One Judiciary and the Administration of Justice in New South Wales

Address to the Local Court of New South Wales Conference 2023

2 August 2023

The Hon. A S Bell, Chief Justice of New South Wales[1]

Introduction

1 May I begin by acknowledging the Gadigal of the Eora nation, and pay my respects to their elders past and present as well as to all First Nations people present today.

2 I also acknowledge the leadership which members of this Court have shown in the development and administration of circle sentencing and on the Youth Koori Court. This is very important practical work directed to what remains the tragic over-representation of indigenous people in our criminal justice system.

3 I start with a confession: when at the Bar, I did not have a big Local Court practice. That having been said, one of my first cases was in the Local Court, in Australia Street Newtown and against Tom Hughes, no less. It was Tom Hughes junior, however, and that perhaps makes the story a little less impressive (with no disrespect to "young Tom"!). I can't remember who won the case other than that I suspect that I must have had success: otherwise, like most barristers, I would have banished the outing from my mind.

4 Suffice to say my knowledge of the Local Court and its work has grown significantly since my appointment to the Bench, initially as President of the Court of Appeal and for the last 18 months as Chief Justice. That is principally because much criminal work which commences in the Local Court comes to the Court of Appeal, notwithstanding the privative clause in the District Court

[1] The Chief Justice acknowledges the assistance of his researcher, Ms Meghan Malone, in the preparation of this paper.

Act, by way of judicial review of appellate decisions of District Court judges from decisions of the Local Court. That is a result of the High Court: decision in *Kirk* to the effect that the Supreme Court's jurisdiction to review decisions of non-superior courts for jurisdictional error cannot be ousted.

5 I am also exposed to the work of the Local Court through the Judicial Commission, not just through its complaints function, about which I shall say a little later in this speech, but also as a result of the dialogue between heads of jurisdiction about common issues of policy and judicial management that is facilitated by of our regular meetings.

One Judiciary and the administration of justice

6 In taking my topic this morning "One Judiciary and the administration of justice", I do not want to detract from the fact that each of the Courts that make up the New South Wales Judiciary has its own distinct history and historical antecedents which are important because a Court whether the Local, District, Supreme or High Court is much more than the sum of its individual judges at any given time.

7 Each Court is shaped by its history, its institutional make up and particular areas of jurisdiction, and the reputation it has forged and which may fluctuate over time.

8 Each court also has particular strengths. In the Local Court, that includes the ability of the vast majority of magistrates to deliver clear and intelligible reasons orally. That is a real skill which I dare say many District and Supreme Court judges would love to be able to emulate. There is much to be said for oral ex tempore judgments, especially in interlocutory and short matters. This is a skill that has perhaps been in decline in the superior courts in more recent times, in part due to the scourge of the word processor and the unnecessary length of many submissions of counsel, even on matters of practice and procedure.

9 Appreciation of the distinct but overlapping history of the various courts of this State is particularly topical as it is almost 200 years since the Third Charter of Justice or the New South Wales Act was passed and, on 17 May next year, the Supreme Court will celebrate the bicentenary of its first sitting.

10 The District Court earlier this year marked the 50th anniversary of the District Court Act 1973 (NSW) which created the District Court in the form it is in today, consolidating earlier District Courts and Courts of Quarter Sessions.

11 Only last year I gave a speech celebrating the 40th anniversary of the Land and Environment Court of New South Wales.[2] The late Roddy Meagher's mischievous description of it as the "Parks and Garden's Court" concealed its importance, both locally and internationally, as one of the first specialist environmental courts in the world.

12 The history of the magistracy of New South Wales is a rich one. Its first 72 years were chronicled by the late Associate Justice John McLaughlin AM (or Master McLaughlin as he was for many years) in a masters thesis written in 1973. The early days were fraught with disputes and rivalries between magistrates, themselves, and between magistrates and judges. Time permits of two short illustrations.

13 Justice Jeffrey Hart Bent was once described by Murray Gleeson as someone "generally regarded, not only as the first judge in New South Wales, but also as the worst." By the time of his removal from office by Governor Macquarie, Bent was in general disfavour, not assisted by the fact that, in September 1815, he had refused to pay toll fees, and had so indecorously conducted himself at the turnpike gateway that he was fined £2 by D'Arcy Wentworth, the chief police magistrate who had been thrice charged with highway robbery at the Old Bailey before arriving at Port Jackson in 1790 and ultimately going on to be one of the founders of the Bank of New South Wales. Bent ignored Wentworth's

[2] A S Bell, "A Model of Judicial Sustainable Development: The Land and Environment Court of New South Wales at 40" (Opening Address, Land and Environment Court Anniversary Conference, 29 August 2022).

summons to appear before the equivalent of the Court of Petty Sessions since, 'as Judge of the Supreme Court", he took the view that he "was by no means amenable to any criminal jurisdiction in this Territory'.[3] We have come quite a long way, I think and hope.

