

An interview with Attorney General Gabrielle Upton

Richard Beasley SC and Victoria Brigden spoke recently with the Hon Gabrielle Upton MP, who was appointed attorney general of New South Wales following the re-election of the NSW Liberals and Nationals government in March 2015.

Bar News: ABC radio recently aired a program about the difficulties of having victims of domestic violence going to local courts because of the way those courts are set up. The parties sit very closely together and there are reports of abuse while waiting to go in the courtroom. You've brought in some reforms to allow evidence to be given by complainants other than at court – can you explain that to us?

Attorney General: There's no doubt that the community is concerned about violence where there's a domestic relationship between the alleged offender and the victim. The home is the foundation of the community and when you have events that are violent, when there's harassment, where there's physical aggression, it goes to the heart of the community and how it can be pulled apart – so this is on the national and state agenda. There are many things at many levels that need to be done to support victims before matters get into the justice system, and we need to recognise that we can make improvements inside the justice system.

To take you back a step, what we announced in the budget is a commitment of opening three additional places for a program called 'It Stops Here – Safer Pathways'. One of them I visited in Tweed Heads recently. The first step of the program is that now when someone makes contact with police, a meeting is arranged that involves representatives of Justice, the police, and local community groups who can provide housing services and assistance to kids. All of this is to take place before an incident gets to court.

The other thing we introduced is that apprehended domestic violence orders can now be issued by senior police – police who have experience with domestic disputes and violence. There is also a process of case-conferencing between community groups, police, and the people involved to work out how you actually help a victim once the risk is identified. Perhaps you don't even get into the court system then because you're providing that victim – who is almost always a woman – with good information about where she can go for support. If it's a matter that's before the courts updates are given to complainants on the court process, the opportunity to access other services – like the women's legal services and community legal centres. If it becomes a matter for the courts, we don't want people who are giving evidence to feel more intimidated than they have to. We need to recognise that court is sometimes a stressful place to be. If it's an ADVO application, it can help the victim if they have the opportunity to give their evidence 'off-site' so to speak, so that they're not having to walk into the court, be confronted with the alleged perpetrator in an environment that can be



quite confronting. We've also got a scheme we're working up called the 'early warner' through police, based on Clareville in the UK – we've been talking about having a disclosure scheme that operates and we're still working out the detail. Probably at the point that a complaint or concern comes to the attention of police, they will do a risk assessment and then decide whether information about the background of the alleged perpetrator is given to that person – the victim or potential victim. So that person can then decide, if they're in a domestic relationship with somebody where they're feeling threatened, if they want to be given information about the other person's past record, so they can make up their mind about what they want to do. We've been consulting with all the agencies and community legal centres about this scheme and it will be piloted next year. It's a combination of making sure people get assistance before a court is involved, and if things do get to the courts, trying to make it as friendly an environment as possible.

Bar News: You've recently announced the appointment of two new specialist judges to hear child sexual assault matters, Judge Trill and Judge Girdham, and we understand you've previously flagged the intention to appoint expert 'children's champions' to help support child witnesses in court. Can you tell us a bit

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about what sort of expertise these children's champions would have and what they would do?

Attorney General: The two women we've just appointed to the District Court have great professional experience in child sexual assault matters. They bring technical expertise and understanding of the court and its processes, but also they will undergo some further training with the Judicial Commission, and I've spoken to Judge Price about this. The training will include more awareness of the issues from the child's perspective. The questions that need to be considered include things like whether a child psychology insight is needed. Is a developmental or medical insight needed? We want a full understanding of how these kids end up in court; all the steps that have to be gone through, how has the complaint been unearthed, and how the child deals with the ordeal of court? It is a holistic training of judges, recognising they are technical experts at the end of the day, but that they need to know as much as they can about the child that's come before them and how the system that has led to them coming into the court works.

