

LAW SOCIETY OF NEW SOUTH WALES
OPENING OF LAW TERM DINNER ADDRESS 2024

“The Bicentenary of the Supreme Court and its significance”

The Hon A S Bell
Chief Justice of New South Wales

31 January 2024

Sydney, New South Wales

- 1 I begin by paying my sincere respects to the Gadigal of the Eora nation and extend those respects to all Indigenous people, to elders, past and present and to indigenous members of the legal profession.

- 2 I also extend my respects and best wishes to all those lawyers, judges and magistrates who are present at this important institutional occasion to mark the beginning of the Law Term, which of course is a curious description as the “Term” runs for a whole year! Your presence at this dinner marks your commitment to the legal profession *as a profession* with all that that profoundly important word conveys.

- 3 I am continuously impressed to see and or learn of the work of so many lawyers in social justice initiatives, pro bono endeavours, educational work and contributing to diverse community organisations, over and above their day jobs, as well as those involved more directly in the important work of the Law Society and Bar Association, and their committees.

- 4 That work deserves to be acknowledged and celebrated, as does the work of the State’s judiciary, including our incredibly hard-working and under pressure magistracy. Local Court lists which have, I am reliably informed, in many cases grown to more than 140 matters a day, are simply unsustainable, both in terms of the provision of justice for litigants and in terms of the working conditions of

the magistracy, including the stress that that workload invariably generates. We know from two instances in Victoria in recent years the tragic consequences that such stress can produce. The vital work undertaken by magistrates and the other members of the State's judiciary is an essential service that must be properly and meaningfully valued as such, and properly resourced in accordance with its character as an essential service, a matter to which I shall return.

- 5 At this occasion 12 months ago, I presaged the Bicentenary of the Supreme Court of New South Wales by speaking to you about the Bigge Report into, inter alia, the rather unsatisfactory early attempts at establishing a judiciary in New South Wales. It was the Bigge Report which resulted in the passage of the *New South Wales Act* of 1823 in the Parliament of Westminster which, in turn, authorised the issue of letters patent in the form of the Third Charter of Justice by which, upon proclamation, my predecessor, 17 times removed, Sir Francis Forbes, was appointed our first Chief Justice.
- 6 That occurred on 17 May 1824 and the Supreme Court will mark and celebrate that milestone in a variety of ways which I will outline.
- 7 The late, great Australian legal historian, Dr JM Bennett, described the Third Charter of Justice as “the instrument that redeemed the colony of New South Wales from its earlier destiny as a mere oubliette for British felons”. “Oubliette” is a French word meaning a dungeon whose occupants could be locked up in and forgotten about.
- 8 Whilst we celebrate the creation of the Supreme Court in 1824, it is salutary to recall (or indeed discover) that, later that same year, Governor Brisbane declared martial law against the Wiradjuri people of what we now know as Bathurst and its surrounds.
- 9 Fully acknowledging this sobering temporal coincidence, the 200th anniversary of the Supreme Court is a milestone worthy of celebration but it is not a

celebration for celebration's sake. It marks 200 years of continuity of the rule of law in New South Wales.

- 10 As I point out to new lawyers on their admission, in a world in which there is much global uncertainty and insecurity, the rule of law is more important than ever and not simply an academic construct or a phrase of some mere theoretical import. At its simplest, it is the opposite of the arbitrary abuse of power and the rule of autocratic dictators and populists. As we survey the globe, there is nothing theoretical about those threats and realities. In a speech delivered in 2018, Lord Hodge of the Supreme Court of the United Kingdom aptly described the rule of law as “a bastion against those who would use chaos as a ladder”.
- 11 The rule of law does not exist in a vacuum, and the Court's vivid history animates it. That history, replete with famous cases and some large personalities – litigants, advocates and even judges - also provides a unique lens into, and is intimately interwoven with, the social, economic and political story of the colony, and then the State, of New South Wales. As the *Sydney Morning Herald* editorialised on the occasion of the Court's centenary in 1924, to study the Court's history “is to study the growth of our nation”.
- 12 One need only take account of the wider sweep of history, necessarily at the most superficial level, to appreciate the Court's longevity and the significance of its long role as the constant guardian of the rule of law in our polity.
- 13 In 1824, Napoleon Bonaparte had only been dead for 3 years and the architects of modern liberalism and communism, John Stuart Mill and Karl Marx, were still boys, as were Charles Darwin and Charles Dickens. Beethoven's ninth symphony was performed in Vienna for the first time only 10 days prior to the proclamation of the Third Charter of Justice in New South Wales.
- 14 Events of great global significance were still on the horizon, in many cases, decades away. Think, for example, of the revolutions that swept Europe in 1848, the so-called Springtime of the Peoples, the US Civil War and the

