

# **LAW SOCIETY OF NEW SOUTH WALES**

## **OPENING OF LAW TERM DINNER ADDRESS 2023**

### **“The State of the New South Wales Judicature 200 years on from the Bigge Report”**

**The Hon A S Bell  
Chief Justice of New South Wales\***

**1 February 2023**

**Sydney, New South Wales**

- 1 I begin by acknowledging the traditional custodians of the land on which we meet today, the Gadigal of the Eora Nation, and pay my respects to their Elders, past and present, and all First Nations people.
  
- 2 I also reiterate, as I did at my swearing in ceremony 11 months ago, my full support for the Uluru Statement from the Heart which is an eloquent, accurate and powerful statement which looks forward to “a fuller expression of Australia’s nationhood” with great dignity. 2023 will be a very important year in the nation’s history and let us all hope that the proposed referendum is a positive and unifying step, and that debate in respect of it is conducted in a mature, civil and respectful way with generous hearts and open minds.
  
- 3 I would particularly like to acknowledge at the outset of this speech the presence of Chief Justice Allsop of the Federal Court who retires next month. His has been an outstanding judicial career, not only as CJ of the Federal Court but as a very fine President of the Court of Appeal and trial judge for many

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\*I express my thanks to my Researcher, Mr Christian Andreotti, for his assistance in the preparation of this address.

years before that. His appointment as a Companion in the Order of Australia was richly deserved.

- 4 This is my first Opening of Law Term Address to you since my appointment as Chief Justice. I commiserate with any of you in the audience who thought that you were going to be addressed by former Justice the Hon. Virginia Bell AC SC, that most formidable and brilliant of after dinner speakers. She has taken to protecting her brand and reputation by constantly referring to me as “Bell Minor” which is entirely her prerogative! It is true that we are sometimes mistaken. When I was President of the Court of Appeal, I received an application from a law student who wanted to be my Associate. I inferred that the application was not intended for me as it referred to my work with the Redfern Legal Centre in the early 1970s (when I was about 6) as well as to my short satirical stint on television as President of the Australian Barrel Girls Association!
- 5 I have chosen as the title of my address “The State of the New South Wales Judicature 200 years on from the Bigge Report”.
- 6 Although it was Sir Garfield Barwick who, as Chief Justice of the High Court, instituted the “State of the Australian Judicature Address” in 1977, thus starting a biennial or quadrennial tradition that continued at least up until 2016, for most of its history being delivered as part of the Law Council of Australia’s annual Australian Legal Convention,<sup>1</sup> the first State of the Judicature survey for New South Wales was in fact that provided by Commissioner John Thomas Bigge in his eponymous report which was published by the House of Commons 200 years ago this month and which was said to have “caused much bitterness in the colony”, with Bigge “publicly accused even of causing [Governor] Macquarie’s early death in July 1824.”<sup>2</sup>

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<sup>1</sup>B Opeskin, “The State of the Judicature: A Statistical Profile of Australian Courts and Judges” (2013) 35 *Sydney Law Review* 489 at 489 (Opeskin). That tradition was fostered successively, on 16 occasions, by Chief Justices Barwick, Gibbs, Mason, Brennan, Gleeson and French.

<sup>2</sup> F Watson (ed), *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, 1914) vol 10 at 805–808.

- 7 Significantly for our purposes, it was also the report which led to the Third Charter of Justice of October 1823 which established the current Supreme Court of New South Wales whose first sitting on 17 May 1824 we will commemorate next year.
- 8 By Letters Patent issued under the seal of King George III on 5 January 1819, Commissioner Bigge was appointed “to examine into all the Laws Regulations and Usages of the Settlements in the said Territory [of New South Wales] and its Dependencies, and into every other Matter or Thing in any way connected with the Administration of the Civil Government, the Superintendence and Reform of the Convicts ... [and] the State of the Judicial Establishment”.<sup>3</sup>
- 9 In relation to the latter subject, and to put it colloquially, much “dirty washing” and dysfunction was uncovered, with very unhappy relations revealed between early judges and magistrates including the Reverend Samuel Marsden, as well as between the early judges and magistrates and Governor Lachlan Macquarie. Indeed the latter wrote of the unfortunately named Justice Bent that “the highest law officer in the Colony is the root of every faction and cabal that takes place in the colony”.<sup>4</sup>
- 10 Justice Bent was described by Murray Gleeson as someone “generally regarded, not only as the first judge in New South Wales, but also as the worst.”<sup>5</sup> 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 summons to appear before the equivalent of the Court of Petty Sessions since,

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<sup>3</sup> United Kingdom of Great Britain & Ireland, *Letters Patent for the Commission of John Thomas Bigge*, King George III, 5 January 1819.

