



NEW SOUTH WALES
BAR ASSOCIATION

Our ref: 20/10

2 December 2020

Senator Kimberley Kitching
Chair, Foreign Affairs, Defence and Trade References Committees
Parliament House

By email: fadt.sen@aph.gov.au

Dear Chair

Answer to question on notice: Inquiry into Issues facing diaspora communities in Australia

The New South Wales Bar Association (**the Association**) thanks the Senate Standing Committees on Foreign Affairs, Defence and Trade (**the Committees**) for the opportunity to give evidence before the public hearing on 6 November 2020.

To assist with the Committees' consideration of this matter and the formulation of a possible recommendation, the Association was invited to provide further details and copies of its submissions made concerning the importance of properly funding the legal system, the Courts and legal assistance to "either the New South Wales Attorney-General's Department or the Commonwealth Attorney-General's Department, and whether those are frequent interactions or annually, in terms of budget submissions".

In addition to pre-budget submissions which are ordinarily made annually, the Association consistently advocates to the Commonwealth and New South Wales Attorneys-General, their Departments, Governments and Parliaments throughout the year concerning the importance of properly funding access to justice, specialist legal assistance and the Courts, and the role of maintaining a properly resourced, stand-alone, specialist Family Court.

To assist the Committees, please find **attached** a hyperlinked annexure of the Association's recent submissions and representations on these issues, including the Association's 2020-21 Pre-Budget submissions referred to in the Association's oral evidence. The Association maintains that a properly resourced legal system and legal assistance sector is crucial to provide access to justice, especially for members of diaspora communities. The Association has also opposed the Government's proposed Federal Circuit and Family Court of Australia Bill 2019 (Cth), alongside more than 110 stakeholders including the former Family Court Chief Justices Elizabeth Evatt AC and Alastair Nicholson AO RFD QC, because the bill will have the effect of abolishing the specialist, stand-alone Family Court as we know it and increasing cost, stress and time for vulnerable people in need of family law assistance, including some diaspora community members. To assist the Committee, the Association has **enclosed** links to like representations made on these issues by other stakeholders in the legal profession, including our colleagues at the Law Council of Australia and Australian Bar Association. If the Association can be of any further assistance to the Committees, please contact our Director of Policy and Public Affairs, Ms Elizabeth Pearson, |

Yours sincerely

Michael McHugh SC
President

ANNEXURE

Non-exhaustive list of recent New South Wales Bar Association submissions and representations concerning the importance of adequately funding and resourcing the justice system, legal assistance and the Courts, including a properly resourced stand-alone, specialist Family Court (in reverse chronological order)

1. Joint supplementary submission by the New South Wales Bar Association and Law Council of Australia to the Senate Legal and Constitutional Affairs Committee's inquiry into the Federal Circuit and Family Court of Australia Bill 2019 (Cth) (November 2020) – see in particular section c 'Adequacy of funding announced during the 2020-21 Budget', section a 'Filing trends in the Family Court and evidence of backlogs in the family law system' and section f 'Structural, Systemic and Judicial Specialisation':

https://nswbar.asn.au/uploads/pdf-documents/submissions/LCA_NSWBA_Supplementary_Submission_-_Merger.pdf

2. Media Release by the New South Wales Bar Association in response to the NSW Budget (November 2020):

https://nswbar.asn.au/uploads/pdf-documents/submissions/NSWBA_MR_18112020_-_NSW_BUDGET_2020-21.pdf

3. Pre-Budget Submission to the New South Wales Treasurer and Attorney General (November 2020) (encl.)

4. Supplementary Pre-Budget 2020-21 Submission to the Commonwealth Treasury (August 2020):

https://nswbar.asn.au/uploads/pdf-documents/submissions/NSWBA_Bar_Association_-_supplementary_pre-budget_submission_to_Treasury.pdf

5. New South Wales Bar Association Submission to the House of Representatives Inquiry into Family, Domestic and Sexual Violence (August 2020):

https://nswbar.asn.au/uploads/pdf-documents/submissions/NSWBA_familyviolence_sub159.pdf

