The Director of Public Prosecutions 17 December 2014
Keynote Address: The District Court 2015 and Beyond - Quo Vadis?

It is an honour to speak to you this morning. I know many of you from appearances in the Supreme Court bail list, the District Court arraignment and short matters lists and committal proceedings in the Local Court. I am also familiar with the dulcet tones of those of you who appear in the country telephone call overs. During my 26 years on the bench in one form or another, I have been impressed by the efficiency and professionalism of the advocates who have represented the Director.

From the outset may I apologise for the use of the Latin phrase "quo vadis" in the topic of my address this morning. For those of you whose Latin is confined to "ratio decidendi" and "obiter dicta", "quo vadis" simply means "where are you going?" In other words, what is the future of the District Court?

Richard Susskind who provides a thoughtful and challenging consideration of the future of legal services in his book "Tomorrow's Lawyers: An introduction to the future" observes:

> "If the courts and tribunals were easily affordable, widely accessible and delivered a swift service, an argument could be made for ignoring the new and emerging technologies. But for today's court system is creaking. Too often, it is inefficient, slow and too costly."[1]

He makes a case for virtual courts and questions whether judges might ultimately be replaced by computers. Mr Susskind does not advocate for the elimination of public prosecutors but argues that for tomorrow's lawyers, appearances in physical courtrooms may become a rarity.

Instead, virtual appearances will become the norm, and new presentational and advocacy skills will be required. I suspect some of you would prefer appearing before R2-D2 rather than myself in the Friday arraignment list. Let me explain to those of you who are Gen Y and not familiar with the main characters in Star Wars films that R2-D2 was an astromech droid who was associated with the Galactic

[1] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (2013) 96.

Republic and the Jedi Order. I am certain Mr Director that you know what I am talking about. However, Gen Y may be more familiar with the Co-Robots Tars and Case in the movie Interstellar.

A difficulty that may arise from virtual courts is that victims of crime and their families may feel unhappy about the lack of seeing the accused, as they do today, physically present in the courtroom. Furthermore, a trial is presently open to all members of the public, the allegations against an accused being declared in a publicly accessible forum. Would a virtual court be able to meet these standards?

I am pleased to say that progress has been slow in developing artificial legal intelligence. Apparently the possibility of knowledge-based assisted legal reasoning remains many years away.

Susskind observes:

> "It might seem intuitively obvious that this lack of success stems from the differences between the nature of legal reasoning and the nature of other enterprises such as diagnostic illness, mineral prospecting and inferring chemical structures."[2]

Although there is no prospect that I will be replaced by an astromech droid or an Interstellar Co-Bot in 2015, the courts have been slowly moving towards 'virtual courts' with evidence being given remotely by video link. The idea that a critical witness could appear on a large screen, suitably located in a court room would have been considered futuristic when the first of the Star Wars Films came to Australian movie theatres in 1973.

Before the advent of remotely taken evidence, questions were raised about the reliability and credibility of such evidence. Would judges and juries be disadvantaged by being unable to consider the demeanour of a witness physically present in the courtroom, or would audio visual link screens provide improved scrutiny? Would the experience of giving evidence remotely enable a victim of crime

[2] Richard Susskind, 'Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning' (1986) 49 *Modern Law Review* 168, 181.

freed from the intimidating atmosphere of the courtroom to give more reliable evidence?

I do not know of any empirical research that has analysed the impact of remotely taken evidence but I think we all might agree that it has greatly assisted victims of crime particularly children who are obliged to give evidence in criminal trials.

Another step towards modernity is the broadcasting of the court's judgment remarks by news media organisations. Amendments have been made to the *District Court Act 1973* (NSW) which permit the recording and broadcasting of sentencing remarks which we anticipate will commence in February 2015. A practice note is to be published which provides for an application process and delineates what is prohibited coverage. Essentially, filming will be confined to the judicial officer who delivers the sentencing remarks.