<sup>4</sup> CH Currey *The Brothers Bent* Sydney University Press 1968 p.125.

<sup>5</sup> Supreme Court of New South Wales 175<sup>th</sup> anniversary dinner.

'as Judge of the Supreme Court", he took the view that he "was by no means amenable to any criminal jurisdiction in this Territory".<sup>6</sup>

- 11 I trust that we have progressed with the quality of our judges but note with interest that toll roads between Sydney and Parramatta were proving problematic in Sydney town more than 200 years ago.
- 12 The Bigge Report was delivered some nine years after the passage of the Second Charter of Justice on 2 April 1814, by which "a separation of the civil and criminal judicatures" was effected,<sup>7</sup> resulting in the "appointment of three new civil courts".<sup>8</sup> Thus, the New South Wales Judicature then comprised the Criminal Court, the Governor's Court, the Lieutenant-Governor's Court of Van Diemen's Land (together **the Vice-regal Courts**) and the Supreme Court of Civil Judicature. The Vice-Regal Courts were respectively "instituted for the trial of all causes where the sum in dispute should not exceed 50 [shillings] sterling".<sup>9</sup>
- 13 Summarising the caseload of the Governor's Court, Commissioner Bigge reported that:<sup>10</sup>

"By the return of causes that have been tried in this court from the month of October 1816 to the end of October 1819, it appears that six hundred and ninety-seven causes exceeding 5 [shillings] in amount have been tried there, in which sums amounting to 13,827 [shillings] have been recovered; and that the greatest number of causes tried in any one year amounted to three hundred and eighty-four. The number of causes not exceeding 5 [shillings] in value, tried within the same period, amounted to five hundred and twenty-four; and the greatest number in any one year amounted to two hundred and twenty."

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<sup>6</sup> CH Currey *Australian Dictionary of Biography*.

<sup>7</sup> Bigge Report at 6.

<sup>8</sup> Bigge Report at 6.

<sup>9</sup> Bigge Report at 6.

<sup>10</sup> Bigge Report at 7–8.

Bigge recommended the abolition of this Court in favour of:<sup>11</sup>

“the expediency of providing Courts of Conscience for the easy recovery of small debts in the colony ... Their importance in a new and agricultural settlement is always great; and their utility is in proportion to the facility of access that they afford, and the cheapness and simplicity with which their proceedings are conducted.”

- 14 Bigge also supplied a simple quantitative analysis of the Supreme Court of Civil Judicature’s more modest caseload, which commenced with the observation that “[t]he causes that have been tried in the Supreme Court from [February 1817], until the end of the month of December 1820, have not been numerous ... for they do not exceed one hundred and sixty-five. Two-thirds of these causes appear to have arisen upon simple contract debts, and upon notes or bills, and very few have occurred in which any difficult questions have arisen”.<sup>12</sup>
- 15 That Court was presided over by the also inauspiciously named Barron Field who replaced Bent. Field is perhaps better known for publishing *First Fruits of Australian Poetry* in 1819, said to be the first book of verse produced in Australia. Field’s obituarist remarked of his poems that “as truth is my friend, even more than Plato, I must confess my regret that he did not suppress them, for the gods had not made him poetical, his ear appearing to have been absolutely insensible to the requisite rhythm of verse”.<sup>13</sup>
- 16 Field, who gave extensive evidence before Commissioner Bigge, was credited with having commenced the rich tradition of law reporting in New South Wales. Bigge wrote that:<sup>14</sup>

“Most of the cases in which Mr Justice Field has taken time to consider of his judgment, have been subsequently reported and published by

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<sup>11</sup> Bigge Report at 74–75.

<sup>12</sup> Bigge Report at 9.

<sup>13</sup> Horace Smith *The New Monthly Magazine and Humorist* 1847, noted by Justin Clemens “Barron Field and the myth of *terra nullius*” *The Monthly* October 2018.

<sup>14</sup> Bigge Report at 11.

himself in the Sydney Gazette, not only with a view to place before the public the grounds of his decisions and those of the members of the court, but to prevent the misrepresentations to which they might have been liable if left to the discretion of the editor of the Sydney Gazette.”

I make no comment ...!