6. New South Wales Bar Association Submission to the Senate Standing Committees on Finance and Public Administration into lessons to be learned following the 2019-20 Australian bushfire season (May 2020) – see in particular section 3 'Funding Legal Aid and legal assistance' and section 4 'Resourcing family violence service providers and family law services for regional Australia':

https://nswbar.asn.au/uploads/pdf-documents/submissions/Sub94_NSWBA.pdf

7. New South Wales Bar Association Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Federal Circuit and Family Court of Australia Bill 2019 (Cth) (April 2020) – see in particular section 3 'Why is resourcing Australia's family law system necessary?' and section 6 'Why should a specialist family court stand alone?':

https://nswbar.asn.au/uploads/pdf-documents/submissions/Submission10_NSWBA_FCFCABill2019.pdf

8. New South Wales Bar Association's Answers to Questions on Notice and supplementary submission to the Joint Select Committee on Australia's Family Law System (March 2020):
https://nswbar.asn.au/uploads/pdf-documents/submissions/20200401_NSWBA_-_Supplementary_submission_and_answers_to_questions_on_notice_to_the_JSC_-_31032020.pdf
9. New South Wales Bar Association's 2020-21 Pre-Budget Submission to Treasury (February 2020):
https://nswbar.asn.au/uploads/pdf-documents/submissions/NSWBA_prebudget202021_04022020.pdf
10. New South Wales Bar Association's Submission to the Joint Select Committee on Australia's Family Law System (December 2019):
https://nswbar.asn.au/uploads/pdf-documents/submissions/Sub227_-_NSWBA_JSC_122019.pdf
11. Open letter to the Cth Attorney-General regarding concerns about the proposed family court merger (November 2019):
http://www.wlsa.org.au/uploads/submission-resources/Letter_to_AG_re_concerns_about_family_court_merger_%28f_021219%29.pdf
12. Media Release by the New South Wales Bar Association, "\$88M Legal Aid injection a positive but incomplete investment in NSW Justice" (Nov 2019):
<https://nswbar.asn.au/uploads/pdf-documents/submissions/mr08112019.pdf>
13. Media Release by the New South Wales Bar Association, "Legal Aid work unsustainable for NSW barristers" (June 2019):
<https://inbrief.nswbar.asn.au/posts/cdb25a7c087884e2216dfe142613eaa4/attachment/legal%20aid%20mr%2019.6.19.pdf>
14. New South Wales Bar Association's NSW Election Policy Statement (February 2019) – see in particular section 3 'Legal Aid' and section 7 'Family Law':
https://nswbar.asn.au/docs/webdocs/Election_2019_22.2.19.pdf
15. New South Wales Bar Association 2019-20 Pre-Budget Submission to Treasury (January 2019):
<https://nswbar.asn.au/the-bar-association/publications/inbrief/view/382308183e574d49c74b3c96090218b8>
16. New South Wales Bar Association Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Federal Circuit and Family Court of Australia Bill 2018 (Cth) (November 2018):

<https://inbrief.nswbar.asn.au/posts/bb24741e67431b27a08039cbb34038ce/attachment/NSWBA%20-%20Senate%20Legal%20Con%20Inquiry%20-%20FCFCA%20Bills%20Submission%2068.pdf>

17. Media Release by the New South Wales Bar Association, “Domestic Violence Court services tender must not compromise victim support” (September 2018):

https://inbrief.nswbar.asn.au/posts/bb24741e67431b27a08039cbb328d68b/attachment/MR_DV_1709_2018.PDF

18. New South Wales Bar Association submission to the Senate Legal and Constitutional Affairs Legislation Committee’s inquiry into the Family Law Amendment (Family Violence and Cross-examination of parties) Bill 2018 (July 2018):

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Cross-examinationofPart/Submissions

19. New South Wales Bar Association’s Discussion Paper – Time to talk about a Family Court of Australia 2.0’ (July 2018):

https://inbrief.nswbar.asn.au/posts/bb24741e67431b27a08039cbb31b5ffc/attachment/Family_Court_2_MR31072018.pdf

