

## OPENING OF LAW TERM ADDRESS

### COMMUNITY CONFIDENCE IN THE JUSTICE SYSTEM: THE ROLE OF PUBLIC OPINION

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1. Criticism of the judiciary has a long, if not illustrious history. In the 17<sup>th</sup> century for example, an assassination attempt was made against a Judge Richardson, by an offender who pelted a large piece of flint at his Honour's head, claiming he was trying to "be a benefactor to the Commonwealth [by taking away] the life of a man so odious". Thankfully for Judge Richardson, his would-be assassin's aim was as bad as his logic. Some two centuries later, Malins V-C was attacked somewhat less frighteningly, when an egg was thrown at him as he presided in Court. He promptly observed, "that must have been intended for my brother Bacon".<sup>1</sup>
2. Historical jokes notwithstanding, it seems that in the last forty or so years there has been a sharp increase in both the quantity and the stridency of criticism aimed at the courts. In 1979, Lord Delvin was able to proclaim, without sarcasm, that there was "virtually no popular criticism of the judiciary" in England and that judges tended to be "admired to excess".<sup>2</sup> I am relatively certain this is a problem that no longer afflicts either the Australian or English judiciaries.
3. Unequivocally, close scrutiny and informed criticism of the judiciary is a good thing. Often, criticism is reasonably based. The courts make decisions that have a huge impact on the lives of citizens and "it is better that people who exercise authority feel uncomfortable than that they feel

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<sup>1</sup> R.E Megarry, *A Second Miscellany At Law* (1973) at 70-71.

<sup>2</sup> See P. Delvin *The Judge* (1979) at 25-26 cited in The Hon. Justice Susan Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium" (Lucinda Lecture, Monash University, 1998).

complacent”.<sup>3</sup> However, criticism of the judiciary today does not solely consist of informed comment borne of close scrutiny. Instead, there has been a tendency to target the judiciary as part of the well-worn “Law and Order debate” that re-ignites whenever a particularly shocking or high profile crime takes place.

4. This so-called debate invariably raises similar themes. The judiciary is publicly condemned for being out of touch with public opinion. Governments of the day proclaim their commitment to being tough on crime, and proposals for new offences, or mandatory minimum sentences are suggested. It is a cycle that is familiar to all of us. However, that does not mean that courts should be impervious to community concerns voiced in these debates or to ignore social ills as they emerge. In sentencing, courts have a statutory obligation to “recognise the harm done to [both] the victim of the crime and the community”<sup>4</sup> and must therefore be cognizant of the community’s views. In any case, the relationship between the community and the judiciary is a vital one, and public opinion of the courts is something we cannot ignore.
5. In that context, I would like to use the occasion of this Opening of Law Term to reflect on the role and relevance of public opinion of the judiciary. How, if at all, should judges react to and take into account public opinions on sentencing and crime? Is there validity to criticisms that judges are out of touch when it comes to sentencing? What can the courts do to improve public confidence in the administration of criminal justice?

## **Context**

6. The first thing to note is that when we talk about public opinion and community criticism of the judiciary, we are overwhelmingly referring to the administration of criminal justice, and in particular to judicial decisions on

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<sup>3</sup> The Hon. Murray Gleeson, “Public Confidence in the Judiciary” (Judicial Conference of Australia, 2002) p. 3.

<sup>4</sup> See *Crimes (Sentencing Procedure) Act 1999*, s 3A.

sentencing. The debate therefore concerns a narrow part of the courts' work. In fact much of what the courts do is accepted as uncontroversial. Cases involving the extinguishment of easements rarely excite public passions, and, to my knowledge, few newspaper columns have been written on the law of contract.

7. Community views on the administration of criminal justice however, have broader implications. As former Chief Justice Spigelman observed, "sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public's attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice."<sup>5</sup>
8. The second thing to acknowledge is that the community's strong interest in, and concern about, the administration of criminal justice is entirely understandable and legitimate. As the Honourable Fred Flowers put it over 100 years ago when introducing the legislation establishing the Court of Criminal Appeal:

"[This is not] a matter which belongs purely to those whose occupation takes them to the court....law and order in the community, the protection of life and property, the punishment of those who do wrong, it must be admitted are some of the most serious and important considerations of a civilised state."<sup>6</sup>

9. The unfortunate reality is that many people in the community are victims of crime or indirectly affected by criminal activity. These persons look to the criminal justice system to vindicate them and to provide justice for what they have suffered. They are naturally acutely concerned with the process and outcomes of judicial decisions on matters of crime and sentencing.

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<sup>5</sup> The Hon. James Spigelman "Fairness in criminal justice: the sentencing debate" (Opening of Law Term Address, 2002) p. 1.

<sup>6</sup> Criminal Appeal Bill, Second Reading Speech, The Hon. F Flowers (Legislative Council, 5 Dec. 1911).

10. The whole community also shares a strong interest in criminal justice and punishment. Crime strikes at the heart of the community's concerns about safety and social cohesion. Many people feel that criminal activity threatens their personal safety. Crime also represents a breach of society's mores. Violent crime in particular is emotionally and morally shocking to all of us. It is not surprising, in this context, that the public has a strong interest in criminal justice.
11. In addition, criminal trials are often sensational and, at the surface at least, easy to understand. There is generally a coherent narrative of factual events. The alleged wrongdoing is often not technical. The harm to the victim is apparent. This means that criminal trials tend to receive more media coverage than other matters which come before the courts. It also means that the public does not readily think of a criminal sentence as an outcome of specific and technical legal principles, requiring expert evaluation. Members of the community therefore feel able and qualified to express an opinion about sentencing.
12. All this can be recognised. That said, the question remains: how are judges to react to the recurring accusations that we are out of touch with public opinion, cloistered from reality, soft on crime, or anti-victim? As I alluded to a moment ago, courts must not simply dismiss and ignore such charges as meaningless abuse. I think that Chief Justice Gleeson put it well when he said in a 2004 speech that we "need to understand the meaning of the accusation, and do what we can to assess its merits, even though it may be difficult".<sup>7</sup> To this I would add that, having done so, we need to confront and counter criticisms that are not well founded and attempt to respond constructively to any that are, subject of course to the constraints which prevent judges from commenting on individual cases.