In my view, the current policy is far too conservative. For example, I do not have a difficulty with the opening and closing addresses of the Crown and counsel for the accused being filmed or the evidence of a witness who consents to filming being broadcast.

A more liberal approach to broadcasting criminal trials has prevailed in New Zealand for many years. Judges from New Zealand wonder why we have such a restrictive approach to the broadcasting of criminal proceedings. We are also moving to the filing electronically of indictments.

The purpose of my musing about the future is to suggest that we cannot hide behind our wigs and gowns and traditions of forms and procedures and be content with what we have been doing for many years.

The District Court which is at the centre of the criminal justice system is "creaking" under ever increasing caseloads. We need to challenge some of the practices with which we are familiar and ask are they really necessary? Or can we do it better?

Let me provide a few examples for your consideration:

(i) Thirty per cent of the District Court's criminal caseload are sexual assault trials. It is not uncommon for the Crown, particularly in child sexual assault or historical sexual assault trials to rely on uncharged acts of sexual assault as

tendency, coincidence or relationship evidence. This will inevitably lead to extensive pre-trial argument and a resulting section 5F appeal or a conviction appeal. I ask particularly in cases of a single complainant why these sexual acts are not individually charged on the indictment, rather than being relied on as tendency, coincidence or relationship evidence. By charging the accused with these offences, complex legal argument and grounds of appeal may be avoided. I am told there is concern about overloading the indictment, but my response to that is the jury must in any event be satisfied that the uncharged sexual act occurred before it can be used for a tendency or otherwise related purpose.

(ii) A complaint I hear from time to time from sentencing judges is that agreed facts are lengthy and contain material that is unnecessary. Please give consideration when settling statements of facts that the statement is confined to facts that are material to the judge's sentencing task.

(iii) When dealing with severity appeals from proceedings in the Local Court that were defended, do you leave it to the judge to work out from the Local Court transcript the findings of fact that were made by the magistrate, or do you helpfully provide a summary of the factual findings that will assist in the efficient disposition of the appeal?

(iv) What use are you making of the Case Management Provisions in Division 3 of the *Criminal Procedure Act 1986* (NSW)? Are the pre-trial disclosure provisions having any impact on District Court trials? Are they reducing the length of trials – in particular by defining the issues? From what I have seen to date, I suspect that the purpose of Division 3 – that is to reduce delays for trials on indictment – is not being fulfilled in the District Court.

On the other hand, the challenge for the District Court is to examine its listing practises. I suspect that the current listing practises and heavy caseload limit the capacity for directions to be made for the conduct of proceedings and pre-trial conferences. What about the arraignment lists in court 3.1 which bear a resemblance to Town Hall station at peak hour? Lawyers are forced to queue out the courtroom door. It is possible to reduce the numbers of persons in the courtroom by Crown appearances in non-contentious matters being by way of audio-visual link

or by other virtual means? Can consent applications for adjournments be dealt with by way of joint emails by the parties so that order may be made by a judge in chambers?

In order to understand the court's future in 2015, it is necessary to consider the present. My predecessor Justice Reginald Blanch AM wrote in the District Court's Annual Review 2012 that the end result of the increase in criminal cases committed for trial during the course of that year "was therefore an increase in trial registrations of 19% but it has led to an increase in the trial caseload of 34%, such that at the end of the year there were 1,363 trials awaiting a hearing compared to 1,019 at the end of 2011."[3]

Justice Blanch observed that "neither the court nor the criminal justice system as a whole can cope with an increase of criminal trials of such magnitude with the same degree of efficiency as has occurred in the past. The number of criminal trials outstanding at the end of the year (2012) is more than at any time since the year 2000."[4]

In the 2013 Annual Review, Justice Blanch wrote:

> "I reported in last year's Annual review a significant increase in criminal trials being sent to the District Court. In the course of 2013 that trend continued almost unabated. The court registered 1,814 new trials compared to 1,876 in 2012 and although the court disposed of 1,662 trials compared to 1,532 in 2012 the result was that at the end of the year that caseload of criminal trials stood at 1,515. That compares with a caseload at the end of 2012 of 1,363 and prior to 2012 the caseload of criminal trials was generally just above 1,000. For example, at the end of 2011 it was 1,019. What that means is that the caseload of criminal trials has increased by about 50%."[5]

Justice Blanch noted that the impact of this increase in trials is a gradual worsening of the timelines in disposing of criminal trials with the result that accused persons spend longer periods in custody while on remand.

