Criminal Law Conference, 2 June 2021

Annmarie Lumsden, Director Criminal Law

Thank you Yvonne Weldon for your warm and thought provoking welcome to country. I also acknowledge the traditional owners of the land, the Gadigal People of the Eora nation, and pay my respects to their Elders past, present and emerging.

Welcome to the 2021 Legal Aid NSW Criminal Law Conference. Welcome to Legal Aid NSW Criminal Law Division lawyers and to our partners in the private profession and from the ALS. Welcome also to colleagues in government and from other Legal Aid Commissions around Australia.

Our last conference was 2 years ago. Notwithstanding a huge amount of preparation, we had to cancel last years' conference because of an unexpected COVID lockdown. We were determined to have the Criminal Law Conference this year, but we did not want to take the chance of having an in person conference cancelled at the last minute.

This years' experience will be very different. It has the disadvantage that criminal lawyers from across the state are not able to physically come together, to meet and catch up. But it has the advantage that it will happen regardless, you don't have to travel and you can watch it from anywhere. I am glad that many of you have arranged to watch the conference together in your offices or teams and to catch up socially.

As with every Criminal Law Conference, this conference provides an opportunity for criminal lawyers to have a break from day to day work, to learn about a range of topics relevant to our work, to get our MCLE points, and to reflect on the value of the work we do. It is also an opportunity to take a broader perspective – to view our role within the broader operational and policy context of the criminal justice system, as well as within the even broader political context.

We have an amazing program which begins with an Opening Address from the Honourable Mark Speakman SC MP, Attorney General of NSW and is followed by our Keynote Speaker, Her Excellency the Honourable Margaret Beazley AC QC, Governor of NSW.

I hope the variety and depth of conference sessions will stimulate thought and discussion about how we as criminal lawyers can promote the continuing relevance and importance of the rule of law.

This morning I am going to talk about a number of aspects of the policy and operational context of the criminal justice system in NSW which are of particular concern to criminal lawyers, and what is being done, or might be done to address those concerns.

Of significant concern is the high rate of incarceration in NSW and in particular, the high rate of indigenous incarceration. We are all aware that overrepresentation of Aboriginal people in custody has human, social and economic costs and is a driver of Aboriginal deaths in custody. It is now over 30 years since the seminal report of the Royal Commission into Aboriginal Deaths in Custody, yet the number and proportion of Aboriginal people in custody in NSW has continued to climb.

So what does the data tell us? In 2017, the Bureau of Crime Statistics and Research reported that between 2013 and 2016, the NSW indigenous prison population grew by 25%. Evidence given by BOCSAR to the recent NSW Government inquiry into the high level of First Nations people in custody was also telling. The Aboriginal prison population in NSW has increased by 37% in the 6 years to February 2020.

For the last reporting period ending 23 May 2021, 27.1% of people in custody were indigenous: 26.7% of men and 33.9% of women. This is disturbing when you consider that less than 3% of the general population are indigenous.

BOCSAR research has also found that high incarceration rates, particularly remand rates, are linked to breaches of bail and Apprehended Domestic Violence Orders that flow from police attending domestic violence incidents. In 2018, 40 per cent of people arrested for a technical breach of bail were Aboriginal. More recently released BOSCAR research found that NSW Police are more likely to refuse bail to male Aboriginal defendants.

In our experience, bail conditions are not consistently linked to mitigating bail concerns, and do not account for individual circumstances such as family obligations or the need to access services. The sheer volume and complexity of bail conditions all increase the likelihood of minor and technical breaches. In addition, NSW Police fail to exercise discretion appropriately when enforcing bail conditions, undertaking onerous curfew compliance checks and arresting Aboriginal people for minor or technical breaches of bail where no new offence has been committed. All these factors lead to significant, and unnecessary increases in the remand population.

Legal Aid NSW has consistently advocated for targeted legislative reforms to the *Bail Act* to ensure that bail conditions made by courts and police address the objectively identified risks, and to achieve improved police approaches to enforcement and breaches of bail. We are hopeful about the outcome of the pending statutory review of the Bail Act undertaken by the Department of Communities and Justice.