14 In one celebrated case in 1823, the liberal and independent-minded Dr Douglass, himself magistrate as well as a medico, and who, according to Manning Clark, had openly associated with the convict party and paid insufficient respect to the "exclusives" or grandees of Parramatta was one of two magistrates who fined Reverend Samuel Marsden, himself a famous and notably severe magistrate, for a breach of certain governmental orders. It led to a heated hearing in Parramatta, one account of which was as follows:

> "Marsden attended and delivered a written paper protesting against the illegality of the fine and intimated an intention of appealing to a higher court. Douglass then lectured Marsden warmly for presuming to question the legality of the fine. Marsden, finding the lecture very insulting and galling to feelings, and resenting the humiliation before the surrounding multitude, shouted back at Douglass, who, becoming warmer, shouted in reply that Marsden was driven by private spleen. Whereupon Marsden rose again from his seat, and began to speak, but before he could do so, the Reverend Thomas Hassall rose up hastily to restrain him, and Marsden went away".

15 The place where Marsden went was the Supreme Court where he was vindicated!

16 Since 1823, the Supreme Court has possessed a powerful supervisory jurisdiction, not only over the magistracy but originally also in relation to the Legislative Council.[4] It was once the Chief Justice's responsibility to certify that each piece of legislation passed by the newly minted colonial Legislative Council was not repugnant to English law. The Supreme Court's supervisory jurisdiction also extended to conducting judicial review of decisions made by magistrates, and later, District Court judges.[5]

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[3] CH Currey Australian Dictionary of Biography.
[4] D Neal, *The Rule of Law in a Penal Colony* (1991, Cambridge University Press) at 109.
[5] Ibid 106-109.

17 This supervisory jurisdiction was an important check on arbitrary exercises of power in classic rule of law terms. But exercises of this jurisdiction were not always well-received and were sometimes criticised by magistrates as imposing "legal technicalities" which stymied their work.[6] However, Dowling CJ, in conducting judicial review of a decision of the Court of Quarter Sessions to convict two men, said the following of the importance of the Supreme Court's supervisory jurisdiction and the role of the Supreme Court in the judicial hierarchy:

> "The Court has no desire to claim to itself a jurisdiction which might interfere with the fair and legitimate discharge of the functions of [the inferior Courts], but … if there be any well-founded objection to the legality of their conviction, this Court cannot deny them any remedy which the law will afford. We cannot look to the convenience or inconvenience to which this, as a precedent, may, be supposed to lead, but are bound to discharge the functions … committed to us by expounding and upholding those principles of justice which are the safeguard of society."[7]

This passage has a continuing resonance, to which I shall return.

18 Now let us move forward some 200 years.

19 Today, the Local Court sits in more than 160 courtrooms around the State. However, magistrates were not always so well-housed (noting that all things are relative). The first magistrates sat in police offices, pubs and even magistrates' private homes.[8] The contemporary magistracy has largely retained the closeness to community for which it has been renowned across its history.[9] Many magistrates continue to serve in or around the suburbs and districts in which they have lived for much of their lives and thus face the challenging task

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[6] See, for instance the criticisms levied by Mr James Macarthur, a prominent Camden district magistrate, who gave evidence to the Molesworth Report in 1837 as discussed in D Neal, *Rule of Law in a Penal Colony* at 109 and 127.
[7] *R v Hodges* (1844) 1 Legge 201 cited in McLaughlin, "The Magistracy in NSW" at 492.
[8] The first paid magistrate, Mr D'Arcy Wentworth, regularly heard criminal matters summarily out of his home: J K McLaughlin, "The Magistracy in NSW" at 144.
[9] The Hon. Marilyn Warren, "Independence of the Magistracy: Crossing over to Judicialism" (Speech, Judicial Conference of Australia, 2 October 2004) at 3.

of being accessible and responsive to the community and its culture whilst retaining impartiality.[10]

20 In 2022, 369,158 criminal matters and 51,770 civil matters were commenced in the Local Court.[11] This means that, just has been the case since colonial times, magistrates deal with the vast majority of legal disputes in this State and, as Murray Gleeson once observed, are often the only judicial officer with whom members of the public will have contact.[12] This puts magistrates at the true coalface of justice and requires that they dispose of an enormous number of cases fairly, but efficiently. As observed by the Chief Magistrate in his Foreword to the 2022 Local Court Annual Review, the efficient resolution of disputes in the Local Court relies on magistrates giving attention to the real issues in dispute while minimising legal technicality and complexity.[13]

21 What was described by one commentator some years ago as the "rough and ready"[14] nature of justice in the Local Court is perhaps historically a product of the fact that magistrates did not need to be legally qualified until 1955.[15] In fact, the early magistrates were volunteers and simultaneously held other non-legal positions in the colony, including as surgeons, naval officers and minsters of religion such as Samuel Marshall with the first paid magistrate not being appointed until 1810.[16]

