First Nations pathways to the Bar

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> As a proud Wiradjuri man, I acknowledge the traditional custodians upon the lands, seas and shores of Australia. I pay my respects to First Nations elders past and present, and to all First Nations people in their survival, connection, and maintenance of culture. Always has been, always was, always will be Aboriginal land.

As legal professionals, many of us know the New South Wales legal system's impact on Aboriginal people. Initiatives for First Nations people by the NSW Bar Association ('NSWBA') seek to address their great underrepresentation in the legal profession and overrepresentation in the criminal justice system. I undertook the NSWBA First Nations Clerkship program and was rewarded with a fulsome experience within the Director of Public Prosecutions, the Supreme Court, the District Court and the Land and Environment Court.

Challenges

Growing First Nations representation within the NSWBA is heartening. Bar Councillor and Chair of the NSWBA's First Nations Committee Mr Tony McAvoy SC and Deputy Chair Mr Damian Beaufils have paved the way for First Nations people at the Bar. However, numbers are still low. There are currently seven Aboriginal members of the NSWBA in New South Wales (none are female); 1 per cent of all lawyers and 0.23 per cent of all barristers are First Nations.[1]

First Nations populations remain mostly in the criminal justice system[2] rather than the legal profession: 30 per cent of people in New South Wales prisons are Aboriginal or Torres Strait Islander.[3]

Courts do not recognise Aboriginality as a source of offending, but rather that an Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.[4] In this respect, Justice Simpson explains that *Fernando*[5] is a decision not about sentencing Aboriginal people, but about the recognition in sentencing decisions of social disadvantage that frequently – no matter what the ethnicity of the offender – precedes the commission of crime.[6] With respect to this decision, adding a section to the *Crimes (Sentencing and Procedure) Act* 1999 (NSW) that provides for sentencing consideration of the broader systemic impacts of colonisation faced by Aboriginal people (much like the Canadian approach) could improve disproportionality within the criminal justice system.

These structures of power imbalance that First Nations people face have not gone unnoticed. The NSWBA has created the First Nations Committee, the Mum Shirl Trust, mentoring programs, and clerkships for First Nations law students and legal professionals.

The NSWBA First Nations Clerkship

Since 2018, the NSWBA has run a program of clerkships for First Nations law students. The clerkships are offered as scholarships, in which the clerks complete rotations over three weeks with judicial officers and barristers in various courts. In mid 2023, Jess Oehm, Alisha Bailey and I completed the clerkships, which greatly enhanced our legal knowledge.

1. The Director of Public Prosecutions ('DPP')

In New South Wales, there is only one First Nations person who is a Crown prosecutor, Mr Damian Beaufils. Similarly, New Zealand faces a scarcity of Māori prosecutors.[7] Recognising the importance of understanding Indigenous issues, especially in the legal profession, is crucial. In New South Wales, over 20 per cent of crime complainants are First Nations people,[8] but underreporting and charge withdrawals persist due to intergenerational trauma. Increasing First Nations representation could address these issues. Underrepresentation potentially links to the social and cultural stigma tied to representing the Crown that asserted sovereignty over ancestral lands.

I witnessed Mr Beaufils in court. It served as inspiration for my pursuit of a career as a barrister. His composed demeanour, particularly during a child sexual assault matter at Parramatta District Court, left a lasting impression. This experience has prompted profound reflection on my advocacy skills, emphasising the importance of regulating emotions when faced with similar situations in the future.[9]

Mr Beaufils emphasised that both defence and prosecution pursue a just outcome, which showcases his capacity to overcome constraints as a First Nations prosecutor. This mindset underscores his dedication to impartiality, transcending potential biases. A notable appeal in which Mr Beaufils was involved was *Russell v R* [2023] NSWCCA 272. This case was in relation to genital mutilation (count 1), grievous bodily harm (count 2), and manslaughter (count 3) under ss 45(1), 33(1)(b), and 18(1)(b) of the *Crimes Act* 1900 (NSW). The accused inserted a silicon snowflake-shaped mould under the skin of a deceased individual. Alongside this, there were other body modification procedures, such as 'abdominoplasty' for a separate complainant and 'labiaplasty' for another. There were 14 grounds of appeal, and interesting arguments were raised concerning four possible causes of death, including the discovery of drug traces in the victim's system. Additionally, arguments on excessive sentencing and questions about evidence were brought forward. Count 1 was quashed, while counts 2 and 3 remained. It makes for a very interesting read.

Despite the expectations placed on First Nations people to be a part of the criminal trial as offenders, First Nations barristers can make an inspiring contribution to the criminal justice system.