17 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.<sup>15</sup> The so-called coming of age of Australian law has been associated with the Chief Justiceship of Sir Anthony Mason<sup>16</sup> whose stewardship of the High Court coincided with the passage of the Australia Acts, the ultimate demise of the Privy Council as far as Australian appeals were concerned and many significant decisions including *Mabo*.<sup>17</sup>

18 In his inaugural State of the Judicature address, Sir Garfield deliberately considered it appropriate [to] include a deal of statistical information, including:<sup>18</sup>

“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.”

19 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. Many of the later State of the Judicature Addresses departed from this model to focus on thematic topics such as “judicial education and training”, “courts, the public and technology”, “court

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<sup>15</sup> G Barwick, “The State of the Australian Judicature” (1977) 51 *Australian Law Journal* 480 at 480.

<sup>16</sup> See SJ Gageler in McDonald, Chen and Gordon (eds) *Dynamic and Principled: the influence of Sir Anthony Mason* Federation Press, 2022, Chapter 1.

<sup>17</sup> *Mabo v Queensland (No 1)* (1992) 175 CLR 1; [1992] HCA 23.

<sup>18</sup> G Barwick, “The State of the Australian Judicature” (1977) 51 *Australian Law Journal* 480 at 480.

facilities”, “the role of the jury”, “unrepresented litigants”, “trans-national litigation”,<sup>19</sup> and “federalism”.<sup>20</sup> It has been said that these addresses tended to consider “the future of the Australian judicature” rather than its present “state”,<sup>21</sup> and so much was acknowledged both by Sir Anthony Mason and Murray Gleeson, each of whom “commented that no satisfactory indicator of judicial productivity has yet been devised” and “warned about using such indicators to draw inappropriate conclusions”.<sup>22</sup> These comments and warnings are apt, as is that of the Hon James Spigelman AC KC, who commented in 2006 that “the most important aspects of the work of the courts are qualitative and cannot be measured, not even by proxy indicators”,<sup>23</sup> a view that has also been powerfully articulated by Chief Justice Allsop AC.<sup>24</sup>

20 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 any number of reasons.

21 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.

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<sup>19</sup> See, for example, A M Gleeson, “The State of the Judicature” (Speech, Australian Legal Convention, Canberra, 10 October 1999).

<sup>20</sup> See, for example, A M Gleeson, “The State of the Judicature” (Speech, 13th Commonwealth Law Conference, Melbourne, 17 April 2003).

<sup>21</sup> Opeskin at 516:

“In 1977, Barwick CJ thought it “appropriate that the Chief Justice of Australia should undertake the task from time to time of indicating the state of the judicature, generalising in an Australian context and ... speaking both of improvement and of the need for correction and development. For the most part, his successors fulfilled that expectation by addressing broad thematic issues affecting the Australian judiciary. Hampered by lack of data, they generally failed to describe or account for the characteristics of a dynamic system experiencing both growth and decay.”

<sup>22</sup> A Mason, “The State of the Judicature” (1994) 68 *Australian Law Journal* 125 at 129; A M Gleeson, “The State of the Judicature” (Speech, 33rd Australian Legal Convention, Melbourne, 17 April 2003) at 8; A M Gleeson, “The State of the Judicature” (Speech, 35th Australian Legal Convention, Sydney, 25 March 2007) at 14; see Opeskin at 492.

<sup>23</sup> J J Spigelman, “Measuring Court Performance” (Speech, 24th AIJA Annual Conference, Adelaide, 17 September 2006; J J Spigelman, “Quality in an Age of Measurement” (2002) [March] *Quadrant* 9; see Opeskin at 492.

<sup>24</sup> JLB Allsop “Courts as (living) institutions and workplaces” (2019) 93 *Australian Law Journal* 375.

- 22 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.
- 23 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”.<sup>25</sup>
- 24 In this context, advances in technology mean that useful data on judicial operations has become ever more available and sophisticated,<sup>26</sup> with the consequence that “sufficient data is available to make the exercise of [judicial statistical analysis] worthwhile” in presenting “the State of the Judicature”.<sup>27</sup> So much can be seen in the annual reports of the various New South Wales courts.
- 25 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.

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<sup>25</sup> G Barwick, “The State of the Australian Judicature” (1977) 51 *Australian Law Journal* 480 at 481.

<sup>26</sup> See, for example, AIJA, *Judicial Gender Statistics (June 2022)* <[https://aija.org.au/wp-content/uploads/2022/09/2022-Judicial-Gender-Statistics-\\_2022-09-14.pdf](https://aija.org.au/wp-content/uploads/2022/09/2022-Judicial-Gender-Statistics-_2022-09-14.pdf)>.