22 Alongside their judicial duties, non-stipendiary magistrates also took on administrative functions including one of utmost importance: setting the price of bread every Saturday morning.[17] The assignment of these administrative functions to magistrates is consistent with the fact that, for much of its history

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[10] J Willis, "The Magistracy" at 136.
[11] Local Court of New South Wales, *Local Court of New South Wales Annual Review 2022* (Report, 3 July 2022) at 9 and 14.
[12] The Hon. M Gleeson AC, "A Changing Judiciary" (2001) 75 *Australian Law Journal* 547 at 547.
[13] Local Court of NSW, *Annual Review 2022* at 3.
[14] J Willis, "The Magistracy: The Undervalued Work-Horse of the Court System" (2000) 18 *Law in Context: A Socio-Legal Journal* 129 at 133.
[15] H Golder, *High and Responsible Office: A History of the NSW Magistracy* (1991, Sydney University Press) at 199.
[16] J K Mclaughlin, "The Magistracy in NSW" at 114 and 140-141.
[17] Ibid 145.

in NSW, the magistracy was part of Executive government, rather than the judiciary.[18]

23 Pursuant to the *Local Courts Act 1982* (NSW) and the *Judicial Officers Act 1986* (NSW), the Courts of Petty Sessions became Local Courts to be staffed by magistrates with the same tenure as judges of the District and Supreme Courts who reported to a Chief Magistrate and were appointed by the Governor, not through the public service.

24 In this manner, the magistracy transformed from a dual judicial and administrative body enmeshed in the public service into a court of first instance.[19] Later, the *Local Court Act 2007* (NSW) combined the distinct Local Courts into a single Local Court with state-wide jurisdiction and, I think it is correct to observe, we now have a far more professional cohort of judicial officers in the Local Court than may have once been the case. The Local Court has always been, and remains, an extremely hard-working court. This observation, I should add, applies to the entirety of the New South Wales judiciary.

The judiciary of New South Wales

25 The New South Wales judiciary includes at least those bodies designated as courts of record by statute, namely the Local Court, the Coroner's Court of NSW, the Children's Court (including the Youth Koori Court), the District Court, the Drug Court, the Dust Diseases Tribunal, the Land and Environment Court and the Supreme Court, including the Court of Appeal and Court of Criminal Appeal.

[18] See, generally, *Public Service Act 1895* (NSW) and *Public Service Act 1979* (NSW).
[19] See, generally, J Lowndes, "The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part 1" (2000) 74 *Australian Law Journal* 509 and J Lowndes, "The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part 2" (2000) 74 *Australian Law Journal* 592.

26 As of June 2022, those courts were staffed by 288 judges and magistrates, not including those in acting roles, making the NSW judiciary the largest in Australia.[20]

27 Judicial officers in New South Wales also sit on various tribunals and commissions that exercise state judicial power or quasi-judicial functions. Those bodies include the NSW Civil and Administrative Appeals Tribunal (NCAT) and the NSW Personal Injury Commission and their decisions are subject to appeals to the Supreme Court[21] and to the Court of Appeal if a judicial officer has participated in the challenged Tribunal or Commission decision. The Industrial Commission of NSW has, at various points in its history (although not at the present time) had judicial functions and, in what is perhaps an historical anomaly, its President is still a statutory member of the Judicial Commission of NSW even though the Industrial Commission members are not subject to the jurisdiction of the Judicial Commission.

28 My theme today, as reflected in the topic "One Judiciary and the Administration of Justice in New South Wales", is to emphasise that, whilst the history of each of the courts that make up the NSW judiciary is rich and distinct, each of the various institutions which constitute the NSW judiciary share an important unity of purpose as well as common challenges which makes it possible to refer to the conception of "One judiciary". The role of the Judicial Commission has been very important in this respect, as I shall explain.

29 The existence of a cohesive judiciary in which the public has absolute faith requires both that we acknowledge our commonalities, but also that we recognise and appreciate the special role each of us must play in the administration of justice.

[20] Data was obtained from the Australian Institute of Judicial Administration Inc.
[21] See, eg, *Civil and Administrative Tribunal Act 2013* (NSW), s 83 which provides that parties to NCAT decisions may, with leave, appeal to the Supreme Court on questions of law and *Personal Injury Commission Act 2020* (NSW), 56 which provides that the Supreme Court may provide relief for jurisdictional error in proceedings for the judicial review of a decision of the Commission.

30 In my opening of Law Term Address to the Law Society earlier this year, I sought to address and describe "The State of the New South Wales Judicature", consciously imitating the biennial "State of the Australian Judicature" addresses that were initiated by Sir Garfield Barwick in 1977.