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The children's champion is someone who is purposefully an advocate for that child – someone who will literally hold their hand through the justice process. They're not lawyers necessarily – although they could be – but it's a bigger manifestation of that context you want the judges to have. They might be developmental psychologists with a background in kids or they might have a medical background.

Bar News: Are they designed to help the children through the processes of the court?

Attorney General: That too. I won't define it narrowly, I won't say anything is in or out; that's why we have a taskforce looking at this at the moment. It has been used successfully in the UK, so there is a model for it, but we will always listen and adapt – same with the DVDS scheme; but the courts can be different, and the kids, will be different and have different backgrounds and experiences. Broadly speaking, what we are concerned about when we made that announcement is that kids when they are in the justice system probably need a bit more of a helping hand – someone who understands what they're going through,

someone who from their perspective, will sit on their side. The judge has to be independent but the champion is actually for the child, that is the purpose. What technical expertise they have is yet to be really locked down but the policy purpose, the outcome for this is hand-holding for the child through the justice system.

Bar News: There was recently a report in the *Sydney Morning Herald* about the backlog of criminal cases in the District Court and the length of time between committal and trial. Are you concerned about it, and are steps being taken to address whatever problem there might be in terms of numbers of criminal trials in the District Court and any delays?

Attorney General: Yes, I am concerned, and I do look at the statistics, and I do speak with Judge Price about it and I like to think I have a good relationship with the heads of each jurisdiction, because it's one system of justice. It's also connected to policing, with police being well-resourced, whatever the policy imperative there is about what types of crime, whatever they're focussed on, that does have an impact upon what comes inside the courts.

Clearly, there are challenges in that and I go back to the appointment of two district court judges, because when I sat down with Justice Price and we looked at some of the lists and what kinds of cases there were, in some regional areas there is a preponderance of child sexual assault matters. Part of it, and I hasten to say it's part of it, it's not the panacea, is the appointment of those two judges. However I have said to Justice Price they are primarily going to focus on CSA and that will help because a lot of regional courts have cases that need to be dealt with quickly, particularly with young kids being the victims, so judicial resourcing is part of it.

Part of the solution also involves having contemporary justice – by that I mean the appropriate use of technology. We put audio-visual links into a number of places and we upgraded it in a couple of regional places, particularly Lismore which I visited recently, where the quality of the AVL they have now allows them to hear from a person who is an offender in custody in, for example, Grafton Gaol, without the two hour round journey. That's two hours less that a person has to spend in court, a saving in transport time and costs, and minimises

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further distress to the victim and that kind of thing. Online filing of documents is another good use of technology. The efficiency of the courts can be improved by the right use of technology. There's been tens of millions of dollars committed over the term of forward estimates in technology to AVL, and about \$10 m this year for the AVL upgrade.

There is currently work going on, consultatively with all of the courts, on looking at how criminal justice matters can be more efficiently dealt with by the courts. That involves discussions with Legal Aid, the police, the ODPP, the Public Defender – because they're all part of making courts work. They all recognise this as an issue, everyone's been really reasonable at identifying this as an issue. There'll be call lists in courts – for example, there'll be special domestic violence hearing days. Appointing judges is important but it isn't a panacea to all the other things we need to look at.

I haven't met anyone in the justice system yet who's not willing to work towards solutions for decreasing delays. I don't pretend I have all the answers. I've encouraged all participants in the system to come to me with a brokered solution or options that they are all happy to sign up to. My job is to look at what's possible to deliver, and having the District Court judges, ODPP, Public Defender and Department of Justice saying 'we've got two options here to address this problem. It's not possible to change overnight, but here are some things you can do'. That makes my job easier and it also makes it more deliverable when I know I can bring all those people along with me.

Bar News: In a speech you gave recently at a Local Courts conference and dinner you mentioned that the government was going to be spending \$19m on upgrading technology in courts and you mentioned just then some of those improvements including AVLS, online filing etc particularly with reference to the criminal justice system. What can practitioners expect generally from these upgrades, particularly in the civil jurisdiction?