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[3] The District Court of New South Wales, *Annual Review 2012* (2012) 2.
[4] Ibid, 2.
[5] The District Court of New South Wales, *Annual Review 2013* (2013) 2.

I interpolate here to mention that a recent rough audit of persons in custody who had un-finalised matters in the District Court revealed that there are 750 such persons.

Regrettably, the increase in the court's pending criminal trial caseload has continued in 2014. At the end of October 2014, the District Court has 1,687 trials pending statewide.

In Sydney, I am currently listing criminal trials in June 2015 approximately 30 weeks from arraignment. Prior to 2012, the District Court in Sydney was comfortably listing trials 8 to 10 weeks from arraignment. The court in Parramatta is listing trials well into the second term of 2015.

There are growing delays in some of our circuit courts. As at October 2014, the pending trial caseload at Newcastle has risen from 80 in December 2013 to 126 in October 2014. Taree's pending caseload has increased from 28 to 37 over the same period. Wagga Wagga's pending trial caseload is 43 compared to 27; Armidale has 26 pending trials compared to 18. Overall, the regional and country pending trials caseload has increased from 563 in December 2013 to 643 in October 2014. We are now listing trials in Wagga Wagga in October 2015, in Albury in August 2015 and Taree in September 2015.

As I previously mentioned, 30% of the court's criminal work are sexual assault trials. The median disposal length of sexual assault trials has increased from 5.9 months in 2010 to 9.5 months as at September 2014. Child sexual assault trials represent 59.4% of the sexual assault trials in the court.

Pending conviction appeals have increased from 407 in 2013 to 507 in October 2014.

The Court's Criminal Time Standards provide that 100% of sexual assault trials are commenced within 6 months of committal, for other trials that 100% are commenced within 1 year of committal. Measured against the Court's Time Standards, it is fair to say that the court is falling below the standards that have been set for the timely disposition of criminal proceedings.

Justice Blanch observed in the 2013 Annual Review:

> "At the same time the major increase in the court's workload has occurred, cuts in funding have resulted in two judge's positions being lost with two more positions to be lost in the next two years."[6]

Notwithstanding the increasing caseload, another judge has not been replaced this year. The court is now three judges down in its establishment.

In my opinion, the funding arrangements for the whole of the justice system should be re-considered.

Let me recount a story about efficiency experts.

> *"According to a story of uncertain origin, an efficiency expert was hired to make a report on the New York Philharmonic Orchestra. As part of this preparation, he attended several concerts. At last, he issued his report, which read in part as follows:*
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> *Report on the New York Philharmonic Orchestra*
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> *For Considerable periods, the four oboe players have nothing to do. Their number should be reduced and the work spread more evenly over the whole of the concert, thus eliminating peaks of activity… All twelve first violins were playing identical notes. This seems unnecessary duplication… Much effort was absorbed in the playing of semiquavers. This seems an excessive refinement. It is recommended that all notes be rounded up to the nearest quaver…. No useful purpose is served by the repeating on the horns a passage which has already been played by the strings…. It is estimated that if all redundant passages were eliminated, the whole concert time of two hours could be reduced to twenty minutes and there would be no need for an intermission."*[7]

In order to deal with the increased caseload without additional resources, the court will take the following measures in 2015:

[6] District Court of New South Wales, above n 5, 2.
[7] Eric W Johnson, *A Treasury of Humor* (1989) [345].