31 In Sir Garfield Barwick's initial conception, the State of the Australian Judicature address was designed to pick up on a then slowly developing sense of unity in the substance and administration of the law in Australia and the evolution towards a national profession. There can, should and I believe is a similar sense of unity within and between the various courts in New South Wales.

32 In his inaugural State of the Judicature address, Sir Garfield deliberately considered it appropriate to include a deal of statistical information, including: "the number of judges and magistrates in office throughout Australia … the number of Australian and State adult population per Australian and State judicial officer and practitioner ... and the details of proceedings in several courts in Australia, so far as that information is available."

33 The inclusion of such data was considered desirable both for comparative purposes with other jurisdictions and also as providing a platform for measuring judicial productivity over time. Although care must be exercised when one speaks of judicial productivity as, to quote Jim Spigelman, speaking in 2006, "the most important aspects of the work of the courts are qualitative and cannot be measured, not even by proxy indicators", and, acknowledging limits on measuring judicial productivity, describing and documenting the work of our courts at least from time to time remains, it seems to me, an extremely valuable exercise for a number of reasons.

34 First, the sheer range and volume of work undertaken by our judges, magistrates and administrative tribunal members is remarkable and unlikely to be fully appreciated by members of the public and indeed many practising lawyers, working as most do in particular and specialised areas of the law and not necessarily or closely familiar with other areas.

35 Secondly, for that work to be understood and properly valued in our community, it must be identified and explained. The rule of law depends in large measure upon confidence in our courts and trust in the integrity, competence, diligence and independence of our judges and magistrates. In an age of seemingly poor civic awareness coupled with the disturbing and sinister spread of disinformation, a bright light should regularly be shone upon the work of the judiciary and its societal importance so that it is understood and appreciated.

36 Third, taking stock of the state of the Judicature provides an opportunity to acknowledge areas requiring improvement or issues requiring remedy, and to propose initiatives for the efficient achievement of those improvements and remedies. That is entirely in keeping with the spirit of Sir Garfield Barwick's inaugural address, in which he considered it "appropriate … to make known to governments matters in relation to the judicial system which seem to call for remedy" and observed that "[t]here may at any one time be many such matters so that a selection must necessarily be made of those which currently call most urgently for correction or amelioration".

37 In this context, advances in technology mean that useful data on judicial operations has become ever more available and sophisticated, with the consequence that "sufficient data is available to make the exercise of [judicial statistical analysis] worthwhile" in presenting "the State of the Judicature". So much can be seen in the annual reports of the various New South Wales courts.

38 Documenting trends in judicial activity is essential for proper planning and provisioning in our judicial system including in relation to personnel and facilities. Increased burdens placed on courts are burdens ultimately placed on the individuals who sit as judges and magistrates. As with many fields of endeavour, we have become more astute to pressures placed on judicial officers both through the volume and nature of the work imposed, and the work of the Judicial Commission.

39 It is also important that courts within the judicial hierarchy have a good understanding and appreciation of each other's role and specific challenges. In this respect, the role of the Judicial Commission since its institution in 1986 has been seminal in allowing us to speak of there being one judiciary in New South Wales.

40 We expect (and receive) a great deal from our judicial officers. Their goodwill and professional commitment must not be allowed to be taken advantage of by unreasonable work pressures or significant drops in real wages. The judiciary of New South Wales – and I mean the whole of it – performs an essential service in our society and it was regrettable, to say the least, that the State Government, without any consultation or even notice, announced a two year freeze on judicial salaries on assuming office earlier this year, in a period of relatively high inflation and in an environment where judicial salaries had been held well below CPI for a number of years. That has and will result in a significant reduction in real wages of the judiciary.

41 To make this point is not to begrudge or criticize wage rises to essential workers in other areas but it is to make the point that the New South Wales judiciary and its demanding and unrelenting work should not be taken for granted. The work performed by the judiciary is essential for ensuring social cohesion and order, and the preservation of the rule of law.

The unifying role of the Judicial Commission

42 The Judicial Commission of New South Wales, established by the *Judicial Officers Act 1986* (NSW), is constituted by ten members, four of whom are the heads of the Supreme, Land and Environment, District and Local Courts, who, alongside the President of the Court of Appeal and the Chief Commissioner of the Industrial Relations Commission, serve in an ex officio capacity. In this sense, it is an important forum for exchange between the heads of jurisdiction of the different courts comprising the NSW judiciary. Its meetings occur on a monthly basis and the heads of jurisdiction also meet informally but regularly between Commission meetings.

43 In dealing with complaints which can be (and are) made against judicial officers from all of the Courts in New South Wales, the heads of jurisdiction in their capacities as members of the Judicial Commission are routinely exposed to the workings of Courts other than their own. In my four and a half years on the Commission, I have reviewed several hundred transcripts of Local Court proceedings, for example, in considering complaints against judicial officers. (The vast majority of these, I should observe, have been dismissed according to the criteria set out in the *Judicial Officers Act*, and the number of complaints made is a tiny fraction of the caseload of our courts.)