Attorney General: Further investment in technology is being done consultatively. There is more to do, and it would be nice if I had a blank cheque to write for that investment but I don't. Every dollar I get is hopefully from a successful argument to our expenditure review committee to Cabinet. I'm hoping our spend on technology will make practitioners' lives easier too. There's a lot of paper in law, and it's not only the criminal justice system, but I have a very strong interest in civil law as well because I have a background that has given me an appetite for looking at good ideas there. Most matters that appear before the Local Court are civil matters. Most people's experience of justice in the research

I've seen is that a significant number – over a third of people from the Law Foundation survey in 2014 – gave up because they thought it was not worth the bother and they didn't feel they could get justice inside the system. They were confused or overwhelmed by the formal documents, the names, the terms etc. We can demystify it a bit and I think that also helps clients of lawyers understand what's going on. There are other ways of getting justice too, so we have lots of ombudsmen, we have the Water Ombudsman, the Telecommunications Industry Ombudsman, the ombudsman; there are other ways in which justice can be served so that we can reach a higher level than 30 per cent saying they just gave up because they couldn't navigate the local courts. For the profession, I strongly believe that being a member of a profession is a higher commitment than just doing a job. You really believe in what you are doing, you take an oath, you are there to help your client, you have professional obligations. My genuine belief is that the profession will be open to these changes in technology because they want to see a good system that they're proud of being a part of. Whether it's a large matter in the Supreme Court or whether it's a local person who can't sort out a bill with their local council because their rates haven't been paid. I do believe the legal profession will embrace anything that makes sense that links into their higher calling of doing the job they do.

Bar News: We wanted to ask you about mandatory sentencing, even though it largely came up under the purview of your predecessors. In 2011 there was a mandatory minimum sentence brought in for killing a police officer. More controversially, the mandatory minimum eight years has been brought in for 'one-punch laws' – the Kieran Loveridge case – but initially the proposal was for a range of mandatory minimum sentences for a range of offences. One was assaulting a police officer when intoxicated, another was assault occasioning actual bodily harm if intoxicated – these didn't get the support of the Upper House. Are those proposals dead or are they still on the table for you to look at?

Attorney General: To take a step back from the specifics of it, mandatory sentencing is something used in very rare circumstances. My personal view is that mandatory minimum sentences should be rare, and that's the view of the government. There has to be a good public policy reason to be served by mandatory sentencing.

Those two things you've raised, one was responding to a concern within the community about police officers that I thought was a reasonable concern. Police are in public service, they put their bodies on the line every day – I think a mandatory minimum is justifiable for killing a police officer.

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In respect of the 'one-punch laws', there was incredibly strong community sentiment at the sense of injustice of a young boy's life being so senselessly taken.

Bar News: There are obviously people who are against mandatory sentencing because they consider that it can lead to injustice, depending on the circumstances of the offender. One of the criticisms though of the mandatory sentencing law that did get passed was that it jumped the gun of the Court of Criminal Appeal, which imposed almost double the sentence that was imposed by the original judge (four years up to seven years). Did you have a view on that at the time?

Attorney General: Sometimes the community expectation is that government or parliament will act on injustice before a matter works its way through an appeal process. My overarching viewpoint though is that the judiciary on the whole does a very good job. They are independent of me and parliament and that's appropriate. They do a really difficult job and they have to consider the subjective factors in the cases that come before them. I think where we've achieved most is with standard non-parole periods. What the government and parliament has done here is set out what should generally be the appropriate sentence for certain serious crimes. There are something like 15 new child sexual assault standard non-parole periods, and six that relate to offences involving the use of firearms. These standard non-parole periods send a signal to the judiciary – and I think assist them – about community expectations regarding sentences for particular offences.

Bar News: They are almost akin to a legislative guideline judgment, aren't they?

