

ADVOCACY: THE GOOD, THE BAD, THE NECESSARY

LEGAL AID CRIMINAL LAW CONFERENCE

Justice Yehia

25 June 2025

INTRODUCTION

- 1 I commence by acknowledging the traditional owners of the land upon which we meet and pay my respects to their Elders past and present. I extend that respect to First Nations people present. I acknowledge First Nations peoples' continuing connection to lands, waters and culture.
- 2 I also take the opportunity to acknowledge the wonderful people that I met in community in Western New South Wales and the relationships forged there. I was taken in, looked after, nurtured and continue to have the benefit of those connections.
- 3 I thank the conference organisers for the invitation to give this keynote speech, the theme of which is Advocacy: the good, the bad, the necessary. I particularly thank Rob Hoyles. I also thank my amazing staff for helping me prepare for this keynote speech. I particularly thank Elizabeth Parsons, my Tipstaff, for the great job she did with the PowerPoint.
- 4 Advocacy can take many different forms including in court advocacy, social justice advocacy, advocacy for systemic change and personal advocacy. As public lawyers, working within a framework governed by principles such as access to justice for the most marginalised and disadvantaged people in our community, you are called upon to represent the interests of others effectively and fearlessly - to work collaboratively with other organisations and institutions which share similar objectives.
- 5 It is a responsibility and privilege.
- 6 It often involves significant professional and personal challenges. Your clients, in the main, present with complex issues including trauma, poverty, mental illness and substance abuse issues.
- 7 I want to acknowledge and celebrate your work whether it be in the criminal or civil division of Legal Aid. This speech is really a celebration of you and an

opportunity to emphasise the importance of advocacy whether it be in court or in protecting the rule of law and access to justice beyond the court.

Advocacy in Court

- 8 When I was invited to give the keynote speech, Rob Hoyles suggested that I speak about my own professional journey, commencing in Western New South Wales at the Western Aboriginal Legal Service, through to my appointment to the Supreme Court - to share with you my experiences informed by 35 years of practice in the law.
- 9 I decided that I would not inflict upon you, my autobiography. I am not going to spend the next 45 minutes talking about myself.
- 10 But I will start in Western New South Wales and more particularly in Bourke Local Court in January 1990. It was my first job as a solicitor. I was 26. I did not have any lawyers or judges in my family. I had shied away from advocacy and litigation subjects at university.
- 11 Moving to rural New South Wales for the first time was daunting. I had never lived, or even travelled, west of Sydney.
- 12 I start in Bourke in 1990 because that experience was the first of many lessons about the law, life, resilience, fearlessness, activism and in court advocacy. To set the scene, it was a defended hearing for an Aboriginal man charged with stealing a motor vehicle. The Magistrate (who I will not name) was someone whose knowledge of the English language did not include the words "reasonable doubt".
- 13 It was my first defended hearing, indeed the first time I had ever said anything in a courtroom. During the hearing I objected to a piece of evidence and was asked about the basis of the objection. It went something like this:

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- 14 I learned very quickly, from that humiliating experience, that I had to be completely prepared and able to anticipate questions from the Bench. Following that experience, I overcompensated by ensuring that I was well prepared but also forceful and passionate in my submissions. It then became something like this.

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- 15 It took some time to find balance between the “vibe” and “the sermon”. I am relieved to say that my advocacy skills improved over the years, and I felt more comfortable in the knowledge that I was representing my clients much more effectively.
- 16 The art of advocacy has been the subject of much writing and many CLE’s. Sometimes, it is said that advocacy cannot be taught. You either have it, or you don’t. It is true that some lawyers are inherently good advocates, able to persuade decision-makers with their knowledge and argument.
- 17 Others, learn over time. I think that lawyers can be assisted to become better advocates by being aware of some of the practical tips and developing them in their own style. You will all be aware of the basics:

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- 18 Good in court advocacy requires an advocate to know their Bench, know their client, and to know the law. It requires listening to your clients, their families and, in some cases, members of their community.
- 19 An important lesson, again learnt quite early in my career, was the importance of honesty in court. While you have a duty to your client, your primary duty is to the court. In that regard, I will share with you a lesson learnt in my first year at the Western Aboriginal Legal Service.