Submissions raising like concerns by other stakeholders in the legal profession

Australian Bar Association submissions

1. Australian Bar Association's submission to the Joint Select Committee on Australia's Family Law System (December 2019):
2. Australian Bar Association's submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2018 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (November 2018):

<https://austbar.asn.au/uploads/pdfs/Sub87 - Australian Bar Association.pdf>

<https://austbar.asn.au/uploads/pdfs/Sub87 - Australian Bar Association.pdf>

3. Australian Bar Association's submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Family Violence and Cross-examination of Parties Bill 2018 (Cth) (July 2018):

<https://austbar.asn.au/uploads/pdfs/media-releases/Senate Legal and Constitutional Affairs Legislation Committee Inquiry of the Family Violence and Cross-examination of Parties Bill.pdf>

Law Council of Australia submissions and media releases

4. Law Council of Australia Media Release, "Put families over politics, abandon flawed family court merger" (November 2020):

<https://www.lawcouncil.asn.au/media/media-releases/put-families-over-politics-abandon-flawed-family-court-merger>

5. Law Council of Australia's Deferred 2020-21 Pre-Budget Submission (August 2020):

<https://www.lawcouncil.asn.au/publicassets/13bfe261-dfec-ea11-9434-005056be13b5/3868%20-%202020-21%20Deferred%20Pre-Budget.pdf>

6. Law Council of Australia's submission to the Select Committee on COVID-19's inquiry into the Australian Government's response to the COVID-19 pandemic (June 2020):

<https://www.lawcouncil.asn.au/publicassets/07db1969-e0ec-ea11-9434-005056be13b5/3830%20-%20Senate%20Select%20Committee%20on%20COVID.pdf>

7. Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Federal Circuit and Family Court of Australia Bill 2019 and the Federal Circuit Court and Family Court (Consequential Amendments and Transitional Provisions) Bill 2019 (April 2020):

<https://www.lawcouncil.asn.au/publicassets/33f94a93-679a-ea11-9434-005056be13b5/3805%20-%20FC%20and%20FAC%20Bill.pdf>

8. Law Council of Australia's 2020-21 Pre-Budget submission (December 2019):

<https://www.lawcouncil.asn.au/publicassets/96de607d-2459-ea11-9403-005056be13b5/3727%20-%20Pre%20Budget%20submission%202020-21.pdf>

9. Law Council of Australia's submission to the Joint Select Committee on Australia's Family Law System (September 2019):

<https://www.lawcouncil.asn.au/publicassets/5fe80168-7fe6-e911-9400-005056be13b5/REDACTED%20-%20S%20-%20LCA%20-%20Joint%20Select%20Committee%20on%20Australia's%20Family%20Law%20System.pdf>

10. Law Council of Australia's submission to the inquiry into the Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) (November 2018):

<https://www.lawcouncil.asn.au/publicassets/be2e5e81-63f4-e811-93fc-005056be13b5/3553%20-%20FC%20and%20FCA%20Bill%202018%20Bill%20Consequential%20Amendments%20and%20Transitional%20Provisions%20Bill%202018.pdf>

11. Law Council of Australia's Justice Project- Final Report (August 2018):

<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20-%20Final%20Report%20in%20full.pdf>

12. Law Council of Australia Media Release, "Unfair hike to FCC migration fees" (November 2020):

<https://www.lawcouncil.asn.au/media/media-releases/unfair-hike-to-fcc-migration-fees>

13. Law Council of Australia Media Release, "Delays and lack of resources lets down families" (March 2020):

<https://www.lawcouncil.asn.au/publicassets/180bd2e2-2064-ea11-9404-005056be13b5/2011%20--%20Delays%20and%20lack%20of%20resources%20lets%20down%20families.pdf>

14. Law Council of Australia Media Release, "Family courts need urgent funding injection, says Law Council" (February 2020):

<https://www.lawcouncil.asn.au/publicassets/3dfe6857-3546-ea11-9403-005056be13b5/2002%20--%20Family%20courts%20need%20urgent%20funding%20injection%20says%20Law%20Council.pdf>