<sup>27</sup> Opekin at 516–517.



- 26 We expect (and receive) a great deal from our judicial officers, but their goodwill and professional commitment must not be allowed to be taken advantage of by unreasonable work pressures.
- 27 What, then, do I say as to the State of the Judicature in New South Wales on the eve of the bicentenary of the Third Charter of Justice, and almost exactly 200 years since Commissioner Bigge's report was published?
- 28 To start with the volume of work.
- 29 In the Supreme Court, civil claims for compensation arising from institutional abuse have exploded, with over 1600 cases filed since the lifting of statutory limitation periods and detailed monitoring which commenced in 2016, the volume having increased by almost 60 % last year compared to 2021. Whilst a good number of these cases have settled, as at mid-December 2022, 24 are listed for final hearing this year.
- 30 We unfortunately also anticipate a very significant growth of work in the possession list this year with the likely continued rise in interest rates likely to be productive of extreme mortgage stress, exacerbated by the end of the covid-related moratorium on actions for possession, and as borrowers come to the end of locked-in and historically low fixed interest rates.
- 31 Within the Supreme Court and averaged over the last three years, the Court of Appeal and Court of Criminal Appeal together delivered 650 judgments a year with the Court of Criminal Appeal regularly hearing 3 and sometimes 4 appeals a day. This volume and rate of work far exceeds that of other appellate courts in the country which in the main have a higher proportion of Supreme Court judges as a percentage of their population than is the case in New South Wales.
- 32 Of interest to many will be the fact that both the Court of Appeal and the Court of Criminal Appeal has and will continue to sit regionally in appropriate cases. In 2022, the Court of Appeal sat in Wagga and the Court of Criminal Appeal

heard several matters in Newcastle. Supreme Court judges regularly conduct trials throughout the State as well as in Parramatta.

- 33 In the District Court, in 2022, the percentage of sexual assault trials compared to all trials was almost 50%, up from 32% in 2016. The complexity of sexual assault trials has also resulted in an increase in the average trial duration in Sydney from 11.79 days in 2016 to 14.42 days in Sydney in 2022. The work of the District Court will no doubt increase with the introduction of the important coercive control reforms by the State legislature in November 2022. The District Court is fortunate to have as experienced and shrewd a Chief Judge as the Hon Derek Price AO at its head.
- 34 In the Local Court in 2021, 358,109 criminal matters were commenced and 351,407 criminal matters were finalised, representing a 27.75% increase in the jurisdictional caseload since 2011 and this comparison does not take into account that 2021 was, of course, a Covid year. This represents a huge volume of work.
- 35 In terms of the constitution of the judiciary, 2022 was a very significant year.
- 36 Including Justice Weinstein who was sworn in this morning and Justice Deborah Sweeney who will be sworn in as a Supreme Court judge next Wednesday, 10 new judges were appointed to the Supreme Court in 2022,<sup>28</sup> representing a turnover of almost 20% of the Court's judges and comprising an equal number of male and female judges. This broad balance in terms of gender has been a pattern in Supreme Court appointments for the last 9 years and has also been reflected in appointments to other courts in New South Wales, with the Local and Land and Environment Courts now at gender parity and the balance between male and female judges in the District and Supreme Courts having changed radically in recent years, with 10 of the last 17 appointments to the District Court being female.

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<sup>28</sup> Justices Peden, Mitchelmore, Kirk, Meek, Richmond, Yehia, Chen, McNaughton, Weinstein and Sweeney.

- 37 We have come a long way from when I commenced practice at the Bar with the then only female Supreme Court judge being the redoubtable Justice Carolyn Simpson AO with whom I have the pleasure to sit on the Court of Appeal and Court of Criminal Appeal.
- 38 I should also observe that there is ever increasing diversity in the legal profession as is demonstrable at the admission ceremonies of new practitioners which I conduct on at least a monthly basis. That diversity will permeate the profession and ultimately the judiciary, as it has already begun to do. This is a good thing for a number of reasons. As I say in my admissions speech to new practitioners, diverse representation amongst solicitors, advocates and judges assists in ensuring that all people who become involved in our justice system can (and feel that they can) be properly heard and fairly engaged with by a system reflective of our broader community. It is bound up with building trust in and respect for both the judiciary and the legal profession more generally.
- 39 The New South Wales Judicature is strongly supported by the Judicial Commission of New South Wales which I regard as of incalculable importance to the judiciary and magistracy of our State. The Judicial Commission comprises myself as Chief Justice, the President of the Court of Appeal, the Chief Judges of the District Court and the Land and Environment Court, the Chief Magistrate and the Chief Commissioner of the Industrial Relations Commission together with four non-judicial members, one of whom is a practising solicitor.
- 40 The Commission has a staff of approximately 35 full and part-time employees under the leadership of Ms Una Doyle. It deals with complaints against all non-federal judges and magistrates in New South Wales as well as being responsible for judicial education of all judicial officers in New South Wales. One of its most important functions lies in the production and constant refinement of civil and criminal trial bench books, the sentencing bench book, the Local Court bench book, the Equality before the Law bench book, the Sexual Assault Trials Handbook, the Children's Court of New South Wales Handbook and the Judicial Officers Handbook.