A further proposal to reduce over representation of Aboriginal people in the NSW prison population is the Walama Court. The establishment of a specific Aboriginal peoples' sentencing Court at the Downing Centre in Sydney is a commitment of the District Court under its Strategic Plan 2018-2021. It is aimed at reducing the incidence of re-offending by Aboriginal people, thereby reducing the representation of Aboriginal people in prisons. 'Walama' is a word from the Eora and Dharug languages meaning 'come back'. In the context of the 'Walama Court' it is a coming back to identity, country, community and a healthy, crime-free life.

In 2017, the Australian Law Reform Commission specifically supported the establishment of the Walama Court, as did the recent First Nations inquiry. The court would be a hybrid model incorporating features of the Victorian County Koori Court, the NSW Youth Koori Court and the well-established NSW Drug Court. The evaluations of these existing courts provide compelling evidence of their effectiveness in achieving better outcomes for offenders and the community, which include increased compliance with court orders, and reduced or less serious re-offending.

Legal Aid NSW, the ALS and the NSWDPP are ready and willing participants in the Walama Court, which we hope will commence in the second half of this year.

At yet another point of intervention of the criminal justice system, we continue to see the harsh and disproportionate impact of both the Crimes (High Risk Offender) and the Terrorism (High Risk) Offender regimes on indigenous offenders. At the Criminal Law Conference two years ago I highlighted the enormous challenges faced by our clients who are subject to applications by the State under the CHRO and THRO regimes. These schemes allow for continuing detention or extended supervision under a strict surveillance regime of up to five years at a time. Orders can be extended every five years, without limit.

Applications under both regimes continue to grow. There are approximately 120 people on one of these orders at any given time, with about 10 on detention orders. Approximately half of all people on a supervision order are in custody for a breach of their order at any given time.

There is no published data on the number and nature of orders sought and granted under the schemes, but our own analysis of published decisions under the CHRO Act and the THRO Act indicates that over the 18 months to August 2020, 14% of people subject to CHRO applications were Aboriginal, and over the two years to July 2020, 24% of people subject to THRO applications were Aboriginal. It is also notable that all of the Aboriginal people subject to an application under the CHRO Act or the THRO Act had a disability.

Extended Supervision Order conditions are applied for by the State and administered by Correctives NSW in a largely standard way, with limited adaptation to individual circumstances or culturally sensitive case planning. A condition requiring an indigenous offender to live at a Community Offender Support Program centre in Sydney for example, will prevent them from accessing family and supports in their own Country.

Invariably, our indigenous high risk offender clients are themselves victims of violence, abuse and neglect borne of complex inter-generational disadvantage and trauma, which has contributed to their entry into the criminal justice system. Indeed, the fact that such disproportionately high numbers of indigenous offenders are caught by the High Risk Offender scheme ultimately reflects the failure of the criminal justice system to address underlying causes of reoffending.

In some cases, the high risk offender scheme has shone a light on systemic failures in early intervention approaches to offending by young Aboriginal people. In July last year our high risk offender team successfully resisted an application brought by the State for an extended supervision order in relation to GB, an 18-year-old Aboriginal man from the Yuin Nation who suffered from significant mental illness and cognitive impairment, with a history since infancy of severe abuse and neglect and out of home care placements. The State's application was dismissed at the preliminary hearing on the basis that there was insufficient evidence to establish, even on a prima facie basis, that GB posed an unacceptable risk of committing a serious terrorism offence.

We continue to raise concerns about the impact of this scheme with the Department of Communities and Justice and in submissions to other forums, including the First Nations Inquiry and the Federal Disability Royal Commission.

A very different issue that has raised significant concerns for criminal lawyers is the treatment of a practitioner by NSW Police officers from Strike Force Raptor. This was disclosed in the Law Enforcement Conduct Commission report relating to Operation Monza which was tabled in Parliament on 26 March. The Commission found that three NSW Police Force officers from

Strike Force Raptor were involved in the deliberate targeting of a practising solicitor in NSW, engaging in conduct which harassed and intimidated the solicitor with the intention of impeding the practitioner's ability to represent their client at court in criminal proceedings.