Presidency of Abraham Lincoln, the Opium Wars in what, from a European or at least British perspective, was the Far East, the 63 year reign of Queen Victoria, the Meiji restoration in Japan, the Boer War and so it goes on. Alexander Graham Bell, Thomas Edison and George Westinghouse would all not be born until the middle of the 19th century and their world changing inventions lay many decades away.

- 15 Throughout this period, and ever since, the justices of the Supreme Court of New South Wales have conscientiously heard and determined cases, faithful to their judicial oath, namely to 'do right to all manner of people according to law, without fear or favour, affection or ill will'. That oath has never changed in its essential terms.
- 16 There have, of course, been changes in the manner in which the work of the Court has been conducted although, in truth, and at the most fundamental level, these changes have been minor. Core features of our judicial system throughout the Court's history, such as procedural fairness, hearings in open court and reasoned judgments delivered by impartial judges, secure in their tenure and thus guaranteed independence, are central to the working of our broader democracy under the rule of law.
- 17 From the earliest years of the Court, the freedom of the press has also been respected and generally upheld in another example of the Court as guardian of liberal values fundamental to an emerging and ultimately functioning democracy. The role of our first Chief Justice, Sir Francis Forbes, in that and other areas was so important. In the Court's first 30 years, that liberal approach to free speech allowed robust debate to occur between the so-called exclusives and the emancipists over the civic and institutional shape the colony would take as it moved incrementally towards representative government.
- 18 Happily, and despite the unavoidable controversy which some decisions produce, and the great disappointment to at least one side of the record which all decisions produce, the quotidian work of the Supreme Court of New South Wales has been respected by the community and the Executive over whose

decisions the Court exercises a supervisory jurisdiction. Such respect is in a very real sense a litmus test for the health of the rule of law in any community.

- 19 In this context, the reported continuing belief by tens of millions of Americans that the 2020 Presidential election was stolen despite considered decisions of a series of superior courts throughout the United States, delivered by judges appointed by both Democrat and Republican administrations, accords with the reported decline in respect for institutions, including courts, in the United States. This is a disturbing trend which we must guard against resolutely in Australia.
- 20 Institutions can and sometimes must change over time, but any such change must be gradual and incremental. So it has been with the Supreme Court of New South Wales. Some of those changes have taken too long. Notwithstanding, for example, the Court's 200 year history, it was not until the *Women's Legal Status Act* of 1918 that females were legally permitted to practice law, let alone take up judicial office.
- 21 Extraordinarily, it would be a further 69 years until Jane Mathews was appointed as the first female justice of the Supreme Court of New South Wales in 1987. The second female judge of the Court, my friend, the wonderful and wise Carolyn Simpson AO, will finally retire from the Court in March of this year, just shy of its 200th anniversary. That the second-ever female judge appointed to the Court is retiring on the cusp of its 200th anniversary speaks for itself.
- 22 However, the role of women in the profession has changed greatly and is continuing to change. More than two thirds of practitioners under the age of 35 are female, as are almost 45% of the State's judicial officers.
- 23 These changes are now also being accompanied by a conspicuous diversification in the profession, something which stands out if you attend any of the many admissions ceremonies that take place each year, and which is in stark contrast, for example, to the religious sectarianism which was an unfortunate feature both of the profession and indeed the Court for many years in the second half of the 19th century, lasting well into the 20th century.