- 41 These judicial tools, together with the Judicial Information Research System (or JIRS) which was pioneered by the Commission and is the envy of other States, are invaluable and assist enormously in ensuring the procedurally fair, efficient and correct conduct of trials, as well as promoting consistency in sentencing. What was a controversial and contentious institution at the time of its establishment in 1986 is, in 2023, at the heart of the administration of justice in New South Wales.
- 42 As I have already indicated, the volume of work done by our judges continues to grow and the point must be made that the work of so many of our judges and magistrates extends well beyond the simple hearing of cases. Many judges and magistrates are heavily engaged in the continuing legal education of the profession, sit on a wide array of court and cross-court committees designed to improve the quality and delivery of justice and also make themselves regularly available to speak at civic and educational events.
- 43 The increasing volume of judicial work and caseload without corresponding increases in the number of judicial officers and resources is an increasingly significant matter, both institutionally and in individual cases where we have tragically seen a number of judicial officers taking their own lives in recent years (as well as many others struggling to cope with the pressure of work).
- 44 Strain upon the physical and mental health and well-being of magistrates was addressed by the dynamic Chief Magistrate, his Honour Judge Peter Johnstone, in the introduction to the Court's most recent annual review:<sup>29</sup>

“Fostering the well-being of magistrates is essential. It is now more widely recognised that judicial officers in summary jurisdictions report significantly higher levels of stress and significantly lower levels of basic psychological needs satisfaction when compared to judicial officers in higher jurisdictions. It is necessary to act on this knowledge now, and the establishment of the Well-Being Committee, working in collaboration

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<sup>29</sup> P Johnstone, “Foreword by the Chief Magistrate of NSW” in *Annual Review 2021* (Local Court of NSW, 2022) at 4.

with the Magistrate’s Association ... is tasked with promoting that cause. The Committee has commenced its task by examining the availability of specialist support services and counselling, overseeing a mentoring program, and paying particular attention to magistrates isolated in remote parts of NSW.”

- 45 The work of the Chief Magistrate and the Magistrate’s Association in enhancing judicial health and well-being is complemented by the Judicial Commission of NSW which, in 2022, launched a *Judicial Wellbeing* portal on JIRS. This is a significant innovation, which:<sup>30</sup>

“provide[s] judicial officers with resources to assist them to maintain and sustain a healthy judicial life. The portal complements published research by University of NSW researchers into judicial trauma and work-related stress. In this context, the Commission also published a new chapter, ‘Trauma-informed courts’, in the *Equality before the Law Bench Book* to raise judicial awareness about the nature and impact of trauma and its prevalence and how to apply trauma-informed principles in the task of judicial decision-making.”

- 46 I also note that the Chief Magistrate last year convened a Local Court “First Nations Committee”, with the intention of acting on the over-representation of First Nations peoples before the Local Court. This work complements that of the Judicial Commission’s Ngarra Yura Committee, now chaired by Justice Yehia, which, since 1993 in response to recommendations 96 and 97 of the 1991 Final Report of the Royal Commission into Aboriginal Deaths in Custody, has actively included Aboriginal cultural awareness in its continuing judicial education programmes as well as including a renewed focus on developing partnerships to assist in providing opportunities for Aboriginal people to learn about the judicial process as well as greater support for Aboriginal law students and young lawyers.

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<sup>30</sup> A S Bell, “President’s Foreword” in *Annual Report 2021–22* (Judicial Commission of NSW, 2022) at 15.