15. Law Council of Australia Media Release, "New funding for family violence victims is a drop in the ocean" (December 2019):

<https://www.lawcouncil.asn.au/publicassets/cbee9789-ba1f-ea11-9403-005056be13b5/1975%20--%20New%20funding%20for%20family%20violence%20victims%20is%20a%20drop%20in%20the%20ocean.pdf>

16. Law Council of Australia Media Release, “Law Council of Australia President, Arthur Moses SC, statement regarding the family law system inquiry” (September 2019):

<https://www.lawcouncil.asn.au/publicassets/4491ec09-aeda-e911-9400-005056be13b5/1910%20-%20Law%20Council%20of%20Australia%20President%20Arthur%20Moses%20SC%20statement%20regarding%20the%20family%20law%20system%20inquiry.pdf>

17. Law Council of Australia Opinion piece: Commonwealth best to fix broken families, child violence (June 2019):

<https://www.lawcouncil.asn.au/media/news/commonwealth-best-to-fix-broken-families-child-violence>

18. Law Council of Australia Media Release “Resourcing, consultation key to improve family law” (April 2019):

<https://www.lawcouncil.asn.au/publicassets/e2a3821e-1a5c-e911-93fc-005056be13b5/1931%20--%20Resourcing,%20consultation%20key%20to%20improve%20family%20law.pdf>

19. Law Council of Australia Media Release, “Rejection of ‘deeply flawed’ Family Court merger plan a win for Australian families” (April 2019):

<https://www.lawcouncil.asn.au/media/media-releases/rejection-of-deeply-flawed-family-court-merger-plan-a-win-for-australian-families>

20. Law Council of Australia Media Release, “\$20m funding increase, single national legal assistance mechanism do little to address huge ‘justice deficit’” (April 2019):

[https://www.lawcouncil.asn.au/publicassets/99840e00-2f55-e911-93fc-005056be13b5/1927%20--%20\\$20m%20funding%20increase,%20single%20national%20legal%20assistance%20mechanism%20do%20little%20to%20address%20huge%20%E2%80%98justice%20deficit%E2%80%99.pdf](https://www.lawcouncil.asn.au/publicassets/99840e00-2f55-e911-93fc-005056be13b5/1927%20--%20$20m%20funding%20increase,%20single%20national%20legal%20assistance%20mechanism%20do%20little%20to%20address%20huge%20%E2%80%98justice%20deficit%E2%80%99.pdf)

21. Law Council of Australia Media Release, “Report highlights why ‘catastrophic’ Family Court merger must be rejected by Senate” (February 2019):

<https://www.lawcouncil.asn.au/publicassets/3088e1ed-cd33-e911-93fc-005056be13b5/1913%20--%20Report%20highlights%20why%20%E2%80%98catastrophic%E2%80%99%20Family%20Court%20merger%20must%20be%20rejected%20by%20Senate.pdf>

1. Former Chief Justices Evatt and Nicholson, Women's Legal Services Australia, Community Legal Centres Australia, National Aboriginal and Torres Strait Islanders Legal Services and Law Council of Australia's Joint Media Release, "Family Court merger 'undesirable' for families, former Family Court Chief Justices say" (November 2020):

<https://www.lawcouncil.asn.au/media/media-releases/family-court-merger-undesirable-for-families-former-family-court-chief-justices-say>

2. Women's Legal Services Australia, Community Legal Centres Australia, National Aboriginal and Torres Strait Islanders Legal Services and Law Council of Australia's Joint Media Release, "Dire Federal Circuit Court backlogs prove family court merger a risk to families, judges" (October 2020):

https://www.lawcouncil.asn.au/publicassets/19cc121a-b414-eb11-9435-005056be13b5/MR_102020_Dire%20Federal%20Circuit%20Court%20backlogs%20prove%20family%20court%20merger%20a%20risk%20to%20families%20%20judges.pdf

3. Women's Legal Services Australia, Community Legal Centres Australia, National Aboriginal and Torres Strait Islanders Legal Services and Law Council of Australia's Joint Media Release "Parliament should reject flawed family court merger Bill" (December 2019):