(1) A “rolling list court” will be trialled at the Downing Centre from 13 April 2015. The court will have permanently assigned to it two discrete prosecution and defence teams, appearing alternatively each fortnight before a permanently assigned judge. Each team will have a particular Crown Prosecutor, Public Defender, Legal Aid and DPP solicitor. A prerequisite for the success of the court is that all of the personnel appointments are of a high standard of skill and experience as well as being congenial and their decisions being eminently suitable.

The court will operate on a seven – week rolling schedule; a fortnight of trials for each team and a seventh week for sentences. The advantages of this model are considered to be the certainty to the out of court teams to properly prepare and negotiate, the greater presence of Public Defenders in the Downing Centre, the on-going relationship between the parties that will lead to a greater number of appropriate outcomes being achieved and the briefing of the Crown Prosecutor and Public Defender who are likely to ultimately appear at trial in the pre-committal phase.

An appreciation by the Crown Prosecutor and the Public Defender who are briefed pre-committal that ultimately they will be appearing in the trial may focus their minds on the real issues in the proceedings at the earliest possible stage.

I am grateful to you Mr Director and to Mark Ierace SC, the Senior Public Defender and to Bill Grant, Chief Executive Officer Legal Aid NSW for bringing the proposal of the “Rolling List Court” to me which I have been happy to embrace.

(2) The court will sit during the mid-term vacation at Parramatta. It is envisaged that up to four judges will sit in 2015. This will gradually increase so that the Parramatta District Court will eventually be fully operational during what was the mid-term vacation. The second court at Penrith will continue to assist Parramatta in 2015.

Additional country sittings have been fixed for Taree, Armidale, Albury and Wagga Wagga.

The court also proposes towards the middle of the year to hold special call overs in selected regional centres to endeavour to “clean up” lists. As you may know, Justice

Blanch with the assistance of you Mr Director and Keith Alder successfully finalised a significant number of matters by such call overs earlier this year.

I should also mention that fewer trials will be listed in the Sydney District Court at the commencement of each week. During this year, as many as 22 trials were listed to commence in a week. We are endeavouring to reduce that to about 16. Over listing places a great strain on judges, you as prosecutors, Legal Aid, the sheriff with jury panels and the system as a whole. The reduction in listings will increase the possibility of the trial commencing on the Monday – thereby decreasing the expectation that a trial will not commence until later in the week.

The number of matters listed for sentence on Thursdays and Fridays in the Sydney District Court is being reduced with special sentencing weeks being established at the commencement of each month to take up the short fall.

I accept, however, that these measures will have a small impact in reducing the pending criminal caseload. The key to dealing with the problem lies in the Local Court. Perhaps, it is time to re-visit the Case Conferencing System that was trialled in the Downing Centre a few years ago. I understand that it did not succeed not because the system lacked merit but due to insufficient resources.

I would also support the maximum discount of 25% for the utilitarian value of a plea of guilty being confined by legislation to a plea of guilty entered in the Local Court. The maximum discount for a plea entered in the District or Supreme Court would be confined to 10%, with the sole exception of a plea to an alternative charge (such as manslaughter) when a plea of not guilty was entered to the primary offence (such as murder) but the offender was ultimately found guilty of the alternative offence.

Furthermore, I would recommend that Table 1 and strictly indictable offences be reviewed with the aim of increasing the number of offences that may be disposed of summarily. This would require a concomitant in the sentencing powers of the judicial officers of the Local Court.

It seems to me that the relative criminal jurisdictions of the three courts should be reviewed from time to time. We cannot afford to guard jealously our current jurisdictions. If our predecessors had done so, offences such as assaults occasioning actual bodily harm would still be heard before a judge and jury.

Fundamentally important to the efficient operation of the District Court is the continued co-operation between the court, the Office of the Director of Public Prosecutions, the Public Defender, Legal Aid, the Bar Association and the Law Society. In the short time that I have been Chief Judge, I have been impressed by the goodwill that has been extended by all of these stakeholders. It has been a pleasure working with you Mr Director and I look forward to continuing to do so in 2015.