The Commission found that the three officers engaged in serious police misconduct and recommended that consideration be given to the Commissioner of Police taking of reviewable action pursuant to section 173 of the Police Act 1990.

The President of the Law Society, Juliana Warner wrote to the Commissioner of Police on 31 March condemning the behaviour of the police officers as completely unacceptable and presenting a real threat to the community's belief that the criminal justice system, which is designed to protect the community, is operating fairly and transparently. She asked for the Commissioner's response to the LECC's report. I understand that there has been no response from the Commissioner of Police to date.

For criminal lawyers the last 15 months, since the World Health Organisation declared a global pandemic in response to the spread of COVID-19 on 11 March 2020, have been like no other.

However, as a profession, we can be proud of our role in continuing to provide services to our clients and protecting their rights. In fact, criminal defence lawyers were instrumental in facilitating the changes in bail decisions and the review of previous remand decisions which led to the large drop in the prison population in the second quarter of 2020.

To put that in context, from an all time high of 14,165 inmates on the day after the pandemic was declared, the NSW prison population declined over the following 8 weeks by 1,508 people or 10.7%, and remained steady for the next 3 months to September 2020. Since then, the prison population has been steadily rising. As at Sunday 23 May 2021 there were 13,151 people in prisons in NSW, but this is still about 7% below the pre-pandemic high.

After the pandemic was declared, criminal lawyers lodged release applications for their clients in record numbers. In making first appearance bail and release applications as well as submissions on sentence, criminal lawyers relied on the risk of transmission of COVID-19 within the prison system and at court, and the impact of steps taken in both the Courts and Corrective Services to mitigate that risk. As a result, the advocacy of criminal defence lawyers facilitated the making of some very useful case law which supported decarceration efforts.

And as an aside, it is interesting to observe that the decrease in the NSW prison population did not see an increase in the crime rate. BOCSAR's most recent NSW Recorded Crime Statistics indicate that in the two years to December 2020, crime rates across most of NSW have remained stable or fallen with the only major exception being sexual assault.

While the productivity of the Local Court has been above 2019 levels since the week ending 28 June 2020, there remains a substantial Local Court backlog of defended hearings which will put pressure on the Court and increase time to justice for the foreseeable future.

At the same time, the legislative reforms designed to address the District Court Backlog have significantly increased the workload of the Local Court. The EAGP Reform has resulted in a substantial rise in the number of committal matters being dealt with to finality in the Local Court.

In addition, the Table Offences Reform has resulted in a discernible rise in the proportion of more complex criminal matters prosecuted to finality in the Local Court.

The increasing caseload, and complexity and seriousness of matters being dealt with in the Local Court is of relevance to most of us. Most criminal lawyers in NSW now do most of their work in the Local Court, dealing with both summary and committal matters. It is essential that the pressures faced by criminal lawyers who work in the Local Court are recognised and that we take care of their health and well-being, both individually and collectively.

We have an interesting year ahead of us. It would be wonderful if the year became one of positive action on reforms and not just further review. We are looking forward to the NSW Government response to the recommendations of the Special Commission of Inquiry into the Drug 'Ice' and are hopeful about the prospect of a Drug Court out west. We are also hopeful that there will be movement at a national and State level to increase the minimum age of criminal responsibility. We await with optimism the Government's response to the First Nations Inquiry.

We are also keen to work with stakeholders to retain some of the legislative and procedural changes made within the criminal justice system in response to COVID-19. Some will be uncontroversial, such as electronic appearances for non-contentious mentions. Others should be supported by evidence based evaluation. For example, evidence suggests the use of AVL in criminal proceedings can significantly impede communication and understanding for vulnerable accused including those with certain impairments or communication difficulties, such as a

learning disability, autism spectrum disorders and mental health conditions, and people with these conditions are significantly over represented in the criminal justice system. The increased use of AVL must be subject to further anlysis.

In closing, I would like to thank Emma Manea, the Criminal Law Manager Professional Development for organising the conference this year. From what I understand, arranging a virtual conference is no mean feat and Emma has done a marvellous job.

Finally, thank you all for the valuable work you do for our clients. The work you do each day, for every defendant, in every criminal court across NSW is instrumental in upholding the rule of law. I hope you enjoy the Conference.