- 20 This time, it was Broken Hill Local Court. The magistrate did have a reasonable doubt but also had the uncanny ability to make you want to vomit with anxiety, before you even commenced your submissions.
- 21 She had a practice of asking whether the criminal record tendered by the prosecution was accurate and up-to-date. In my first matter before her, I had received instructions from my client which revealed that his criminal history was incomplete. After the last conviction appearing on the criminal history, he had been convicted for further offences of break enter and steal.
- 22 When I first looked at the criminal record that was about to be tendered, my initial and short lived reaction was – great - that record isn't as bad as it could be. However, the magistrate then asked the question: is his record accurate and up-to-date?
- 23 I had two options - the first was to try to answer the question without disclosing my instructions about the subsequent convictions. My client would be better served because it was unlikely that he would receive a term of imprisonment given that the criminal record that was about to be tendered was not extensive. But I was also racked with fear that I might be misleading the court and that the first year of my career could also be my last.
- 24 The second option was to tell the magistrate that my client's record was in fact much worse because he had several subsequent convictions for similar offences, which increased the chances that my client would be sentenced to a term of imprisonment.
- 25 I am happy to say that I made the right choice and disclosed the information. Two very surprising things happened that were instructive.
- 26 First, my client was not sentenced to a term of imprisonment. Second, I could do no wrong in that magistrate's eyes from then on. Any submission I made was accepted. Any suggested penalty was imposed.

- 27 That lesson has been reinforced throughout the last 3 decades. Your reputation, your integrity, your duty to the court, is extremely important.
- 28 The lessons I learned included the importance of mentors and the essential support and strength one draws from one's colleagues. This was especially so in small remote communities where conditions are more challenging than metropolitan Sydney.
- 29 The lessons of Western New South Wales were, however, more extensive and far reaching than developing necessary in court advocacy skills. My experiences reinforced the fundamental importance of community controlled First Nations Organisations.
- 30 I witnessed firsthand the unique systemic factors that continue to impact on First Nations people and how that disadvantage and systemic racism plays out in our system of justice.
- 31 What does access to justice really mean? How do lawyers represent the interests of their clients fully, meaningfully, effectively? How does the system foster dignity, engagement, strength?
- 32 These experiences informed the conceptualisation and articulation of the submissions before the High Court in *Bugmy*. How do marginalised individuals, offenders, complainants and witnesses, experience the courts? How do we deal with deeply entrenched trauma? How do we achieve community protection in a meaningful way?
- 33 These questions or themes are relevant to in court advocacy. I have observed a growing interest in and discussion about therapeutic, restorative and trauma informed practices, not limited to specialist courts, but having a place in mainstream proceedings.

- 34 I am going to make three suggestions about ways in which you can inform yourselves about better advocacy and ensure meaningful access to justice for your clients.

Therapeutic, Restorative and Trauma Informed Practice in Court

- 35 Formal equality suggests that all people should be treated the same regardless of their differences. However, substantive equality is “premised on the basis that rights, entitlements, opportunities and access are not equally distributed throughout society and that a one size fits all approach will not achieve equality”: ALRC, Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (2017).
- 36 An example of the way in which substantive equality for First Nations people may be achieved is consideration of the unique and systemic factors affecting Aboriginal and Torres Strait Islander offenders and ensuring that sentencing options and diversion and support programs are culturally appropriate.
- 37 Although everything that I say today applies generally to people interacting with our system of justice, my focus is on delivery of justice for First Nations people because of the disproportionate rate of their interaction with the justice system and the disproportionate rate of their incarceration. That interaction with the system has profound negative consequences - taking children into care; loss of housing; fracturing families and compounding trauma.