2. The Supreme Court

Shadowing Justice Weinstein of the Supreme Court (a passionate advocate for our community) was a refreshing experience. I observed bail applications, an administrative appeal, and a conviction appeal with his Honour. Connecting with Justice Weinstein, his associate and tipstaff was rewarding. Justice Weinstein's extensive insights into the *Uniform Evidence Law*,[10] especially the admissibility of hearsay evidence, were particularly intriguing. It is evident that his Honour is vigilant and zealous in achieving just outcomes for the First Nations community.

Additionally, my observations led to discussions about the case of *R v TB & CD* [2023] SASC 45 – specifically, how Justice Kimber in the South Australian Supreme Court considered an application by the accused to exclude AN0M messages (an encrypted messaging program deployed by the Australian Federal Police [AFP] to capture alleged illegal activity) on the grounds that the messages were copied by the AFP contrary to the *Telecommunications (Interception and Access) Act 1979* (Cth) ('TIAA'). Justice Weinstein was to interpret this in the context of a 'strong Crown case' in a bail application and the evidence presented by the Crown against the accused on the AN0M platform. Justice Kimber held that there has been no analysis of whether the AN0M ecosystem may itself be a telecommunications network (as defined in s 5(1) of the TIAA) and that he did not 'have a firm view one way or the other on this issue'. It seems likely that the accused did not raise this point, and it may well be that there was no 'interception' of the AN0M network because it was the AFP's (and FBI's) network to begin with. These matters have not been resolved by an appellate court.[11] In the case I observed, bail was granted by Justice Weinstein with strict conditions.

I observed various bail applications and trial segments with other judges. In one instance, there were seven accused, two of whom were Aboriginal. When the judge addressed the Aboriginal Legal Service solicitor about one of the Aboriginal accused, his Honour said, '[h]e has no family … no support … How do you expect me to grant bail?'

All five (except these two Aboriginal offenders) were granted bail. Section 18(1)(k) of the *Bail Act 2013* (NSW) requires consideration of 'any special vulnerability or needs the accused person has, including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'. However, these observations draw upon the systemic disadvantage that Aboriginal and Torres Strait Islanders continue to face.[12] I was initially shocked. However, the statistics reflect that one can now expect many Aboriginal defendants to be refused bail: on average, 41 per cent of all Indigenous defendants are refused bail,[13] compared with just 22 per cent of non-Indigenous defendants. This is clearly an issue.

3. The District Court (the Walama List)

On 22 November 2021, New South Wales Attorney-General Mark Speakman introduced the Walama List Pilot ('Walama'), beginning in the Sydney Downing Centre District Court in February 2022. Walama aims to:

> Bring more community involvement into the judge's sentencing process, building trust in the justice system and improving the diversion of Aboriginal and Torres Strait Islander offenders into critical support services that tackle the causes of offending behaviour.[14]

Operating one week per month under the *District Court Criminal Practice Note 26 of 2022*, Walama can accommodate up to 50 participants at a time from Sydney, Parramatta, Campbelltown, and Penrith District Courts. Offenders who plead guilty engage in a tailored program encompassing alcoholic and other drug (AOD) treatment, counselling, and therapeutic support before sentencing. Walama is not directly funded and resourced.[15]

During my participation in the NSWBA clerkship program, I observed Walama led by Judge Hopkins and her Honour's Associate. Their dedication to achieving just outcomes for the First Nations community was evident as they collaborated with Aboriginal elders, support staff, and offenders at the same table. This unique approach effectively addressed issues such as bail, rehabilitation, and sentencing considerations. Participants expressed gratitude, calling it a 'privilege' and the most support they had ever received. There being only 50 places necessitates a ballot process, highlighting the urgent need for expansion.

4. Land and Environment Court

The Land and Environment Court ('LEC') was established on 1 September 1980 by the *Land and Environment Court Act 1979* (NSW) as a superior court of record, born from a desire to create a specialised 'one-stop shop' for environmental, planning and land matters. Prior to the establishment of the LEC, planning and land matters were dealt with by a range of different tribunals and courts, and there was no 'environmental law', as it is now known. It was great to visit this court. I was able to see behind the scenes in the court with her Honour Justice Pritchard. Justice Pritchard provided me with a great insight into environment, planning and property law, constitutional law, and administrative and public law.