<https://www.lawcouncil.asn.au/publicassets/d1462e04-e616-ea11-9403-005056be13b5/1974%20--%20Parliament%20should%20reject%20flawed%20family%20court%20merger%20Bill.pdf>

4. Women's Legal Services Australia, Community Legal Centres Australia, National Aboriginal and Torres Strait Islanders Legal Services and Law Council of Australia's Joint Media Release "Put safety first in family law, abandon flawed family court merger" (November 2019):

<https://www.lawcouncil.asn.au/publicassets/6b309d78-0904-ea11-9400-005056be13b5/1969%20--%20Put%20safety%20first%20in%20family%20law,%20abandon%20flawed%20family%20court%20merger.pdf>

5. Women's Legal Services Australia, Rape & Domestic Violence Services Australia, Academics of the UTS Faculty of Law and the Law Council of Australia, "Put children first, abandon flawed family court merger" (July 2019):

<https://www.lawcouncil.asn.au/media/media-releases/put-children-first-abandon-flawed-family-court-merger>

6. Women's Legal Services Australia Media Release, "Domestic violence advocates welcome much needed funding for legal assistance services and call for some funding to be directed to specialist legal services" (May 2020):

https://www.wlsnsw.org.au/wp-content/uploads/Media-Release_WLSA-Announcement-of-additional-funding-for-legal-services-in-COVID-19-fwebsite7.pdf



Our Ref: 17/183

13 November 2020

The Hon Dominic Perrottet MP
Treasurer of New South Wales
GPO Box 5341
SYDNEY NSW 2001

By email

Dear Treasurer

Pre-Budget Submission 2020

1. I write on behalf of the New South Wales Bar Association (**the Association**) in relation to priorities for the deferred 2020-21 Budget in November 2020. The Association seeks the Government's urgent assistance to fund the following initiatives, as outlined in this submission:
 - a. establishing the Walama Court in the NSW District Court;
 - b. implementing the recommendations of the 2018 *Pathways to Justice* report by the Australian Law Reform Commission;
 - c. actioning the recommendations of the 2020 *Final Report of the Special Commission into the Drug 'Ice'*; and
 - d. properly resourcing Legal Aid, legal assistance and family violence support services on a sustained and ongoing basis.

a Funding to establish the Walama Court

2. The Association urges the Government to commit to funding the Walama Court in the District Court of NSW.
3. The recognition of First Nations voices in our criminal justice system and sentencing processes is integral to any serious attempt significantly to reduce the terrible incarceration rates of our First Nations Peoples. Establishing the Walama Court will meaningfully address the underlying issues that can disproportionately affect First Nations persons and give rise to repeat offending, and assist in reducing the disproportionate rate of their incarceration.
4. The Association has made extensive submissions to the Premier and Attorney General regarding the Walama Court over some years. In relation specifically to the 2020-21 Budget cycle, the Association and the then President of the Law Council of Australia (**the Law Council**), wrote again to the Premier in November 2019 to encourage the prioritisation of funding to establish a NSW Walama Court in 2020.
5. The Association has consistently advocated for a Walama Court to address the longstanding issue of the over-representation of Indigenous people in the NSW criminal justice system. Most recently, the Association raised this issue in submissions to the NSW Parliamentary Inquiry into the High Level of First Nations People in Custody in NSW.