Attorney General: Exactly. They provide an average about where sentences should come out at for particular crimes. We've done it with serious firearm offences because with gun and weapon crime we need to reflect the community's view that gun crime is something that we won't tolerate. It's not about mandatory minimums but the expression of an expectation concerning sentence, while recognising that in some cases there may be subjective factors that suggest a lower sentence might still achieve appropriate justice. We don't want to fetter the judiciary from being able to consider individual matters that

may not be the norm. I think that's a good balance; we can set the signals but we're not telling them exactly what to do, or impinging on the separation of powers.

To give you some examples, with child sexual assault offences, we brought some new standard non-parole sentences in and we increased two because there's been such a huge community focus and concern off the back of things that have recently been exposed and that's entirely appropriate. The firearms goes back to the issue of safe community. People don't want to see weapons on the street. I think that recognises that balance between judiciary being independent, government being accountable to community and giving them a framework they can work within, but recognising that when you read judgments, it's nuanced, they are made by real people in real time and you can't fetter the discretion of the judiciary to make judgments that are based on all of the facts.

Bar News: You've recently announced that victims in transition between the old Victims Compensation Scheme and the new Victims Support Scheme can have their claims reassessed and if they're found to be awarded a higher amount then they get the higher amount, and if it's a lower amount under the redetermination then they don't need to pay any money back. Do you know yet what the reassessment process will involve and is there a timeframe on how long that will take?

Attorney General: I announced that recently – it was a big focus of mine and an election commitment to make that right. It related to people who had put in claims under the old system but who were being treated under the new system. We're giving people a chance to be reassessed.

Claimants will have six months to provide evidence to support the claim which can be done from 1 September, and the program will run for basically three years, we're thinking, but it had to be budgeted on the administrative side and it had to be modelled actuarially, to understand on claims like this what was the cost of this to government so we could put it in the budget and get it approved. I talk to the head of the department probably once a week asking how it's going. On the first day there were ten callers, the second day there were eight, so we're not being inundated but that's appropriate and they're

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writing to everybody; we will put an advert in the paper, a really strong outreach because we don't want anybody not knowing this is available for them and to provide good information so they can decide if they want to do it.

Bar News: For a very short time your portfolio was in what was called the Department of Police and Justice. Then the Police Department dropped off the title. There is the police minister in the Justice Department, you as attorney general, and Corrections.

Attorney General: And Juvenile Justice.

Bar News: Is there something akin to what was the Attorney General's Department, and is that what gives advice to you, and how does the department work if on a policy issue you had a disagreement with the police minister, and wanted to give different advice to Cabinet? Is there a potential that the one department could give conflicting advice to parliament. How does that work?

For a very short time your portfolio was in what was called the Department of Police and Justice.

Attorney General: Andrew Cappie-Wood is the Secretary of the Justice Department. I have a very strong relationship with him which is one of mutual respect. He's a consummate public servant. He knows what he needs to do and he provides me with options. Whatever structures you set up, government and Cabinet rely on ministers knowing their portfolio, knowing what they're doing, making strong arguments to Cabinet. Cabinet involves robust debate and we are all equals in Cabinet, and when I formulate a policy to go before Cabinet, I formulate that as attorney general. We get robust advice from the department, but at the end of the day it's the will of the minister and the premier so, obviously the premier has a strong say in that discussion because he is the leader of us, first among equals if I can put it that way, but in terms of a practical sense of getting reforms up, that's up to the minister to make the point. There is no structural impediment to me doing what I think is appropriate in my portfolio as attorney general. That may involve robust debate with the minister for police. It also runs over with many of the other things I take an interest in, because some of the work we do in the justice system will impact upon lots of ministers, like the health minister. This is where my role is different from the other ministers, because I'm the