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- 38 The statistics continue to increase. They have increased exponentially since I first entered the law.
- 39 In answering some of the questions I have posed, I have come to realise that cultural safety and cultural authority in the courtroom is an important part of access to justice. It is not enough that a lawyer is provided. Real access to justice requires a lot more.

- 40 The need for cultural safety applies equally to First Nations defendants, complainants and witnesses. The NSW Office of the Director of Public Prosecutions identifies a lack of cultural safety as a barrier to the disclosure of criminal offences by First Nations complainants:

“Witness Assistance Service officers have noted that concerns about culturally unsafe court proceedings are particularly pressing where a First Nations complainant’s family, or other First Nations community members, have been called as witnesses. As indicated in the Significance of Culture Report, this is because well-being may be collective for First Nations people. Accordingly, First Nations complainants may be unwilling to continue court proceedings where they know that this may involve the re-traumatisation of family or community members”.

- 41 Cultural safety considerations are addressed in the ‘Significance of Culture to Wellbeing, Healing and Rehabilitation’ report, authored by Vanessa Edwige and Dr Paul Gray. The authors refer to Australian Health Practitioner Regulation Agency (AHPRA) guidelines to ensure cultural safety and respectful practice for health practitioners. Those guidelines include:

- acknowledge colonisation and systemic racism, social, cultural, behavioural and economic factors which impact individual and community health;
- acknowledge and address individual racism, their own biases, assumptions, stereotypes and prejudices and provide care that is holistic, free of bias and racism.
- recognise the importance of self-determined decision making, partnership, and collaboration in health care which is driven by the individual, family and community; and
- foster a safe working environment through leadership to support the rights and dignity of Aboriginal and Torres Strait Islander people and colleagues.

- 42 These guidelines are equally applicable to the provision of legal services.

- 43 Being trauma informed and adopting trauma informed practices is a matter of court integrity and procedural fairness.¹

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- 44 Knowing the impacts of trauma and trauma responses informs the work of judges and practitioners in important ways. Relevant matters include the following:

- consider the way in which you obtain instructions, particularly about background of trauma, and ways in which you minimise re-traumatising clients by having them repeat that background every time they give instructions;
- better understanding an accused person's or witness' behaviour or responses when giving evidence;
- assess the appropriateness of questions being put to an accused or witness;
- suggest modifications to ensure that the court functions in a trauma informed way, including minimising the risk of re-traumatisation;
- appreciate the impact of the experience of trauma on offending;
- develop and propose conditions of bail or sentencing options which are tailored to reducing the person's experience of trauma and/or intergenerational trauma.

- 45 There are many practical examples of trauma informed approaches, but I will mention two.

¹ Professor Felicity Gerry QC, 'Why being informed is an issue for court integrity', <<https://legalwiseseminars.com.au/insights/why-being-trauma-informed-is-an-issue-for-court-integrity>>.

- 46 First, think about ways to reduce the anxiety, shame or trauma of a client having to re-tell their story again and again when they are represented by different lawyers in different proceedings - sometimes in the same proceedings.
- 47 We need to stop and think about how that impacts them. Taking instructions about a client's background can be done once - perhaps in affidavit form and then made available to other lawyers within the organisation who deal with that person. Consent would have to be obtained. You may need to update the instructions from time to time. But it would mean that that the individual does not have to tell multiple strangers about their background and their history of trauma.
- 48 The second practical measure is to think about the way in which evidence of childhood trauma, usually sexual abuse, is talked about in open court. That history will often be contained in a psychiatric or psychological report. It does not have to be read out in open court. The magistrate or judge can be referred to the relevant portion of the report and appropriate submissions made without having to recount the detail.
- 49 These are not extraordinary measures. They are simple but effective ways in which to reduce trauma. All we have to do is think about advocacy in a different way.