44 Although the Judicial Commission's complaints handling function is perhaps its most well-known, my predecessor, Chief Justice Bathurst, expressed the view that its other two principal functions: providing judicial education and promoting consistent sentencing practices, are perhaps of even greater significance. [Chief Justice Bathurst referred to the sentencing statistics and resources available on the Judicial Information Research System (JIRS) as equally "indispensable" for magistrates and District Court judges required to sentence large number of offenders quickly.[22]

45 As you all know, the Judicial Commission provides critical judicial education services to judicial officers of all courts. Chief Justice Gleeson once wrote that, in order to preserve judicial independence, judicial education must, consistent with the model adopted by the Judicial Commission, be "judge-driven".[23] The Commission now facilitates an annual conference, like this one, for each of the courts, and often relies on the input of judges from other courts in the delivery of the program. That is reflected in your conference this week with presentations to be given by three of my colleagues on the Supreme Court.

46 The Commission also convenes various other education programmes which are open to judges and magistrates alike and provide an important, and rare,

[22] The Hon. T F Bathurst AC, "Demystifying judicial commissions" (2020) 14 The Judicial Review 215 at 217.
[23] The Hon. A M Gleeson, "The future of judicial education" (1999) 11(1) Judicial Officers' Bulletin 1 at 2.

opportunity for dialogue between judicial officers of all courts.[24] For instance, the Ngara Yura Program, which seeks to promote a better understanding of Aboriginal social and cultural issues among the judiciary and to provide Aboriginal people with the chance to learn about the judicial process, recently organised a visit to the Dharawal community at La Perouse which was attended by judicial officers on the Local, District and Supreme Court benches.[25]

Judicial movement and exchange

47 Another way in which the courts of this State are integrated is through movement of judges between courts. When first Court of Civil Judicature was established in the colony of New South Wales, it was constituted by the Judge-Advocate sitting alongside two magistrates.[26] Civil matters continued to be decided in this manner for some time.[27] The first District Court judges also occasionally acted as Justices of the Supreme Court, particularly for the purpose of trying issues of criminal or civil law in remote locations which the Judges of the Supreme Court of Sydney could not travel to without interrupting their ordinary business.[28]

48 Today, the courts of the NSW judiciary continue to be united by judicial officers who hold dual appointments or who move between branches of the judiciary. The Chief Magistrate of the Local Court, Judge Peter Johnstone, is a judge of the District Court and former President of the Children's Court, and the Chief Judge of the District Court and President of the Dust Diseases Tribunal, Justice Derek Price AO, is a judge of the Supreme Court and was himself once a magistrate and then Chief Magistrate. The President of NCAT, Justice Lea Armstrong, is also a Supreme Court judge while Judge Gerard Phillips is President of the Personal Injury Commission and a judge of the District Court.

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[24] Kate Lumley, "From controversy to credibility: 20 years of the Judicial Commission of New South Wales" (2007) 19(9) Judicial Officers' Bulletin 73 at 79.
[25] Judicial Commission of NSW, "Ngara Yura Program: judicial visit to Dharawal community at La Perouse" (2022) Judicial Officers' Bulletin 34(5) 54.
[26] The Hon. H V Evatt, "The Legal Foundations of New South Wales" (1937) 11 *The Australian Law Journal* 409 at 412.
[27] D Neal, *The Rule of Law in a Penal Colony* at 100.
[28] Section 26.

Judges of the LEC can also act as judges of the Supreme Court and vice versa while the Chief Judge of the LEC may serve as an additional Judge of Appeal on both the Court of Appeal and Court of Criminal Appeal, and often does. [29]

49 There are now several District Court judges who were formerly magistrates. Including Judge Nell Skinner, now President of the Children's Court and a judge of the District Court in November 2021. Similarly, Judge Jane Mottley AM was appointed as a magistrate in 2000, Deputy Chief Magistrate in 2009, an acting District Court judge in 2017 and both a permanent District Court judge and Senior Judge of the Drug Court in July 2021. Former Deputy Chief Magistrate, Judge Michael Allen was also elevated to the District Court Bench earlier this year after 14 years of service to the magistracy.

50 Three of the judges appointed to the NSW Supreme Court in the last twelve months, Justice Dina Yehia, Justice Richard Weinstein and Justice Deborah Sweeney, were formerly long-serving judges of the District Court, as were the recently retired Justice Nigel Rein and Acting Justice R.A. Hulme. Michael Elkaim was a District Court judge for many years before becoming a judge of the Supreme Court of the ACT, and is now an acting judge of the Supreme Court of NSW.