6. The establishment of the Walama Court was expressly supported by the 2018 Australian Law Reform Commission's (ALRC) *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* Report.¹
7. In 2018, the Association successfully secured support from the Police Association of NSW and mainstream media for the proposal, including through an interview with 2GB Radio's Ray Hadley and the publication of an opinion piece in *The Australian*. The Association has continued to advocate on this important issue since that time.
8. As we understand it from evidence given by Mr Coutts-Trotter before the NSW Legislative Council's Committee 5 – Legal Affairs in 2019, the only issue now is one of funding.
9. First Nations Peoples in NSW continue to experience profound disadvantage, including in the criminal justice system. This cannot continue.
10. The establishment of the Walama Court is critical to address First Nations incarceration rates. The Walama Court involves community participation and greater supervision, resulting in reduced recidivism and increased compliance with court orders better to protect the community. It would provide a more effective manner to supervise offenders post-sentence, to enhance rehabilitation and prevent re-offending. The Walama Court would ultimately result in long term economic cost savings, as fewer Indigenous persons will be imprisoned and rates of recidivism would be reduced.
11. The Walama Court involves a hybrid model incorporating aspects of the Victorian Koori Court and the NSW Drug Court and would operate at the District Court level. The Walama Court model proposes that the judge has greater capacity to monitor the progress of the individual post-sentence.
12. The NSW Youth Koori Court was expanded by the NSW Government because of its acknowledged success. There is no reason to believe that the Walama Court would not produce similar results.
13. Research released by BOCSAR in May 2020, further supports the case for the Walama Court by demonstrating the effectiveness of Circle Sentencing in lowering rates of imprisonment and recidivism for First Nations People.² The research found that Aboriginal offenders who participated in Circle Sentencing are 9.3 percentage points less likely to receive a prison sentence, which represents a 51.7 percent decrease from the rate at which offenders undergoing traditional sentencing are incarcerated. Offenders who underwent Circle Sentencing are 3.9 percentage points less likely to reoffend within 12 months and take 55 days longer to reoffend if and when they do, than Aboriginal offenders sentenced in the traditional way.
14. Under the proposal, an offender may elect to be referred to the Walama Court where they have pleaded guilty to an offence, are appealing a Local Court sentence of imprisonment, or are to be sentenced for a breach of a community order.
15. Once the offender's cultural background has been determined, a Sentencing Conversation would be held in Court in the presence of the judge, involving two Elders, the prosecutor, the offender and their lawyer, a Community Corrections officer and any other person at the judge's discretion, such as the victim and a domestic violence support person or mental health workers. Like other Courts, proceedings would be open to the public.
16. The Conversation would involve discussion about the nature of the offending, the effect on any victims, the offender's background and problematic areas in the offender's life which may need to be addressed. Post-sentence, under the Walama Court model, the judge would have greater capacity to monitor an individual's progress, including through an intensive period of monitoring and supervision by Community Corrections in the community.

¹ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, March 2018), recommendation 6-1 and [10.48].

² BOCSAR, 'New circle sentencing evaluation finds positive results' (Media Statement, 26 May 2020) <https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2020/mr-circle-sentencing-cjb226.aspx>.

17. If a sentence of more than three years is imposed, the offender will serve it in the normal course. Nevertheless, the offender would have benefited from participating in a culturally appropriate Sentencing Conversation and better understood, with the input of the Elders, the impact of their actions on the community.
18. The Walama Court would not create two systems of justice in NSW. Rather, the Walama Court would still be required to deal with proceedings in accordance with the legislative regime and sentencing principles that apply to proceedings generally. It would be bound to have regard to the purposes of sentencing contained in sentencing legislation and the various legal principles relevant to sentencing set by decisions of the Court of Criminal Appeal, and subject to review by that Court.
19. The difference in approach is related to the objectives of the Walama Court which include seeking to:
 - a. reduce the over-representation of First Nations Peoples in the criminal justice system;
 - b. reduce the frequency and seriousness of offending by First Nations offenders;
 - c. increase the level of compliance by First Nations offenders with community-based orders;
 - d. promote community safety by reducing recidivism;
 - e. enhance the level of court support provided to First Nations offenders and victims; and
 - f. enhance the confidence of First Nations communities in the courts and the administration of justice by promoting closer engagement.
20. The Walama Court proposes an effective way to sentence First Nations offenders, which would reduce the disproportionate rate of incarceration and meaningfully address the underlying issues that give rise to repeat offending. This will be achieved in the following ways.
21. First, it will involve Elders and other respected community members in the sentence proceedings. This will serve to involve people whom the offender respects and who can serve as mentors throughout the process. The involvement of Elders will also mean that offenders will be held to account in a more substantive way.
22. Second, the Walama Court's proceedings will involve a multi-agency approach to sentencing, which will provide wraparound services such as medical and mental health services, substance abuse treatment, employment programs and housing. This will provide meaningful support to the offender which will thereby reduce the likelihood of reoffending.
23. Third, proceedings before the Walama Court will involve more intensive supervision on the part of service providers and more intensive monitoring by the Court. Under the present system the Court has no power to monitor the offender post-sentence. Under the proposed model, the Walama Court will have power to continue monitoring the offender and holding him/her to account even after sentence has been imposed.
24. The Walama Court proposal is supported by a sound business case, prepared by the Walama Working Group led by Her Honour Judge Dina Yehia SC of the District Court. It also has the support of the Police Association of NSW,³ the Law Council, the ALRC,⁴ and the Special Commission of Inquiry into the Drug 'Ice' which recommended that:⁵