- 47 The Commission has subsequently collaborated with the NSW Bar Association, Federal Court of Australia, Supreme and District Courts of NSW to offer Indigenous clerkship programs and with the Bar Association and Law Society of NSW to offer jointly hosted seminars. All of this is important work.
- 48 2022 also saw the introduction of the Walama List pilot in the District Court of New South Wales, building on circle sentencing initiatives that had been instituted in the Local Court and the Youth Koori Court within the Children’s Court of New South Wales.<sup>31</sup>
- 49 That Court, under the leadership of her Honour, Judge Ellen Skinner, plays a perhaps underappreciated role in our judicial system, as children’s early involvement in the criminal justice system is an obvious tragedy. The Children’s Court, when originally constituted under the *Neglected Children and Juvenile Offenders Act 1905* (NSW), was one of the first specialist children’s courts in the world. The Court in its current form, as established by the *Children’s Court Act 1987* (NSW), comprises a President and 15 specialist children’s magistrates, who sit at four designated courthouses (at Surry Hills, Parramatta, Broadmeadow and Woy Woy) and five shared premises (at Campbelltown, Port Kembla, Sutherland, Nowra and Wyong) across the State.
- 50 Following the delivery of the *Report on the Independent Review of Aboriginal Children and Young People in Out of Home Care (the Family is Culture Review)* in 2019, the Children’s Court has taken steps towards implementing recommendation 125, which involves the establishment of a “dedicated court list for proceedings under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) involving Aboriginal children”. The process of implementing this recommendation is described in the Court’s 2021 Annual Review as follows:<sup>32</sup>

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<sup>31</sup> The work of this List and circle sentencing more generally is discussed in AS Bell “Innovative Justice”, being the 29th Sir Ninian Stephen address to the University of Newcastle Law School to be published in *Judicial Review* (forthcoming).

<sup>32</sup> “Children’s Court Operations: Developments in 2021” in *Annual Review 2021* (Local Court of New South Wales, 2022) at 36.

“The Review is about the experiences of Aboriginal children and young people, their families and their communities, as they navigate the NSW Child Protection System. In 2021 the Children’s Court commenced work to establish a dedicated care list for Aboriginal families consistent with Recommendation 125 of the Review. A Working Group comprised of a number of representatives of First Nation communities, legal stakeholders and Children’s Court representatives has recommended the establishment of a pilot list in Dubbo NSW. Members of the Working Group are currently consulting with members of the First Nations Community in Dubbo with a trial of a co-designed model expected to commence in 2022.”

- 51 In light of the considerable risk posed to a child’s psychological health and well-being by their participation in contested care and protection proceedings, the Children’s Court has also championed the “unique” role of Children’s Registrars, who are:<sup>33</sup>

“Australian lawyers appointed pursuant to s 10A of the *Children’s Court Act 1987* to perform *alternative dispute resolution functions* under the *Care and Protection Act 1998*. Children’s Registrars assist with facilitating conferences under the *Education Act 1990* to address unsatisfactory school attendance. Children’s Registrars are based at seven locations across the state and provide services throughout the State.” (emphasis added).

- 52 Another important specialist court is the Drug Court of New South Wales which has been in operation since 1999. Premised upon the concomitant principles of rehabilitation (from substance abuse and dependence) and diversion (from incarceration), the Court’s programs are reserved for drug dependent individuals residing in the Greater Sydney, Hunter or (since 2021) Central West regions of the State who have pleaded guilty (or intend to do so) to a non-violent summary offence and are likely to receive a prison sentence. Participation in the Drug

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<sup>33</sup> “Children’s Court Operations: Developments in 2021” in *Annual Review 2021* (Local Court of New South Wales, 2022) at 35.

Court's programs involves "intensive supervision and monitoring by the court, frequent drug testing, sanctioning for non-compliance and treatment for drug dependency".<sup>34</sup>

53 The past three years have seen both considerable challenges and change for the Drug Court. As to the former, the effects of the COVID-19 pandemic proved particularly difficult to navigate for a jurisdiction with face-to-face supervision and participation at its heart. Notwithstanding those difficulties, the Court supported 293 offenders to complete diversionary programs successfully during 2020, with that number decreasing to 248 in 2021 as the pandemic persisted.<sup>35</sup>

54 August 2021 saw the retirement of Judge Roger Dive as the Senior Judge of the Drug Court, after 17 years in that role and a remarkable 32-and-a-half years in judicial office. The "humanity, humility and intelligence"<sup>36</sup> that characterised Judge Dive's service on the Drug Court is reflected in the great success of the Court's programs. Research conducted by the New South Wales Bureau of Crime Statistics and Research and published in September 2020 concluded that "Drug Court participants had a 17% lower reoffending rate than those not placed in its programs. Participants in the Drug Court programs also took 22% longer to commit an offence against the person".<sup>37</sup>

55 That research followed some 974 participants in the programs over an average period of 13-and-a-half years. Having reviewed the findings of the study, the lead researcher, Professor Don Weatherburn, commented that:<sup>38</sup>

"It is important to remember that the Drug Court is not dealing with people who have simply dipped their toe in the water of crime. A

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<sup>34</sup> D Weatherburn, S Yeong, S Poynton, N Jones and M Farrell, "Long-term Effect of the NSW Drug Court on Recidivism", (2020) 232 *Crime and Justice Bulletin* (NSW Bureau of Crime Statistics and Research) at 1.