51 Of particular note, Justice Sweeney who is the first woman in NSW to have completed the "trifecta". Her Honour spent ten years in the magistracy, 16 years in the District Court and was then elevated to the Supreme Court earlier this year where she is doing an excellent job.

52 The late Justice Jerrold Cripps was also well-known for his movement between courts, tribunals and commissions.[30] His Honour was appointed to the District Court bench in 1977. He then moved to the Land and Environment Court in 1980 where he became Chief Judge in 1985. In 1992, he was then appointed to the Court of Appeal. Following his retirement in 1993, and appointments to

[29] *Land and Environment Court Act 1979* (NSW), s 11A; *Supreme Court Act 1970* (NSW), s 37B.
[30] J Stephen and M Gleeson, "Jerrold Cripps' numerous appointments mark his loyalty, integrity" *Sydney Morning Herald* (online, 3 February 2016) <https://www.smh.com.au/national/jerrold-cripps-numerous-appointments-mark-his-loyalty-integrity-20160203-gmk910.html>.

several tribunals, panels and arbitration bodies in the interim, Justice Cripps returned to the District Court as an acting judge in 2002.

53 Judicial officers who move between courts or who hold dual commissions have important work to do in unifying the judiciary. As I have discussed, each branch of the NSW judiciary has a unique function and history. Not only will judges who have moved from courts of first instance to intermediate courts and then to higher appellate courts be able to share knowledge gleaned when running busy lists and dealing with a broader cross-section of the public, they are able to and do promote sensitivity on appellate courts as to the practicalities of day-to-day life in the lower courts and or at first instance.

54 Equally, judges who move between courts may be able to foster an appreciation for and understanding of the role of appellate courts in promoting consistency and high-quality decision-making in the lower courts.

A hierarchy within the one judiciary

55 Although it is meaningful and valuable to conceive and speak of one judiciary in New South Wales, that one judiciary has a hierarchy that must be respected, as Chief Justice Dowling pointed out so many years ago. As Justice Davies has recently pointed out, in an appeal from the Local Court which achieved some notoriety,[31] this is not for reasons of status, vanity or the personal sensitivity on the part of appellate or Supreme Court judges but because respect for the decisions of courts higher in the judicial hierarchy is a fundamental aspect of the rule of law, as is the ability to appeal and the doctrine of precedent.

56 If judges of lower courts do not respect and are seen to be openly critical of decisions of courts higher in the judicial hierarchy, why should we expect members of the public to respect any judicial decision? The same applies to judicial criticism or even personal attacks on other judges in the judicial hierarchy including self-indulgent and disrespectful suggestions that they are

[31] *Elwood v Director of Public Prosecutions* [2023] NSWSC 772

out of touch. Comments such as these are corrosive of respect for the rule of law.

57 It is trite to observe that apart from being tied together by the work of the Judicial Commission and the judges and cases that move between them, judicial officers in courts, tribunals and commissions across NSW are broadly unified by their overarching function and role: to adjudicate disputes according to law, and to do so with impartiality, integrity and a sense of fairness.

Common challenges

58 Although sometimes manifesting differently in the unique conditions of the different courts in which they operate, the judicial officers of NSW are also united by common challenges faced in performance of this overarching function. I will address some but not all of these.

Stress, Mental Health and Workload

59 Many of you may be familiar with a 2019 study conducted by UNSW which surveyed 371 appointed and retired NSW judicial officers.[32] Only 35% of judicial officers returned scores on this survey which were indicative of good psychological wellbeing, as compared to 68% of the general Australian public. 30% of respondents returned scores high enough to suggest a possible PTSD diagnosis.[33]

60 Conversation about the wellbeing of the judiciary in NSW was motivated, in large part, by Justice Michael Kirby who addressed this conference in 1995 on the topic. His Honour identified several inherent features of judicial office which may create stress or mental illness including:[34] isolation and loneliness, high caseloads, lack of support and resources and the need to adapt to changes in

[32] J Hunter et al, "A fragile bastion: UNSW judicial traumatic stress study" (2021) 33(1) *Judicial Officers' Bulletin* 1; see also, K O'Sullivan et al, "Judicial work and traumatic stress: Vilification, threats and secondary trauma on the bench" (2022) 28(4) *Psychology, Public Policy, and Law* 532.
[33] J Hunter, "A fragile bastion" at 3.
[34] The Hon. Michael Kirby, "Judicial Stress: An Unmentionable Topic" (Speech, Annual Conference of the Local Courts of NSW, 2 June 1995)

the law and society as well as the various personal challenges which judicial officers may face while serving on the bench. Justice Kirby also suggested that particular stresses may attach to judicial office based on whether a judge is working in an urban or rural environment and on a first instance or appellate court.[35]

