Brief remarks delivered at the VLA, OPP & VALS Bail conference on 21 March 2024.

In his findings in the Report into the death of Veronica Nelson, Coroner Simon McGregor found that Ms Nelson's death was a preventable one.

In his detailed and considered report, the Coroner examines every decision made by every person who had contact with Ms Nelson's case in the lead up to her passing.

He examines the decision by police to arrest, the decision to handcuff, the decisions on when and how her arrest was communicated to VALS, the decision to charge, the decisions about when she was transported to Court, the decisions about the content and structure of the remand brief, decisions made by her solicitors, the decision by counsel not to appear at her bail application, the decision to apply to remand her in custody, the decision of the prosecutor not to raise

relevant matters in Court, the decision of the Magistrate and so on. He goes on to discuss the medical and institutional decisions made after Ms Nelson's remand into custody. From there, the decisions are made by medical and prison staff, so of less relevance to us, but those decisions only had to be made because of the earlier decisions by the police, lawyers, and the Court.

My name is Judge Fiona Todd. I sit in the County Court Criminal Division and County Koori Court, and I have been invited to speak to you about Court expectations in applications for bail under the new legislation.

I will speak briefly now about how you should fulfill your obligations when representing, prosecuting, or making decisions about an Aboriginal person who is making an application for bail.

But the single most important thing I have to say to you is just this: if you want to occupy a seat at this table, by which I mean if you want to assume any professional role in the administration of justice which might bring you into contact with Aboriginal people in custody, you

have an obligation to read the report into the death of Veronica Nelson. It is a remarkable document. It details what took place, in very recent times, just a couple of hundred meters from where we sit today, and which contributed to Ms Nelson's death in custody, without any professional person bearing any ill intent or ill will towards her, but which cumulatively added up to her preventable death in custody just a few days later.

There are individual people named in the report, but what I wish to suggest to you today is that those named people, may be none of us, but they are all of us. That, I suggest, the decisions or non-decisions made were made in a system within which we all operate, so it falls to each of us to read the report and not view the decisions of those involved critically as outsiders, but to assume a level of collective responsibility for a system within which we all make decisions. They are us and we are them. Fallible, under pressure, confronted with difficult circumstances and so on.

Read the report. Skip the Charter bit if you must but don't tell Simon McGregor I said that. It's online; it won't cost you a lot of time. It's value to the administration of justice - immeasurable. You have plenty of time. The new law doesn't come into force until Monday, and it is only Thursday.

If you are thinking that this Judge didn't really understand systemic failure as it relates to Aboriginal people before she read the report, then you are absolutely right. If you're thinking: she thought she got it but didn't really get it, you're also right.

Read the report. And let it haunt you in every bail application that you participate in future. I suspect that anyone who reads the report will never be quite the same again.

What does that all mean in practice.

The County Court Practice Direction already requests certain things be done in advance of an application for bail, but I think these things will be equally applicable in the Magistrates' and Supreme Courts.

The Court asks for advance notice to be given of the applicable threshold. The Practice Direction also requires notice of whether the accused is an Aboriginal and/or Torres Strait Islander, and if yes, whether s 3A of the Bail Act 1977 will be relied upon.

The new legislation

Be ready to address the bail decision-maker about the historical and contextual factors in the new s 3A. The Veronica Nelson report is an excellent source of some of this information, or will at least tell you the type of information that might assist the bail decision maker.

There is now no longer any strategic advantage in not appearing for your client on a first bail application. Your client can have an application refused once before needing to show new facts and circumstances on the next. Always remember: time is not neutral here. Right now, I cannot imagine any circumstance where not appearing on a first remand bail application could be justified.

Be ready to address the Court about the risk of harm and trauma posed to Aboriginal people in custody. Again, you will find good information about this in the Nelson report.

Have detailed instructions about your client's connection to their culture, family and country; upskill yourself in getting instructions from people about these things.

Have detailed instructions about the matters in s 3A(1)(d), the impact of intergenerational trauma if any, impact of out of home care, experience of social and economic disadvantage, ill health, disability, caring responsibilities and cultural obligations. Do they have Sorry Business obligations?

Who do they have looking after them, is anyone able to come to Court, do they have the support of an Aboriginal bail support service?

Familiarise yourself with the Aboriginal bail support services; 'Aboriginal Bail Support Service' is defined in the new Act.

This is your job not the Court's. If you don't know the names of the Aboriginal bail support services in the relevant city or region, find out. Start with the Local Aboriginal Health Service, develop relationships with the people who accept referrals, learn the criteria for admission.

It will be difficult. Bail applications are hard, there is a lot at stake. Liberty, high levels of distress, sometimes withdrawal from drugs or alcohol, and the symptoms which can make it difficult to get instructions: the work in the criminal law doesn't get harder or more important than this.

The more careful your efforts to get instructions, the better you will be able to assist the Court.

Not every applicant will be granted bail of course, that's not what these changes mean. But Parliament's intention is clearly to improve the information before a Court where the applicant is an Aboriginal person.

We have all chosen this area to make our professional lives. We all want a system that is not only protective of community safety, but we also need a system that is safe for everyone, and all our safety depends on a system that has authority and legitimacy. Systemic change is possible, but it takes a high degree of intention, across all participants and a day-in-day out attention to the difficult, messy details in every case. Every decision, big or small, has within it a real importance, and the potential for real danger if those small decisions fail, and add up, and compound one another.

Many of the matters in the new legislation will be the domain of defence counsel or solicitors. But prosecutors must also step up. You owe duties to the Court. Police prosecutors and counsel need to be aware that you are not exempt from responsibility in this context.

I will end now by saying that the only thing I want to leave you with is the same as where I began. Read the report. It's important. It puts Parliament's legislation into context. It should galvanise you, like it did me.