- 24 A mature understanding of, and respect for, the rule of law informs and underpins the events and initiatives that will mark the Bicentenary of the Supreme Court of New South Wales this year.
- 25 As part of the Court's commitment to civic education, a brilliant "History Wall" - a detailed chronological timeline of the Supreme Court's history placed in its larger historical context – has been curated and installed outside of the Banco Court. It will be complemented by a gallery of historic pictures, photographs and memorabilia (some of which are nationally significant items of cultural heritage) in the public areas of Level 13 of the Joint Law Court's Building. This will become known as the Supreme Court Gallery and will be the starting point for tours by secondary school children and members of the public which will include a short lecture in the Banco Court itself, study of the History Wall, attendance at a hearing and visit to the historic (and still used) King St courthouse.
- 26 In addition to students, the History Wall will be able to be studied, absorbed and enjoyed by the thousands of newly admitted lawyers and their friends and family who attend the almost 60 admissions ceremonies that take place each year, as well as by those attending swearings-in and lectures in and around the Banco Court.
- 27 Much of the content of the History Wall has been garnered from a magnificent Bicentenary History of the Court edited by Keith Mason and Larissa Reid, entitled "*Constant Guardian: Changing Times: The Supreme Court of New South Wales 1824-2024*". This book, which literally went to press two days ago, is a stunning 450 page richly illustrated account of the history of the Supreme Court. It will be launched on 3 April 2024 by our 16th Chief Justice, Jim Spigelman, in the lead up to a ceremonial sitting on 17 May 2024, exactly 200 years after the first sitting of the Court and the proclamation of the Third Charter of Justice.
- 28 Consistent with the commitment to civic education, and with the support of the Legal Profession Admission Board, every new lawyer admitted to practice this

year after 17 May 2024 will be presented with a copy of the Court's history as, I hope, will every new barrister who completes the Bar Readers' course. (I also expect everyone in this room to buy a copy of the history! It will be available through both the Law Society and Bar Association.)

- 29 Another significant bicentenary initiative, suggested by my colleagues, Justices Michael Slattery and Dina Yehia, will be to offer indigenous students or young practitioners, an opportunity to have a mini-internship with a Supreme Court judge. It is proposed that such opportunities be integrated into existing indigenous internships offered by Legal Aid, the Public Defenders, the DPP and a number of leading private law firms. There are some outstanding indigenous lawyers in our profession but they are far too few, and a great burden is placed upon them.
- 30 On the subject of indigenous affairs, the defeat of last year's referendum cannot and must not be permitted to obscure the stark and confronting reality, captured in the words of the *Uluru Statement from the Heart*, that "[p]roportionally, [the Indigenous people of Australia] are the most incarcerated people on the planet". The *Uluru Statement* laments that "our youth languish in detention in obscene numbers". That language is strong but it is not hyperbole.
- 31 The referendum's defeat means that more, not less, needs to be done to address levels of indigenous incarceration, especially amongst indigenous youth. Aboriginal Elders (themselves invariably members of the Stolen Generation) play important roles in the Walama List in the District Court, and circle sentencing in the Local Court and the Youth Koori Courts, together with many non-indigenous practitioners, in seeking to achieve diversion towards critical support services directed to underlying offending behaviour, enhanced respect for the legal system, and rehabilitative justice, especially for young offenders.
- 32 It is my hope that, on the occasion of the bicentenary of the proclamation of the Third Charter of Justice, the Walama List Pilot in the District Court which has now been running for two years with notable success, is able to be placed on a

more secure footing with the support of the Government. This will be of advantage for the whole community.