61 In this respect, it must be noted that while the UNSW study indicated that judicial stress and poor wellbeing affect judges on both higher and lower courts, scores were noticeably more concerning among the Local Court bench than the higher courts.[36] This may be a product of the fact that magistrates are required to deal with an enormous caseload, in rapid succession where many cases involve traumatic events and suffering. Former magistrate David Heilpern AM, who spent 21 years on the Local Court bench, has spoken and written frankly on the subject and has described the mind as being a sponge which will inevitably absorb trauma vicariously where magistrates are dealing constantly with a high volume of traumatic material, particularly concerning children.[37]

62 This is a good place to make the point that the successful functioning of the judiciary depends on the health of its judges and magistrates, including their mental health. So, irrespective of the court on which we sit, we must encourage one another to reach out for help where needed. Various initiatives which aim to provide that help, such as the Local Court's Wellbeing Committee and the Judicial Commission's evolving Judicial Wellbeing Portal on the Judicial Information Research System, should be commended.[38]

The media and the judiciary

63 The media, and increasingly social media, is also deeply intertwined with stress and mental illness among the judiciary. Although fair criticism of the judiciary is

[35] Ibid.
[36] J Hunter, "A fragile bastion", 6.
[37] See generally, D Heilpern, "Lifting the judicial veil – vicarious trauma, PTSD and the judiciary: a personal story" (Speech, Tristan Jepson Memorial Foundation Lecture, 25 October 2017).
[38] E Kennedy, "Introducing solutions for maintaining positive psychological health: the judicial wellbeing portal" (2021) 33(11) *Judicial Officers' Bulletin* 111.

important, some ill-informed and unfair media commentary can be damaging to judicial officers personally.[39]

64 Additionally, earlier this year, Chief Justice of the High Court Susan Kiefel, in delivering the George Winterton Memorial Lecture in the Banco Court, discussed both the vilification and praise which courts can receive in the media when making politically charged decisions and the way in which this commentary may undermine the public's confidence in the role of courts as impartial arbiters of disputes.[40] Although such commentary is more frequently directed towards appellate courts, judges and magistrates in lower courts are not immune.

65 It is well-established, even in response to vitriolic criticism, judges should not provide comments to the media concerning cases before them, or express or volunteer their private views on questions of political controversy or matters of public affairs. I have had to deal with a number of instances of that this year.

66 Judges across the NSW judiciary must also be careful about their own social media presence. A New York judge has recently been criticised because of his private TikTok account which depicted him lip-synching to popular rap music, sometimes in judicial robes.[41] Similarly, two magistrates in France got themselves into a spot of trouble when they mused on their personal Twitter accounts about the possibility of slapping a witness before tweeting: "legal question … if any exasperated magistrate strangles his chief justice during a hearing, how much would that be worth".[42]

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[39] Dr M Bromberg and A Ekert, "Haters gonna hate: when the public uses social media to comment crticially or maliciously about judicial officers" (2017) 26(3) *Journal of Judicial Administration* 141.
[40] See also, The Hon. M Kirby, "Attacks on Judges – A Universal Phenomenon" (Speech, American Bar
[41] T Tully, "Judge Investigated Over His Profane TikTok Videos" *New York Times* (online, 3 July 2023) <https://www.nytimes.com/2023/07/03/nyregion/new-jersey-judge-gary-wilcox-tiktok.html>.
[42] See discussion of this issue in Dr M Bromberg, "Right Here Waiting for You: The New Social Media Chapter in the Australian Guide to Judicial Conduct" (2018) 27 *Journal of Judicial Administration* 123 at 123.

Judicial demeanour and conduct in the courtroom

67 Perhaps even more important than a judge's behaviour online is their behaviour in the courtroom.

68 Throughout the 1950s and 1960s, some of this State's appellate judges were well known for striking terror in the hearts of advocates appearing before them with behaviour sometimes referred to as "judicial savagery". The New South Wales Court of Appeal had a particularly poor reputation in this regard prior to Justice Michael Kirby's ascent to the Presidency, and even the High Court has not always been free of judges who have conducted themselves from time to time in a manner that might not be thought to model exemplary and respectful judicial demeanour.

69 Members of the legal profession and the public alike have come to appreciate judges who are courteous, patient and respectful in their dealings with parties and legal representatives.[43] Judicial *hearings* are just that: they require listening to the arguments of both sides.

