THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

COMMUNITY AWARENESS OF THE JUDICIARY PROGRAM

OPENING ADDRESS

30 OCTOBER 2014

1. Good morning. It is an absolute pleasure for me to welcome you to this year's Community Awareness of the Judiciary Program. At the outset I'd like to thank you for being here. The Program is in its third year, and I hope you find it as thought provoking as those who have participated previously.

2. I know the Program has been extremely well received by past participants. This is entirely due to the hard work of the staff at the Judicial Commission, as well as the current and former judicial officers who donate their time to prepare for and lead each of the sessions. Without wanting to put undue pressure on today's speakers, I have no doubt their presentations will be equally, if not more, stimulating than those in previous years. Can I thank each of them – Keith Mason, John Doyle, Justice Peter Garling and Judge Andrew Haesler – in advance for their papers. I'm sure they will generate an excellent discussion, and I'm only sorry that I can't stay and participate.

3. The goal of the Program is to give you a better understanding of our legal system, the role of the judiciary and the day-to-day work of judicial officers

in New South Wales. However, its aim can probably be reduced to just two words: open justice. Open justice is a fundamental principle which rests at the heart of the rule of law. At a basic level, it requires that judgments be publically available and that hearings typically occur in a courtroom that any member of the public can come in and out of as they please. Open justice is a critical feature of ensuring confidence in the administration of justice.[1] It was explained recently in the case of *A v British Broadcasting Corporation* in the United Kingdom Supreme Court, where Lord Reed said eloquently:

> '*…society depends on the courts to act as guardians of the rule of law. … [but] Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.*'[2]

4. Traditionally, open justice was limited to those two concepts: open courts and accessible judgments. Beyond that, judges were restricted by what was colloquially known as the Kilmuir rule, which referred to a letter from Lord Kilmuir to the BBC, in which he noted that 'So long as a Judge keeps silent, his reputation for wisdom and impartiality remains unassailable'.[3] The idea was that a judge should only speak through his or her judgments.

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[1] See eg *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 [20]; *Rinehart v Welker* [2011] NSWCA 403 at [32].
[2] *A v British Broadcasting Corporation (SAcotland)* [2014] UKSC 25; [2014] 2 All ER 1037 at [23] referring to *R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618 at [1].
[3] See A.W. Bradley, "Judges and the Media – The Kilmuir Rules" (1986) *Public Law* 383 at 384-386 extracting the letter from Lord Kilmuir to the Director-General of the BBC, Sir Ian Jacob.

5. Speaking personally, I'm not sure if refusing to speak publically would make people think that I am much wiser. However, it's probably a catch-22 – because I don't know if me talking to the media from time to time has improved the situation either. Regardless of this, what is obvious is that a greater degree of public engagement by the judiciary is now unavoidable. While it probably took far longer that it should have, most judges have come to the realisation that very few people actually read the decisions that we spend so long considering and crafting. That realisation does not excuse us from continuing to work to make judgments more accessible and concise. However, what it does mean, in my opinion, is that we need to contemplate a broader understanding of open justice which reflects our society today.

6. It is no longer the case that judges can speak solely through their decisions and expect to have the unwavering confidence of the community behind them. In this respect – and as some of you would already know – the Supreme Court has taken a number of steps this year to increase its engagement with the community and to make our work more accessible.

7. The first, and I would say most significant, change is that the Court has started to publish judgment summaries on its website for decisions that are of general interest, or that are legally significant. This is something that a number of other courts have been doing for some time. For instance, the High Court now prepares summaries for all of its decisions and the UK Supreme Court has been preparing press summaries since it was

established in 2009. Of course, it is not possible for us to produce summaries for all decisions in the Supreme Court – over 2,000 judgments were handed down by the Court last year, without including the Court of Appeal or the Court of Criminal Appeal. More importantly, as hard as it is to admit, not all of our cases would be that interesting to the public. However, for those that are, I hope the summaries on our website – of which there are more than 200 so far this year – provide a concise outline of the facts, the basic reasoning of the judge and the outcome of the case.