³ New South Wales Bar Association and Police Association of NSW, 'New South Wales Bar Association and Police Association of NSW unite to support Indigenous sentencing court' (Media Statement, 24 June 2018) <https://inbrief.nswbar.asn.au/posts/bb24741e67431b27a08039cbb311bba3/attachment/JMR_24.6.18.pdf>.

⁴ Recommendation 10-2.

⁵ Prof Dan Howard SC, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants* (2020) lxvii, recommendation 61 <<https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/02-Report-Volume-1a.pdf>>.

the NSW Government implement the Walama Court proposal, including through adequate funding and resourcing, to improve access to culturally appropriate diversion programs for Aboriginal people.

25. Importantly, the proposal has support from the NSW Department of Communities and Justice. Secretary Coutts-Trotter told an estimates hearing 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”.⁶
26. The Association appreciates the significant budgetary pressures facing the NSW Government at this time. However, failing to commit to and invest in remedying the continued injustices faced by First Nations Peoples is not acceptable. Initiatives to address the over-representation of First Nations Peoples should not be placed in competition with other justice initiatives when there is no question of this pressing need for change, endorsed by the ALRC.
27. The Walama Court will need to be adequately resourced and funded to ensure its success. In the long term, the proposal will realise savings for the Government as fewer First Nations Peoples will be imprisoned and reduced recidivism rates would mean generations of people will no longer continue to cycle through the criminal justice system. \$216,550,617 per year is already spent by NSW taxpayers on the imprisonment of Aboriginal and Torres Strait Islander offenders. The Walama Court will deliver further social benefits to the community, as the model would involve community participation and more supervision resulting in reduced recidivism and increase compliance with court orders to better protect the community. Incarceration has an unquantifiable social impact on First Nations families and communities.
28. In about 2015, the reduction in recidivism rates of individuals who had their matters considered by the NSW Drug Court was 37 percent. The Association is confident that if the Walama Court were to be established, it would achieve at least a similar result.
29. The Association urges the Government to prioritise the establishment of the Walama Court and secure funding for the proposal in the upcoming NSW Government Budget.

b Implementing Pathways to Justice recommendations

30. The ALRC’s other recommendations are also strongly supported by the Association and we urge the Government urgently to fund and act to implement these.
31. More than eighteen months after the *Pathways to Justice* Report was released, many of its recommendation are yet to be implemented.
32. For example, the ALRC also recommended that the minimum age of criminal responsibility be raised from 10 years of age. The Association wrote to the NSW Attorney General, the Hon Mark Speakman SC MP, regarding this issue on 22 November 2019, to encourage support for raising the minimum age of criminal responsibility to 14 and made a submission in 2020 to the Council of Attorneys-General Working Group.
33. Implementation of these recommendations must not be delayed any longer. A taskforce should be created to examine the essential services required for children between the ages of 10-14 outside of the criminal justice system who would otherwise be dealt with in the criminal justice system.

c Funding to action the recommendations of the Ice Inquiry

34. The Special Commission of Inquiry into the Drug ‘Ice’ handed down its final report in January 2020 (*Report of the Ice Inquiry*).
35. On 15 October 2020, the Bar Council resolved to endorse the recommendations made in the Report of the Ice Inquiry and to call upon the Government to act on the Association’s decades long position that

⁶ New South Wales, *Budget Estimates*, Legislative Council, 2 September 2019, 84 (Mr Coutts-Trotter).

the issue of personal drug use and possession be treated as a health issue requiring a properly resourced health intervention and treatment strategy, rather than by criminal sanction.

