

# JUDICIAL OFFICERS' BULLETIN

Published by the Judicial Commission of NSW

July 2022 | Volume 34 | No 6



## The importance of trauma-informed court practice

His Honour Magistrate Michael King\*

The Judicial Commission has published a new chapter 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.

The subject of trauma and its effects form a significant part of the daily work of the justice system, reflecting the pervasive nature of trauma and its effect on society and its members. In order to properly conduct proceedings, reach a just outcome and promote public confidence in courts, judicial officers need to be aware of the nature of trauma, its effects on behaviour and wellbeing and how judicial processes can be conducted sensitive to the needs of those affected by trauma without compromising traditional values that courts and tribunals must promote. The new "Trauma-informed courts" chapter at Section 12, a timely addition to the *Equality before the Law Bench Book* (the chapter), explores these issues.

The emergence of trauma-informed court practice is a part of a wider development in courts and the justice system generally towards a more comprehensive, less damaging and more psychologically appropriate means of addressing legal problems.<sup>1</sup> Thus, courts now use processes sensitive to the situation of complainants when conducting trials involving sexual offences; courts are being constructed or modified to create safe entry points and safe spaces for victims; victim impact statements inform sentencing; restorative justice processes such as victim offender mediation are often used in conjunction with court processes; solution-focused courts such as drug courts, mental health courts and family violence courts, Indigenous sentencing courts and court diversion programs are intimately concerned with addressing trauma and promoting wellbeing as an essential part of their function; and therapeutic jurisprudence informs legal actors, processes and laws so that they can minimise negative effects and promote positive effects on wellbeing through their operation.

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The US Substance Abuse and Mental Health Services Administration (SAMHSA) states that individual trauma “results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life-threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional or spiritual well-being.”<sup>2</sup>

People react to stress and traumatic events differently. For some the effects of a traumatic event may be short-lived, for others there may be significant dysfunction in multiple life domains. This difference in people’s response to trauma is recognised in s 292D of the *Criminal Procedure Act* 1986 (NSW) concerning directions to be given as to the varying effects of trauma during the trial of sexual offences.

Research suggests that traumatic events can adversely affect various aspects of physiological functioning such as neurochemicals, the hypothalamic-pituitary-adrenal axis, amygdala, hippocampus and cortex resulting in physiological dysfunction in the immune system and digestion and psychological dysfunction including impaired executive functioning, mood disturbance, hypervigilance, anxiety and sleep disturbance.<sup>3</sup> The person’s sense of self, safety and meaning in life may be compromised.<sup>4</sup> The fight or flight response activated in the mind and body of someone at the time they experienced trauma may continue to be replicated whenever they perceive a threat in their lives — including when they give evidence in court. They may freeze, unable to respond to the threat.

The physiological, psychological and social development of a young person may well be significantly damaged by trauma. Trauma may have substantial, long-lasting negative consequences for the developing brain.<sup>5</sup> Exposure to at least four adverse childhood events such as maltreatment and family violence has been found to increase risk in relation to health outcomes, including sexual risk taking, mental health, substance misuse and violent behaviour.<sup>6</sup>

Trauma not only adversely affects individuals, it also affects families, groups and communities across generations. Families may experience family violence across generations. First Nations people commonly carry the burden of the trauma caused by displacement from land, culture, language and community transmitted through the generations and compounded by adverse living conditions. Migrants may carry with them the trauma caused by war, civil disturbance or abuses in their country of origin. Holocaust survivors can transmit the effects of trauma to their descendants.

Trauma intersects the daily work of courts and tribunals in multiple ways. For example, it may be an offender before a court for dishonesty-related offences committed to buy drugs to mask the emotional pain caused by an abusive and/or deprived childhood; a victim of crime or a plaintiff in a civil action having to recount traumatic events in the witness box; parties to a traumatic relationship breakdown seeking the assistance

of a court to resolve their differences in relation to their children; a woman traumatised by persistent family violence seeking the protection of a court order while at the same time being in fear of how the male perpetrator will respond; a grieving family attending a coroner’s court inquest into the death of their loved one; a lawyer or judicial officer traumatised by having to view graphic photographs in child pornography cases; or where the subject matter adversely affects some people — including judicial officers and lawyers — present in a court or tribunal hearing by the very nature of the material and/or by bringing back memories of past traumatic events in their lives.

How courts and tribunals respond to trauma affects the experience of court users and whether the court outcome is fair and perceived as fair. Further, those affected by trauma may not have had the opportunity to address their trauma previously. Contact with a court may be the vehicle whereby they can be connected to appropriate support and treatment services. Thus, it is vital that courts and tribunals apply trauma-informed practices. The chapter sets out principles and practices that these institutions can apply to promote a trauma-informed approach.

Trauma-informed practice is less about the rigid application of processes and more about the recognition of fundamental principles that should inform how judicial officers and other legal professionals should perform their functions and the processes to use when trauma is a relevant issue. Referring to work by SAMHSA and Hora,<sup>7</sup> the chapter emphasises the importance of ensuring that the court environment is safe and perceived to be so; promoting trustworthiness and transparency in decision-making; providing peer support; where possible, promoting collaboration and mutuality; empowerment, voice and choice; and responding appropriately when cultural, historic or gender issues are raised.