Education

- 50 Another important aspect of achieving better in court advocacy and access to justice is to educate ourselves. Not just lawyers as members of the profession. But also judges and decision-makers. Education requires a process of self-reflection, critical analysis and being prepared to be uncomfortable.
- 51 Lawyers are not psychologists or social workers. But your work involves dealing with individuals who have experienced significant trauma, and these cases involve very complex issues. Resources are available to facilitate the process of education.

- 52 An essential resource is available through the Bugmy Bar Book (<https://bugmybarbook.org.au/>). Since its inception in 2019, the Bugmy Bar Book has been cited in over 96 published judgments across 13 jurisdictions nationwide. It has played an important role in reducing sentences where systemic disadvantage and trauma diminished moral culpability; providing expert evidence to support psychological reports and submissions; shaping rehabilitative sentencing options and promoting culturally informed justice.
- 53 The chapters not only serve to educate and adapt practices but are often practically relevant and impactful in legal proceedings. By way of example, the following chapters contain material that may be relevant on sentence and bail:

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- (1) “Fetal Alcohol Spectrum Disorders” (FASD) - the chapter pulls together the literature which includes the characteristics often associated with FASD, such as impulsivity, difficulty with consequential thinking and vulnerability to social influences. The information is important when addressing the assessment of moral culpability.
- (2) “Interrupted School Attendance” - the research establishes a strong link between interrupted schooling attendance and contact with the criminal justice system. Such information may be relevant to rehabilitation as a purpose of sentencing.
- (3) “Significance of Funeral Attendance and Sorry Business” - sets out the cultural and community imperatives in sorry business, which may be little understood by non-indigenous people. This information is often relevant in bail applications.

Observing Specialist Court Approaches

- 54 We can learn a lot from the approaches adopted in specialist courts. Walama, circle sentencing and youth Koori Courts are some examples. The approaches

in these courts are trauma informed and adopt therapeutic and restorative practices. Shout out to Frith Way and her team in the Walama Unit.

- 55 There is a focus on cultural authority and culturally appropriate diversion programs. There is also, importantly, a focus on strength-based evidence and the recognition that deficit narratives are insufficient in achieving informed decision-making.
- 56 A further important aspect of specialist courts that should apply more generally is acknowledging that there must be a holistic approach. A person who has committed a criminal offence and is to be sentenced for that offence almost always has complex underlying issues that must be addressed. Those issues will often involve challenges that are beyond those normally addressed in criminal proceedings. It might be unpaid debt, access to housing and health services. These challenges are normally addressed by civil lawyers. There must be a closer interaction between criminal and civil lawyers to properly meet and address the complex needs of your clients.
- 57 A further consideration is the presentation of evidence. In the case of First Nations people, Indigenous Experience Reports are very valuable. This was also a recommendation of the ALRC Pathways to Justice Inquiry.
- 58 In 2017, the Victorian Aboriginal Legal Service initiated the Aboriginal Community Justice Report (ACJR) Program. The ACJR is an Aboriginal designed and controlled project which commenced in 2021, providing the court with holistic information on an Aboriginal participant's life story, community, culture, experience of the systemic impact of colonisation, and attitude to past actions and future plans. The reports assist courts with options for appropriate and individualised community-based sentence orders.
- 59 An evaluation of the ACJR program included interviews with Victorian judicial officers. One judicial officer noted that a sentence was reduced because "it gave me a richer understanding of Bugmy principles".

- 60 Another judge said: “the ACJR breathed life into Bugmy”. Yet another said that the report gave them “more confidence in their decision and clarified the path with regard to that decision”.
- 61 The difficulty in New South Wales has been the lack of funding for such reports. There is no question in my mind that these reports must be an Aboriginal designed and controlled project. But that does not mean that the Legal Aid Commission does not have a role in collaborating with and supporting the ALS in their attempts to obtain funding for such reports.
- 62 Because, after all, the objectives are the same - improving access to justice in a meaningful way for those who come before the courts and in this instance, for First Nations people.
- 63 And that is a good segue to advocacy outside the courts.