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chief law officer and I have powers that are important vestiges of what was a role where the attorney was actually the lawyer or barrister for government. There are things that go beyond our immediate portfolio and really are oversight roles that you have of the law across the portfolios outside of Justice, broadly described as I have from corrective services back to policing. I have a very active role and embrace talking across government about law reform and law proposals. So what I'm painting is the picture where, this role is beyond Justice in the organisational sense, and then within that portfolio cluster we do have robust debates, of course we're going to have them, but you expect that. To have those debates is democracy. The police do very good community work as we have said. They are out there putting their bodies on the line every day and there will always be a robust debate about what properly falls into their province and what is the court's. I think that is how it should and is going to be, because they are stakeholders, they are articulate stakeholders and they believe in what they do, so equally those robust policy debates will happen between the police minister and myself.

Bar News: In Queensland and Victoria, barristers who were senior counsel have now had the option of taking up the title queen's counsel. There are members of the New South Wales Bar who are SCs who are keen to take up the QC title. Equally there are probably juniors who when they take silk are keen to take up the QC title rather than SC. Is that a debate you are following and do you have any particular view at the moment about whether the administration of justice would be served in any way by allowing barristers to take up that option?

Attorney General: That's the test – the administration of justice and whether it would be improved or not. I'm happy to look at everything, I don't have all the answers, I don't know all the issues and so that's why we have regular meetings with all the key stakeholders.

Bar News: Some of the proponents are saying that competitiveness in Asia in the arbitration market in particular requires the title of QC.

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Attorney General: Yes, I've heard that. I think the profession is divided over it. We have the federal body saying no and the state body has had feverish debates over it. There is not one view. What I would say to barristers who want a return to the QC option is to tell me how this improves the experience of justice in NSW, because that's what I'm interested in. We do get emails from time to time from people but I wouldn't say there is any leadership group coming to me saying this is what the profession has resolved because I think the profession is divided on it.

Bar News: You have a wealth of professional experience as a solicitor and in the business world, and a wealth of personal experience as a wife and mother. You've been reported as saying that you think those roles bring special qualities to any role you do, but you believe in promotions based on merit and so on. What assistance do you think your professional and personal background brings to your role as attorney general?

Attorney General: A life experience and perspective, and I think that's really important when you're in a decision-making role. Technical experience is important and in politics you have such a range of people, doctors, nurses, helicopter pilots, for example. What I like to think I bring to the decisions I make is firstly the perspective and experience gained from my former ministry, because being the minister for Family and Community Services has helped me act quickly and knowledgeably on child sexual assault issues that I've seen from the side of that portfolio – the court is just one part of the solution for those poor kids who deserve every chance at a good life.

I'm also kept very honest by being a local member so you get that feedback in your own community every day, and I'll be out there each week and they'll be telling me 'you should do this, you should do that', and that's healthy. At the end of the day you make a judgment about it.

I was gratified, surprised and humbled by a call from the premier saying, 'how would you like to be the first female attorney general in the state?'.

Living and working in New York has been helpful. Having teenage kids is also 'educational'. Like most parents I have that practical insight of knowing the challenges of social media and having teenage kids these days. I'm the sum of the parts of my life. Inasmuch as this portfolio is about some really technical, detailed stuff, you have to have the ability to be able to go through some serious arguments and present them in an understandable way to the community which is the challenge of politics because things are very complicated, particularly when you're talking about the law. I've always been engaged with the community which I think is probably what eventually means you want to run for politics, although people who knew me said 'we always thought you'd run for parliament', but there wasn't any crystal-clear vision I had when I was 16 saying 'I'm going to be in parliament', so it's been an evolution. So I haven't done everything through the prism of politics either, which I think is very helpful, I haven't thought I'm doing this because I want to be an attorney general. I was gratified, surprised and humbled by a call from the premier saying, 'how would you like to be the first female attorney general in the state?'. I thought, 'wow, I wouldn't have dreamed this up'; it wasn't that I wouldn't have dared to dream, but it wasn't something I dreamt long and hard about – but it's been a great opportunity and privilege to seize.