<sup>35</sup> J Mottley, *Annual Review 2021* (Drug Court of NSW, 2022).

<sup>36</sup> M R Speakman, "Drug Court Pioneer Judges It's Time to Retire" (Media Release, Attorney-General of New South Wales, 14 July 2021).

<sup>37</sup> D Weatherburn, S Yeong, S Poynton, N Jones and M Farrell, "Long-term Effect of the NSW Drug Court on Recidivism", (2020) 232 *Crime and Justice Bulletin* (NSW Bureau of Crime Statistics and Research) at 1.

<sup>38</sup> NSW Bureau of Crime Statistics and Research, "NSW Drug Court Reduces Risk of Reconviction in the Long Term, New Research Finds" (Media Release, 24 September 2020).



substantial proportion have committed serious offences and have long criminal records.

Almost 1 in 20 of the treatment group had accumulated 15 or more convictions. Our findings therefore show that participation in the Drug Court program can have lasting positive effects on the lives of recidivist offenders and are a credit to all those involved in the Drug Court program.”

- 56 The specialist nature of the Children’s Court and Drug Court of New South Wales is also reflected in the Land and Environment Court of New South Wales, which celebrated its 40<sup>th</sup> anniversary in 2020. Upon its commencement on 1 September 1980, the Land and Environment Court became the first specialist environmental court in the world. Its enduring success over the ensuing four decades is evident from a very simple quantitative metric. Since the turn of the 21st century, over 350 specialised environmental courts and tribunals have been established across 41 national jurisdictions.<sup>39</sup> A study conducted by academics at the University of Cambridge of environmental and planning jurisprudence in the European Union and across Australasia concluded that the Land and Environment Court of New South Wales “was the model most frequently cited by other jurisdictions as the one that should be followed”.<sup>40</sup>
- 57 The Land and Environment Court’s status as a leader of its specialist field is reflected in its *global* influence upon environmental jurisprudence, particularly in the context of sustainable development as the world grapples with the existential threat of anthropogenic climate change. For example, data gathered as part of a conjoint project between the Land and Environment Court and the Australasian

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<sup>39</sup> G R Pring and C K Pring, “The Confluence of Human Rights and the Environment: Specialised Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment” (2009) 11 *Oregon Review of International Law* 301, cited in A S Bell, “A Model of Judicial Sustainable Development: The Land and Environment Court of New South Wales at 40” (Speech, Land and Environment Court Anniversary Conference, Sydney, 29 August 2022) at 14.

<sup>40</sup> J Cripps, “25th Anniversary of the Land and Environment Court” [2005] (Summer) *Bar News* 51.

Legal Information Institute (**AustLII**), implemented in furtherance of the International Framework for Court Excellence,<sup>41</sup> records that:<sup>42</sup>

“since 2010, decisions of the LEC have been cited seven times by New Zealand courts (three times by each of the High Court and the Supreme Court); five times by South African courts (once by the Supreme Court of Appeal); twice by the National Court of Papua New Guinea; and once each by the Belize Supreme Court, the Court of Appeal of Fiji, the Court of Appeal of the Cook Islands, the High Court of Trinidad and Tobago, the Singapore District Court and the Hong Kong Court of First Instance

- 58 This influence is especially notable given the relatively small size of the Court. In 2022, the Court delivered 895 written judgments across its eight jurisdictional *classes*. This is a very substantial increase from 2021, during which 583 judgments were delivered.<sup>43</sup> For the most part, those judgments were delivered with admirable efficiency, with the Court’s statistics for 2021 recording that 21% of judgments were delivered within 14 days, 48% within 30 days, and 78% within 90 days of being reserved.<sup>44</sup>
- 59 The Court’s most recent annual review also records that it achieved an overall case clearance rate of 103.9% in 2021, a considerable increase from the rate of 88.9% recorded in 2017.<sup>45</sup>
- 60 The Land and Environment Court has also taken active steps to promote greater equity in access to justice, in accordance with the first of its three “principles of administration”, namely *equity*, effectiveness and efficiency.<sup>46</sup> An example of

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<sup>41</sup> See International Consortium for Court Excellence, *International Framework for Court Excellence* (3rd ed, May 2020) <[https://www.courtexcellence.com/\\_\\_data/assets/pdf\\_file/0023/66605/The-International-Framework-3rd-Edition-Amended.pdf](https://www.courtexcellence.com/__data/assets/pdf_file/0023/66605/The-International-Framework-3rd-Edition-Amended.pdf)>.

