As members know, the Walama Court was supported by the Australian Law Reform Commission (ALRC) in its 2018 Report *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* to address the overrepresentation of First Nations peoples in custody. The Walama Court was also recommended by the Special Commission of Inquiry into the Drug 'Ice' in 2020.

The NSW Department of Communities and Justice Secretary told Parliament in September 2019 that the Walama Court was 'an excellent proposal' being considered alongside 'a range of other proposals, in the 2020-21 budget cycle' and 'the issue is simply one of funding'.¹

However, the fiscal benefits of the pilot, such as savings from reduced rates of incarceration and recidivism, and a gain in productive output, are expected to equal and exceed its cost. The Walama Court would also result in further fiscal benefits in other areas such as policing, health, family welfare payments and out of home care costs.

Sexual harassment has no place at the Bar

As a Bar, we also choose to challenge sexual harassment, bullying and discrimination in the community and most especially in our profession.

The Association is continuing to work with members, Heads of Chambers, Committees, Courts, the Office of the Legal Services Commissioner and our colleagues at the NSW Law Society, Law Council and Australian Bar Association to ensure that sexual harassment is understood as plainly unacceptable and eliminated from our profession.

This year the Association's regional CPD conference series included for the first time a session at each conference on combatting sexual harassment. These sessions were developed by the Deputy Chair of the Diversity and Equality Committee, Melissa Fisher, with Committee Chair Kate Eastman SC and the Department of Policy and Public Affairs. They were delivered by senior members of the Bar: Advocate for Change, Anthony McGrath SC; Robert Lethbridge SC; and Craig Everson, with Robert Hollo SC and Executive members serving on a discussion panel following the presentation. These sessions at the regional bar conferences at Newcastle, Ballina and Orange generated frank and helpful discussions and, together with similar feedback from the Sydney conference, the ongoing work of our committees and Association staff, give me real confidence that, with continued focus, we can make the Bar a fairer and more equitable profession for all of us.

AVL and remote hearings

While COVID-19 restrictions in NSW continue to ease, our legal system and policy makers are actively considering the further role of AVL and remote hearings. The Bar will continue to consult with them and the wider profession on its impacts, including on case management hearings, interlocutory applications, trials, witnesses, appeals and open justice, among other factors.

At a recent CPD, the Chief Judge of the NSW Land and Environment Court, the Hon Justice Brian Preston, reflected on what his Honour saw as both the qualitative and quantitative improvements that have been made through the use of remote hearings in the Court and associated alternative dispute resolution processes. His Honour observed that, in the LEC at least, the court would never return to the way it was before, and that pluralism and hybrid processes were the silver lining in the COVID-19 cloud.

I recently attended a roundtable discussion held by the NSW Law Reform Commission, which is currently inquiring into Open Justice in this State. Their inquiry is grappling with issues now including the extent to which open justice is impacted by remote hearings, where people cannot attend the court in person or where the media are required to request individual links from the court to observe particular proceedings. Live-streaming capacity has alleviated some of these concerns, and yet there are 'live' issues still to be worked through and the Bar's voice will remain an important sounding board for good policy.

In some respects, these technologies have improved – and have capacity to further improve – accessibility to our justice system. In other cases, reliance on these technologies where it is not in the interests of justice, will undermine the very principles our system is based on, such as open justice and the right to a fair trial.

Members ought be alert to even small infringements on the rule of law and respectfully hold the line. We will back you and I'm very happy to report our experience to date shows the heads of jurisdiction share these concerns.

Moreover, while remote hearings and reliance on AVL has improved access for vulnerable people, conversely, these platforms can and do impede access to justice for those who cannot afford or do not have the skill to use the technology required for meaningful participation. Other troubling issues are managing new risks for abuse or duress, eg others standing off camera and influencing the evidence given by a remote witness where the witness is a victim-survivor of domestic violence or elder abuse.

Again, if not managed well, these technologies have created new and different accessibility challenges especially for those of us, lawyers and lay persons alike, with hearing or visual impairments. Late last year, the Association's Accessibility Panel launched an accessibility survey to better understand the experiences of members at the Bar with accessibility issues at the Bar and the Courts. This confidential survey has been advertised through *InBrief* and I would encourage members who have not already done so to complete the survey – it is short and your experiences and insights are

instrumental in informing our continued advocacy in this space.

Within our own workplaces, remote hearings have increased flexibility and the opportunity, together with its own demands, to work from home. How do we balance this without damaging important aspects of the traditional chambers model, such as collegiality of the profession, learning from peers and connectedness, or the great strength of the independent referral Bar, our open door policy?

Excellence in all we do

There are important questions still to be answered and challenges, known and unknown to be met, managed, accommodated and mastered. And which I firmly believe the Bar is absolutely capable of – there will always be a strong demand for expert advocates, independent legal advice and assistance in the administration of justice. Our daily strives for excellence in these and other areas augur well for our future.

Thank you to all members and committees who have prepared and delivered CPDs to date this year, and to the Association's Professional Development Department for their hard work in facilitating this important service for the Bar.

Our Bar and our members are strong, vibrant, fearless, and I am confident in our continued capacity to successfully adapt to the changing environments in which we ply our trade, all the while remaining a true profession and serving our community to the best of our undoubted talents. **BN**

ENDNOTES

- 1 New South Wales, *Parliamentary Debates*, Legislative Council, 2 September 2019, 84 (Mr Coutts-Trotter).



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