- 33 An historical focus on the work of the Supreme Court highlights its role as a continuing vital organ in our functioning democracy. As our fourth Chief Justice, Sir James Martin, put it so eloquently in a judgment delivered in 1880:

“A Supreme Court like this ... is the appointed and recognised tribunal for the maintenance of the collective authority of the entire community. The enforcement of all those rules which immemorial usage has sanctioned for the preservation of peace and order, and for the definition of rights between man and man, is entrusted to its keeping. Every new law made by the Legislature comes under its care, and relies upon it for its application. Without armed guards, or any ostentatious display - with nothing but its common law attendant, the sheriff, and its humble officials the court-keepers and tipstuffs, it derives its force from the knowledge that it has the whole power of the community at its back. This is a power unseen, but efficacious and irresistible, and on its maintenance depends the security of the public.”

- 34 The maintenance of the institution Sir James Martin described, and of those related courts whose jurisdiction it oversees and supervises, must be properly valued and funded by the Executive.
- 35 For a population of almost 8.5 million people spread over 800,000 square kilometres and with an economy valued at almost \$700 billion, New South Wales has a judiciary of less than 300. Our judges and magistrates can only be stretched so far. And overstretched they are, both in terms of numbers and resourcing. The pool of their undoubted goodwill and physical and emotional capacity is not infinitely deep.
- 36 The nature of an essential service is that society could not function without it. So it is with the courts, and at so many levels.

- 37 To understand how quickly a critical part of civil infrastructure may deteriorate unless properly valued and supported, one need only look to the current position in the United Kingdom where there is an acknowledged crisis in judicial recruitments, a spate of early judicial retirements, a burgeoning backlog of criminal cases, record numbers of prisoners on remand and a lack of investment in the basic maintenance, let alone construction of adequate court facilities.
- 38 We cannot slide down that slope.
- 39 In this context, the State Government's current two-year freeze on judicial salaries which, unless corrected, will result in a 10% reduction in real wages for judges and magistrates, cannot go unremarked upon.
- 40 Before I close, may I also take the opportunity to pay tribute to two heads of jurisdiction who will be retiring this year?
- 41 First, the Chief Magistrate, the Honourable Judge Peter Johnstone, will retire in June at the mandatory age (which I will not mention but which you can find it in the *Judicial Officers Act 1986* (NSW)!). Peter will have served in the role of Chief Magistrate for 2½ years and, before that, spent almost a decade as President of the Children's Court of New South Wales, having also served as a Deputy Chair of the Medical Tribunal, part-time member of the NSW Law Reform Commission and as a District Court judge. He discharged those judicial roles after a distinguished career as a solicitor, culminating as managing partner of the famous firm then known as Blake Dawson Waldron, now Ashurst.
- 42 Second, his Honour Justice Derek Price AO, Chief Judge of the District Court of the New South Wales, earlier this week announced that he would retire on 26 April 2024. The Chief Judge has had one of the longest judicial tenures of any judge in New South Wales, having initially been appointed a magistrate in 1988, some 36 years ago. He has served on the Local, District and Supreme Courts of the State, including as Chief Magistrate between 2002 and 2006, and as Chief Judge of the District Court since August 2014 – a position he has held

for almost a decade. During that time, he has also sat regularly on the Court of Criminal Appeal and, of course, on the Judicial Commission to which he has made a significant contribution. His support of circle sentencing when in the Local Court and the establishment of the Walama List pilot in the District Court should be particularly acknowledged.

- 43 Judicial service is a great honour but also a heavy burden. Judicial leadership carries many additional burdens and, with them, great institutional responsibility. The role of a head of jurisdiction, especially in such large and busy courts as the Local and District Courts of New South Wales, is relentlessly challenging.
- 44 On behalf of the judiciary and of the wider profession, may I take this opportunity to acknowledge and thank both the Chief Magistrate and Chief Judge for their outstanding public service over so many years. The State and the public have been most fortunate to have had such strong judicial leaders of great energy, integrity, skill and dedication.
- 45 Needless to say, the appointments of their successors, which it will fall to the Government to make on the recommendation of the Attorney General, will be vital in ensuring strong continuing leadership in the Local and District Courts.
- 46 With that, may I wish you all a healthy and prosperous 2024. Thank you for your kind attention.