<sup>42</sup> *Annual Review 2021* (Land and Environment Court of New South Wales, 2022) at 28.

<sup>43</sup> B J Preston, “Foreword from the Chief Judge” in *Annual Review 2021* (Land and Environment Court of New South Wales, 2022) at 1.

<sup>44</sup> *Annual Review 2021* (Land and Environment Court of New South Wales, 2022) at 49.

<sup>45</sup> *Annual Review 2021* (Land and Environment Court of New South Wales, 2022) at 47–48.

<sup>46</sup> B J Preston, “Foreword from the Chief Judge” in *Annual Review 2021* (Land and Environment Court of New South Wales, 2022) at 1.

such a step is the Court's "duty lawyer scheme", which commenced on a pilot basis for a six-month period commencing in April 2018. The scheme:<sup>47</sup>

"is the result of a collaboration between the Environment and Planning Law Association, the Environmental Defenders Office, NSW Law Society Young Lawyers Environment and Planning Committee, Macquarie University Law School and practitioners from the Court Users Group. The pilot scheme was aimed at assisting self-represented litigants in Classes 4 and 5 of the Court's jurisdiction [comprising civil enforcement, judicial review and summary criminal enforcement]. As a result of the success of the scheme, it has been extended to run permanently and has been broadened to other classes or types of proceedings in the Court. A duty lawyer is available between 9am and 12 noon each Friday, either in person or by telephone, to provide preliminary advice to self-represented litigants with a view to guiding them through the Court process and referring them to appropriate services. In 2021 it assisted 77 unrepresented persons, an increase of 12% from the previous year."

- 61 Another specialist body which must be acknowledged is the Industrial Relations Commission of New South Wales which, in its various manifestations, sometimes as a Court and sometimes (as now) a Commission, last year celebrated 120 years of industrial conciliation and arbitration in New South Wales. It also happens to be, in terms of historical continuity, the longest continuous industrial court of tribunal in the world. It does extremely important work under the leadership of Commissioner Nicola Constant.
- 62 In the same vein, and while not strictly part of the judicature, the work done by the New South Wales Civil and Administrative Tribunal under the leadership of Justice Lea Armstrong also plays a critical role in the resolution of a huge variety and enormous volume of disputes throughout New South Wales.

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<sup>47</sup> *Annual Review 2021* (Land and Environment Court of New South Wales, 2022) at 24.

- 63 I should also say something briefly and for the record about the pandemic. Despite the vicissitudes of COVID-19 and associated public health restrictions, the courts and tribunals of New South Wales continued to provide access to justice to the people of New South Wales with great dedication and versatility.
- 64 The pandemic presented numerous challenges to the administration of justice including the suspension or regular disruption of jury trials and the closure of public registry counters due to the risk posed by the virus. Court staff and judicial officers alike responded with ingenuity and flexibility, by hearing matters remotely where possible or adopting COVID-safe protocols throughout court premises.
- 65 I take this opportunity to express my admiration and sincere gratitude for the dedication of my colleagues throughout the New South Wales judiciary as well as court staff. The people of New South Wales were well-served during the most difficult times the community has faced in a generation with access to our courts being maintained as completely as was possible.
- 66 While the controversy sparked by the Bigge Report's was relatively short-lived some 200 years ago, its legacy in the form of the establishment of the Supreme Court of New South Wales and the reform of lower courts has endured. In my assessment, in 2023, we have a dynamic, robust, independent, respected, collegiate and extraordinarily hard working judicature in New South Wales that upholds and promotes the rule of law in its daily work.
- 67 Finally, I would say this. The ability of the New South Wales courts to perform their critical role in our society and to perform it well is in no small part a function of the competence, skill, integrity and professionalism of those practitioners, whether solicitors or barristers, who regularly appear in them. In this context I acknowledge the role of the wider profession in the administration of justice.
- 68 With that parting observation, I wish you all well, both personally and professionally, in 2023.