Oliver with her Honour Judge M Kumar and Damian Beaufils

Her Honour's extensive legal experience spans many areas of practice, including an environmental prosecution that I observed. I saw that Justice Pritchard, her Honour's associates and tipstaff exercised a huge degree of emotional, legal, and personal intelligence, particularly in the way that her Honour remained 'poker-faced in court'.[16] It was valuable to absorb the intricacies of the environmental prosecutions in my observations. I also had the pleasure to meet Justice Duggan, who was able to give a similar experience to my fellow clerk, Jess Ohem.

Closing remarks

Organisations that are committed to social justice provide First Nations people opportunities to expand their legal expertise. First Nations people can contribute to the legal profession in an innovative and collaborative manner, fostering paths of reconciliation. Pursuit of justice, impartiality, and advocacy for the First Nations community provide hope for a more inclusive and equitable legal landscape in the future. It is crucial that these experiences and insights prompt further dialogue, policy changes, and a collective effort to address the systemic imbalances faced by First Nations people in the legal profession and the broader justice system. BN

ENDNOTES

1 Oliver Williams, 'Footsteps Of Leaders' (2022) 24(2) *Law Society Journal* 24; 'Indigenous Members of the Australian Bar Association', Australian Bar Association (Web Page) <https://austbar.asn.au/for-members/Indigenous-members>; 'About the Bar Association' The New South Wales Bar Association (Web Page) <https://nswbar.asn.au/the-bar-association/about-the-bar-association#:~:text=The%20Bar%20Association%20has%203483,South%20Wales%20barristers'%20practising%20certificate> Note: The number of First Nations members of New South Wales was divided with the number of all members in New South Wales and multiplied by 100 (8/3483x100=0.23%).

2 Chris Cunneen, 'Racism, discrimination and the over-representation of Indigenous people in the criminal justice system: Some conceptual and explanatory issues' (2006) 17(3) *Current Issues in Criminal Justice* 329, 346; Pete Carol, 'Aboriginal over-representation in the criminal justice system: A tale of nine cities' (2002) 44(2) *Canadian Journal of Criminology* 181, 208.

3 NSW Bureau of Crime Statistics and Research (BOSCAR), 'NSW Criminal Justice Aboriginal over-representation, Quarterly report, June 2023 – Summary' (2023) ; Garry Torre 'Over-representation of Aboriginal people in New South Wales prisons 'highest on record' *National Indigenous Times (2023)*.

4 *Bugmy v The Queen* [2013] HCA 37, 38 ('*Bugmy*')

5 *R v Fernando* (1992) 76 A Crim R 5857 ('*Fernando*')

6 *Bugmy* (n 4); see also *Biddle v The Queen* [2017] NSWCCA 128 (Hoeben CJ at CL,Price J agreeing at [68], Rothman J agreeing at [121]–[124]).

7 Garry Espiner, 'Not a single Māori Crown prosecutor in Christchurch, Gisborne, Whanganui' (RNZ 2021).

8 Office of the Director of Public Prosecutions, *Annual report 2021/2022* (Report 14 October 2022) 8 <https://www.odpp.nsw.gov.au/sites/default/files/2022-11/ODPP_Annual_Report_2021-2022.pdf>

9 Judge Paul E Smith 'Advocacy in the District Court' ODPP Crown Prosecutors' Conference, 29 June 2021 4; Micheal Kirby 'Judicial stress and judicial bullying' (2013) 87 *Australian Law Journal* 516.

10 *Evidence Act 1995* (Cth)

11 *R v Okusitino; R v Lavulo; R v Iongi [2024]* NSWSC 143: at [42].

12 Jennifer Tsui 'Incarceration in Australia since 1967: Trends in the Over-representation of Aboriginal and Torres Strait Islander Peoples' (*Bugmy* Bar Book Research Paper, NSW Public Defenders Office 2022) 2.

13 NSW Bureau of Crime Statistics and Research (May 2021), which recorded the bail status of the defendant at their final court appearance. 'Bail refused at finalisation' means that as at the date of the defendant's final court appearance, they were on remand due to a court bail refusal (as opposed to being in custody for a prior offence or in police custody).

14 Department of Communities and Justice (NSW), 'Pilot of specialist approach for sentencing Aboriginal offenders' (Media Release, 22 November 2021) 2. <https://dcj.nsw.gov.au/documents/news-and-media/media-releases-archive/2021/november/Pilot-of-specialist-approach-for-sentencing-Aboriginal-offenders.pdf>

15 District Court of New South Wales, *Criminal Practice Note 26 of 2022: Walama List Sentencing Procedure*.

16 Sean O'Brien 'Interview with Justice Pritchard of the Land and Environment Court' [2023] (Winter) *Bar News* 74.