8. I also hope that judgment summaries are helping journalists in reporting on Supreme Court decisions. Without wanting to be critical, I am aware of one particular editorial earlier this year which contained a number of inaccuracies. The Court was able to point to the summary – as well as to the judge's complete sentencing remarks – to in some way correct the record. This is not to suggest the media are doing a poor job. Generally reporting is accurate, and it is often done to what I know are challenging deadlines. However, I do hope the summaries are assisting journalists in their work. The media plays a critical role in open justice. Most members of the public get information about court decisions from the media, rather than by attending hearings in person or reading decisions in full.[4] Criticism of the courts is important. However, it should be informed and accurate criticism.[5]

[4] See the recent discussion of the media and open justice in Lord Neuberger, "The Third and Fourth Estates: Judges, Journalists and Open Justice" (Hong Kong Foreign Correspondents' Club, 26 August 2014).
[5] The Hon. T F Bathurst, "Community confidence in the justice system: the role of public opinion", Opening of Law Term Address (3 February 2014).

9. The second step that the Court has taken is establishing a Twitter account. It allows us to inform the public about new judgment summaries, and also to provide general details of activities at the Court, as well as information that may be useful to legal practitioners. While it isn't a perfect form of two-way communication, it does allow people to ask general questions and to let us know if they are experiencing difficulties with other Court materials online.

10. As you would expect, there are limits to the extent that the Court is able to communicate via Twitter. However, I do think it provides another useful link between the Court and the broader community. Having said that, you won't be reading personal information about judges any time soon. It is very different to some personal Twitter accounts of judges in America who like to update people about legal developments, as well as television shows, football results and how their daughter can spell her name using pretzels. This is to say nothing about taking judicial notice of the fact that it happens to be so-and-so's birthday. You won't be hearing about my TV viewing habits at any time; not that I can imagine why anyone would be interested.

11. The third step we took was to host a number of seminars in relation to criminal sentencing. In fact, I see a few familiar faces from the community seminar, which was filmed and is available online for anyone to watch.[6] In particular, I hope that the online version of the seminar is of some interest to

[6] See http://www.supremecourt.justice.nsw.gov.au/supremecourt/videos.html.

students, both at school and university. In my view, it was a successful format, and I hope that we will be able to hold similar events in the future.

12. Today's Program is another important step in fostering greater openness and transparency of the judiciary. I understand you come from different backgrounds and have had different levels of contact with the courts. I also believe you have expressed interest in a wide variety of legal issues which include access to justice, sentencing, judicial bias, at-risk youth, crime prevention, professional regulation and the role of victims in sentencing. These are topics that could hardly be covered in a week, let alone one day.

13. However, what I do hope you take away from the Program is a deeper understanding of how our courts operate, the critical significance of judicial independence in our democratic system of government, and some of the work and challenges which are faced by judicial officers on a daily basis. You are each community leaders, and I hope the Program arms you with greater knowledge to discuss issues concerning the judiciary with others. Today is also an excellent opportunity for the retired and sitting judges to hear about your experience of the justice system. There is much that we can learn too, and part of the conversation is about hearing your thoughts.

14. I want to conclude by mentioning some ongoing research in relation to juries and sentencing. There are two current projects that are studying juries to explore the issue of public opinions regarding sentencing; one, in particular,

is focussing on perceptions in trials for sexual offences.[7] This follows from a number of earlier studies. In one, immediately after a guilty verdict was delivered, jurors were invited to select the penalty that they believed the offender should receive from a list of options. 52% of jurors chose a penalty which was more lenient that the sentence imposed by the judge. At a later stage, jurors were provided with the judge's actual sentencing remarks. 90% of jurors said the sentence was either appropriate or very appropriate.[8]

15. I am not raising this either to predict what will be found by the studies that are ongoing, or to say that public criticism of sentencing is unfounded. Rather, it a fascinating example of the effect that can be had by being better informed or involved in the workings of the justice system. It reflects the benefits which come from open justice. All that is left for me to do is to once again thank you for participating in this initiative. I hope your discussions are productive and that you leave with a better understanding of how our justice system works, and a willingness to share that knowledge with others.

[7] See K Warner, "The Australian national jury sex offence sentencing study" (March 2014) 11:4 *The Judicial Review* 459.
[8] K Warner, "The Australian national jury sex offence sentencing study" (March 2014) 11:4 *The Judicial Review* 459, 462-3 referring to the findings reported in K Warner et al, "Public judgment on sentencing: final results from the Tasmanian jury sentencing study" *Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, No 407, 2011).