36. The Association notes that the Ice Inquiry's recommendations included the following:

Recommendation 11

That in conjunction with increased resourcing for specialist drug assessment and treatment services, the NSW Government implement a model for the decriminalisation of the use and possession for personal use of prohibited drugs, which includes the following elements:

- removal of the criminal offences of use and possession for personal use of prohibited drugs
- at the point of detection, prohibited drugs to be confiscated and a referral made to an appropriately tailored voluntary health/social and/or education intervention
- no limit on the number of referrals a person may receive
- no civil sanctions for non-compliance.

Recommendation 12

In the alternative to Recommendation 11, in conjunction with increased resourcing for specialist drug assessment and treatment services, that the NSW Government introduce a legislated police diversion scheme for use and possession for personal use of prohibited drugs with the following elements:

- mandatory referral by police of people detected in possession of a prohibited drug to an appropriately tailored health/social and/or education intervention
- a maximum of three times that a person may be diverted
- threshold quantities that do not unduly limit access to diversion
- no requirement to admit guilt.

Recommendation 60

That the NSW Government expand the Youth Koori Court to regional areas to improve access to culturally appropriate diversion programs for Aboriginal youth.

Recommendation 61

That the NSW Government implement the Walama Court proposal, including through adequate funding and resourcing, to improve access to culturally appropriate diversion programs for Aboriginal people.

37. The Association considers that the 2020-21 Budget provides a crucial opportunity to provide funding and resourcing to implement a number of the recommendations of the Report of the Ice Inquiry.

d Properly resourcing Legal Aid, legal assistance and family violence services on a sustained, ongoing basis

38. In November 2019 the Association welcomed an \$88 million funding injection by the NSW Government into the state's chronically underfunded legal aid system, but warned it must be followed by further funding to improve access to justice.
39. The Association has consistently raised concern about the adverse impacts of underfunding legal aid on access to justice and the quality of justice in NSW. These impacts are particularly acute following the COVID-19 pandemic and its terrible shadow pandemic of family violence.
40. The \$88 million announced was only about a third of what Legal Aid NSW advised was desperately needed. The urgently requested increase of \$236.8 million would have potentially reduced trial lengths in the District Court.

41. The Association acknowledges the Government's provision of a further \$13.26 million in 2020 to support frontline legal services in response to COVID-19. However, further sustained funding is urgently required to ensure sufficient and ongoing resourcing of this important system, particularly as the impacts of the pandemic will continue to be felt for many months to come.
42. This must include funding for specialist legal assistance and family violence support services, including for culturally and linguistically diverse communities in NSW.
43. Underfunding legal aid and legal assistance continues to adversely affect clients, victims and witnesses of crime, and places further pressure on an already overstretched court system. Equal and fair access to the law is undermined by the reality that, without legal aid or legal assistance, many people are not able to afford legal representation in criminal, civil or family law matters.
44. The current subsidisation of the justice system by the legal profession regrettably continues and comes at a great personal and financial cost to barristers who have been willing to represent clients in legal aid matters. Once unpaid hours and overheads are taken into account, some barristers undertaking legal aid matters find themselves working for around half of the minimum wage.
45. The Association remains concerned that the Legal Aid allowances for preparation time are not sufficient to ensure that lawyers are adequately paid for the critical work required to enable them to properly advise clients and prepare matters for court. More must be done to provide ongoing and sufficient funding for this important system.

Conclusion

46. If you would like any further information, or to discuss this submission, our contact is the Association's Director of Policy and Public Affairs, Elizabeth Pearson, [_____] Thank you for your consideration, we look forward to hearing from you.

Yours sincerely

Michael McHugh SC
President

CC: The Hon Mark Speakman SC MP, Attorney General of New South Wales