Advocacy Outside the Courts

- 64 There has been a long and proud tradition of lawyers and law students advocating for systemic change including to our system of justice. When I was thinking about this topic I was drawn back to the Freedom Rides in NSW. It is important to be reminded of that advocacy.

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- 65 If you think that the racism that motivated these young lawyers and law students is a thing of the past, think again. Structural and systemic racism exists - it has adverse outcomes including on access to justice. As lawyers, it is important to raise awareness and find innovative ways to facilitate and enhance meaningful access to justice.
- 66 Another area in which lawyers must be diligent in court and beyond the court, is in their responsibility to defend the rule of law.

67 The independence of the judiciary is essential to the rule of law. But the rule of law can be fragile. It is, I fear, taken for granted by segments of our society.

68 At one end of the spectrum, the rule of law is undermined by misreporting amongst some in the media. At the other end of the spectrum, we have seen extreme examples overseas of direct assaults on the rule of law and on the independence of the judiciary.

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“The basic differences between the branches mandate a serious effort at mutual respect. The respect that courts must accord the Executive must be reciprocated... Too often today this has not been the case, as calls for impeachment of judges for decisions the Executive disfavors and exhortations to disregard court orders sadly illustrate... Now the branches come too close to grinding irrevocably against one another in a conflict that promises to diminish both. This is a losing proposition all around... We yet cling to the hope that it is not naïve to believe our good brethren in the Executive Branch perceive the rule of law as vital to the American ethos” - *Circuit Judge Wilkinson (King and Thacker JJ agreeing), United States Court of Appeals for the Fourth Circuit, Kilmar Abrego Garcia case*

69 If you think that the dangers and risks to the rule of law in Western democracies is confined to the US, think again. Examples in Australia are not as extreme but are concerning.

70 Attacks on judicial decisions and on judges personally, by segments of the media, risk the same adverse consequences.

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71 Judges and their decisions are not above criticism or challenge. Indeed, the rule of law requires that there be a system in place through which decisions made by judges are the subject of challenge - we have such a system in place through the appeals process. It is robust. It is comprehensive. It is effective.

72 However, misinformed and misconceived criticism of judges and their decisions is corrosive and in the long-term, destructive. The Chief Justice recently

published a Bail Statement, in part to address misinformation and misconceived reporting.

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“Our criminal justice system takes as its starting point the fundamental proposition that an accused person is innocent until proven guilty and, generally speaking, should not be deprived of his or her liberty unless and until found guilty by a judge or a jury. This common law presumption of innocence is a fundamental plank in our system of justice and is referred to in the Preamble to the Bail Act 2013 (NSW) together with the need to ensure the safety of victims of crime, individuals and the community, and the need to ensure the integrity of the justice system. Bail is not the occasion on which the guilt or innocence of an accused person is decided.

While judges’ decisions are not immune from criticism, media reporting of decisions to grant bail is sometimes not informed by a full understanding or proper appreciation of the evidence before the court on any given bail application, the legislative framework and principles that must be applied, or the conditions imposed by the judge and the judge’s reasons.

As my predecessor, the Hon Tom Bathurst AC KC observed in 2012, *“there are few people as much in touch with the realities faced by victims, accused and convicted as are the judges of the criminal courts. They are in the thick of it every single day”*. That remains the case today.”

- 73 What is required is calm, informed explanation about the process. The tools available to you include litigation, policy work, grassroots outreach and education.
- 74 I have urged you to consider different approaches to advocacy in the courtroom and to reflect on your role as advocates outside the courtroom in promoting and protecting the rule of law and ensuring meaningful access to justice.
- 75 You might think this is a heavy burden. That is probably true but the protection of the rule of law is essential in providing the framework for a just, stable and prosperous society and in fostering trust in institutions.
- 76 Lawyers must be vigilant and proactive in defending the rule of law. Without it, our democratic institutions flounder and fail. Without community confidence in our system of justice, the future is very bleak.

- 77 There is no one better placed than you in ensuring access to justice through your advocacy within and outside the courtroom.

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- 78 Thank you.