These principles tap into areas emphasised as important by therapeutic jurisprudence and procedural justice. Therapeutic jurisprudence emphasises the value of autonomy, that people wish to be involved and have a say in decision-making that affects their wellbeing and that processes that violate that principle are likely to be counter-productive and to adversely affect their wellbeing.<sup>8</sup> Procedural justice has found that people are more likely to perceive that judicial proceedings are fair if they have been treated with dignity, they have been given the opportunity to be heard and that the decision-maker is trustworthy, that is they demonstrate a genuine commitment to listening to the parties and reaching a fair outcome.<sup>9</sup> To be listened to properly and with dignity requires sensitivity to issues of trauma, culture, gender and background that should inform the place and process used for telling a person’s story, a listener alert to those issues and the listener’s use of body language and communication skills that conveys listening, interest and understanding.<sup>10</sup>

The chapter also suggests that sensitivity to how court processes may re-traumatise those suffering from trauma, awareness of the effect of trauma on memory and the delivery of oral evidence and taking an attitude of “what has happened to this person” rather than “what is wrong with that person” are essential in taking a trauma-informed approach. While court buildings in Australia are being modified to promote the safety of victims, it is also important that judicial officers are sensitive to the environment and the dynamics within the courtroom and that they take requisite remedial action to ensure that, as far as possible, parties, witnesses and others present are not subject to trauma.

The lived experience of many people coming into our courts and tribunals in various capacities includes dealing with the unresolved and debilitating effects of trauma. For our courts and tribunals to properly address the justice needs of our community requires judicial officers and other legal professionals to understand what trauma is and how it can affect human functioning and to use processes that ensure that people affected by trauma are heard and their situation is properly taken into account in decision-making.

**Ed note:** A print-ready pdf of the chapter may be downloaded from the Commission's website under the Publications/Bench Books menu.

## Endnotes

- \* Dr Michael King is a magistrate of the Dandenong Drug Court and Magistrates Court of Victoria. He is the author of *Solution-focused judging Bench Book*, AIJA, 2009. He was previously a magistrate in Western Australia until 2016 and an academic. He is recognised internationally as an expert on therapeutic jurisprudence. Dr King was one of three expert reviewers who kindly reviewed the recently published trauma-informed chapter in the *Equality before the Law Bench Book*.
- 1 M King, A Freiberg, et al, *Non-adversarial justice*, 2nd edn, Federation Press, 2014.
- 2 SAMHSA, *Concept of trauma and guidance for a trauma-informed approach*, 2014, p 7, accessed 2/5/2022.
- 3 J Sherin and C Nemeroff, “Post-traumatic stress disorder: the neurobiological impact of psychological trauma” (2011) 13 *Dialogues in clinical neuroscience* 263.
- 4 J Herman, *Trauma and recovery: the aftermath of violence — from domestic abuse to political terror*, Basic Books, 2015, p 51.
- 5 R Herringa, “Trauma, PTSD and the developing brain” (2017) 19 *Current Psychiatric Reports* 69.
- 6 K Hughes, M Bellis et al, “The effects of multiple adverse childhood experiences on health: a systematic review and meta-analysis” (2017) 2 *Lancet Public Health* 356.
- 7 P Hora, “The trauma-informed courtroom” (2020) 32 *JOB* 11.
- 8 B Winick, “On autonomy: legal and psychological perspectives” (1992) 37 *Villanova Law Review* 1705.
- 9 T Tyler, “The psychological consequences of judicial procedures: implications for civil commitment hearings” in D Wexler and B Winick (eds), *Law in a therapeutic key: developments in therapeutic jurisprudence*, Carolina Academic Press, 1996, p 3.
- 10 On judicial listening, see: M King, *Solution-focused judging Benchbook*, AIJA, 2009, ch 6.

## Retirement of the Honourable Justice Peter Johnson

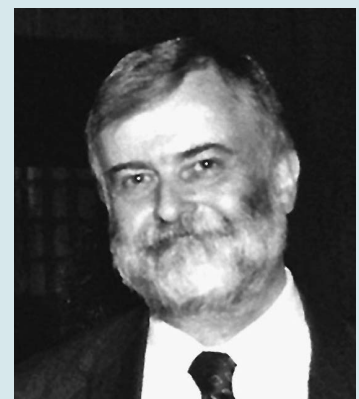
Highly respected and admired judge of the Supreme Court, the Honourable Justice Peter Johnson, has retired to take up a five-year appointment as Chief Commissioner of the Law Enforcement Conduct Commission.

His Honour was appointed a judge of the Supreme Court in 2005, having been an acting judge of the District Court 1998–1999 and an Assistant Commissioner at an ICAC inquiry in 2003–4. He sat in the Common Law Division in civil and criminal matters and on the Court of Criminal Appeal. He has been the joint author of *Criminal Practice and Procedure NSW*<sup>1</sup> since 1986.

His Honour has been a much valued supporter of and contributor to the Judicial Commission. He has served as a member of the Criminal Trial Courts Bench Book Committee, 2005 to 2019, and the Supreme Court Education Committee for many years and contributed articles to the *Judicial Officers' Bulletin* and *The Judicial Review*.

In a tribute to his Honour to mark his retirement from the Supreme Court, the Honourable Justice R A Hulme observed that Justice Johnson:<sup>2</sup>

has been a giant of the criminal law of NSW. As a solicitor, barrister and judge, he has made an enormous contribution to the law, and to legal and judicial administration and education, for almost half a century.



1 R Howie and P Johnson, *Criminal Practice and Procedure NSW*, LexisNexis, 1988–  
 2 R A Hulme, “Tribute to the Honourable Justice Peter Johnson”, 16 June 2022, Sydney.