70 Former Chief Justice Brennan said the following with respect to the challenges of maintaining appropriate judicial demeanour, even in trying circumstances:

> "…the atmosphere of the court is chiefly in your hands. From time to time, you will experience a mounting frustration as a bumbling counsel fails to tell you what the case is about …, or the key issue in the case is missed or some idiosyncrasy of counsel, party or witness proves bothersome. At such times, judicial sang froid is tested … A sense of humour helps. I do not mean the bon mot that extracts a dutiful show of mirth from counsel nor the flippancy that might lead a litigant to think that the trial is regarded as a mere entertainment. I mean a sense of humour that allows the mind to concentrate on the issues without taking oneself and one's preconceptions too seriously. If humour fails, the situation is ameliorated by a certain remoteness created by the physical separation of the bench from the well of the court and the wearing of the judicial robe. Although both of these features undergo critical evaluation from

[43] S Roach Anleu, K Mack and J Tutton, "Judicial Humour in the Australian Courtroom" (2014) 38 *Melbourne University Law Review* 621 at 626; See, eg, K Mack and S Roach Anleu, "Performing Impartiality: Judicial Demeanour and Legitimacy" (2010) 35(1) *Law & Social Inquiry* 137.

> time to time, I doubt whether curial decorum could be so easily preserved without them."[44]

71 The kind of judicial demeanour required of a judicial officer may also differ based on the court in which they are operating. As I have discussed, the Local Court is unique in that magistrates deal more closely with the public and hear high volumes of matters in quick succession. This will often require that some of the formality required in the higher courts be modified in favour of a more approachable, accessible manner. But this must not be taken too far. Judicial officers at all levels wield enormous power, and that power must be exercised with respectful authority and detachment.

Dealing with the public

72 On this point, one of the primary challenges faced by judicial officers of all courts is dealing with the public. In his Opening of Law Term Address in 2014, Chief Justice Bathurst reminded us that judges have always had difficult dealings with litigants in courtrooms by referring us to the story of the Lord Chief Justice Richardson who, during the reign of Charles I, had a piece of flint thrown at him in court by a disgruntled offender.[45] Unfortunately for that litigant, the flint "flew too high, and only took off [Chief Justice Richardson's] hat".[46]

73 For judicial officers of all courts, dealings with the public may be particularly challenging where litigants are self-represented. Although unrepresented litigants are more prominent in the lower courts, they appear in all NSW courtrooms. Sometimes, self-represented litigants may be vexatious, querulant or experiencing a mental illness.

74 When dealing with self-represented litigants, judicial officers must strike a delicate balance between, on the one hand, preventing them from being deprived of a fair opportunity to present the substance of their case due to

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[44] The Hon. G Brennan AC KBE, "The Role of the Judge" (Speech, National Judicial Orientation Programme, 13 October 1996).
[45] The Hon. T Bathurst, "Community Confidence n the Justice System: The Role of Public Opinion" (Speech, Opening of Law Term Address, 3 February 2014) at 1.
[46] J Campbell, *The Lives of the Chief Justices of England from the Norman Conquest Till the Death of Lord Tenterden – Vol 1* (John Murray, 2nd ed, 1858).

ignorance of the judicial process and, on the other hand, providing them with too much assistance such that judicial impartiality is compromised.[47] They must at all times be appropriately respected. I am not naïve about the practical challenges that this may sometimes pose, especially in relation to certain groups who appear to aim to disrupt the orderly proceedings of the courts.

75 Judges and magistrates across the board also share an increasing awareness of the fact that many parties to legal proceedings may be affected by trauma, or have experienced discrimination, which is linked to previous interactions with the legal system. As has been discussed by Magistrate Mark Douglass, whose work as Chair of the Local Court's First Nations Committee and vulnerability in sharing his personal experience as an Aboriginal magistrate should be commended, First Nations people have a particularly unique experience of intergenerational trauma associated with the Australian legal system. [48] This past experience may adversely affect the way in which litigants engage with court proceedings and judicial officers.

76 Although it will be difficult at times, dealing with litigants in a manner which is sensitive to their past experiences and trauma can ensure that legal processes have a positive, rather than a negative impact, on parties. Doing so has a real potential to foster increased public confidence in the NSW judiciary. [49]

77 Given that the Local Court, alongside the District Court, will deal with the broadest spectrum of litigants, it is here that trauma-informed court practice may present the greatest challenges, but also the greatest rewards, for judicial officers.

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[47] The Hon. Justice E Kyrou, "Managing litigants in person" (2013) 25(2) *JOB* 11.
[48] See, eg, M Douglass, "A road less travelled: footprints from trauma" (2022) 34(6) *Judicial Officers' Bulletin* 62; See also, B O'Neill, "Decolonising the mind: working with transgenerational trauma and First Nations People" (2019) 31(6) *Judicial Officers' Bulletin* 54 and P Johnstone, "The Local Court of NSW is committed to Closing the Gap" (2022) 34(6) *Judicial Officers' Bulletin* 65.
[49] See, eg, M King, "The importance of trauma-informed court practice" (2022) 34(6) *Judicial Officers' Bulletin* 59.

Conclusion

78 It is a pleasure for me, as the head of the one judiciary I have described, to have been able to join you this morning.

79 Thank you for the incredibly important and tireless work that you do.

80 I wish you all the best and trust that you enjoy the remainder of the Conference.