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<sup>7</sup> The Hon. Murray Gleeson, "Out of Touch or Out of Reach?" (Judicial Conference of Australia, 2004), p. 1.

## Is the judiciary “out of touch”?

13. So what is meant by the accusation that judges are out of touch and soft on crime? To again quote Chief Justice Gleeson, if the accusation is more than just a smear “it must mean that judges as a class take crime, or some forms of crime, less seriously than the general public...[and that] sentences reveal a systemic failure to understand, or a determination to ignore, the seriousness with which the community regards deviant behaviour”.<sup>8</sup> In other words, judges do not understand the reality or seriousness of crime, systematically give an “easy ride” to offenders, and ignore the community’s legitimate views on how to sentence offenders.
14. This, I think, is an accusation without merit. First, the proposition that judges are a closeted elite who do not understand the real world impact of crime is simply untrue. It is undeniable that judges, generally speaking, enjoy socio-economic privilege and do not live in the neighbourhoods most affected by violent crime. However, as the tragic events of recent times have demonstrated, criminal conduct can affect all socio-economic and geographic areas of the community.
15. Judges are not isolated from the reality of crime. Not only are judges members of the community, but sentencing judges have seen more of the reality of crime than most members of the community can imagine. With great respect to the media, the community and members of parliament, it is judges who day after day have contact with people from disadvantaged social backgrounds, both offenders and victims of crime; it is judges who review gruesome exhibits; it is judges who hear evidence of violence and abuse in criminal proceedings; it is judges who read victim impact statements and see in court the grief of victims whose lives have been torn apart; it is judges who grapple with the history that many offenders have of addiction, mental illness and neglect; and it is judges who try to balance an often impossible set of competing considerations to come to a result that is

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<sup>8</sup> Ibid, p. 2

appropriate according to law. To accuse the judiciary of not understanding crime simply fails to take account of these matters and is incorrect.

16. Interestingly, a new variant on the “out of touch” theme has recently emerged. One media commentator has suggested that far from being cloistered, judges have *too much* exposure to the realities of crime and become, in effect, immune to it. That criticism, like the one that judges are isolated from the consequences of crime, simply fails to recognise that judges do not sentence according to their emotional reactions, but according to established legislative requirements, guidelines and binding precedent, and with regard to the submissions made by the parties. Decisions are also subject to a right of appeal. The process is designed to ensure that factors personal to the judge are taken out of the equation.

17. Secondly, accusations that the judiciary is out of touch with the public on sentencing wrongly assume that the “public” has a homogenous view on these matters. The public who the judiciary serves is each and every member of the community, and the community does not speak with only one voice.

18. Third, research suggests that a significant proportion of the community is misinformed about crime and sentencing, and change their views of sentencing when presented with accurate information. That misinformation exists is perhaps not surprising. It is trite but true to point out that it is only the unusual, controversial or macabre cases that the public hears about. There are hundreds, if not thousands of other criminal cases dealt with each year before our courts that never receive publicity. This naturally skews perceptions. Further, media coverage of the cases that do garner public attention is often selective. The judicial reasons given, the submissions of the prosecution and the many factors which a judge must have regard to in sentencing, are rarely mentioned. The sentence is often reported as though the non-parole period represents the total term of imprisonment. These are just two of many examples.

19. These may not be the only reasons for misinformation, but as a substantial body of research from Australia and around the world consistently indicates, the fact is the community is misinformed. Most people overestimate both the frequency of violent crime and the chance that they will become a victim.<sup>9</sup> A significant section of the population believes that crime rates are rising, when in fact statistics released late last year re-confirm that almost all categories of crime, including non-domestic assaults, robberies and shootings have fallen over the last five years.<sup>10</sup> A majority of the community also underestimates both conviction and imprisonment rates.<sup>11</sup>

20. Research from the UK also suggests that members of the community who wrongly believe that crime rates are rising tend to perceive lenient sentencing as a cause of that increase, with many citing it as a major cause.<sup>12</sup> While, to my knowledge, similar studies have not been conducted in Australia, this would suggest that the community sees sentencing as a “control mechanism”, and perceives lenient sentences as a failure on the part of the judiciary to prevent crime.<sup>13</sup> The reality is more complicated. The legislation under which judges operate requires a sentencing judge to take into account many factors beyond general

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<sup>9</sup> NSW Sentencing Council, “Public Confidence in the NSW Criminal Justice System” (Monograph 2, May 2009) p 15; NSW Bureau of Crime Statistics and Research ‘Public confidence in the NSW criminal justice system’ (Crime and Justice Bulletin No 118, August 2008) 5-6; NSW Bureau of Crime Statistics and Research, “Crime Perception and Reality: Public Perceptions of the risk of Criminal Victimization” (Crime and Justice Bulletin No 28, May 1996).

<sup>10</sup> See Attorney General Media Release “Crime Rates Trending Down or Stable” [http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll\\_corporate.nsf/pages/LL\\_Homepage\\_news2013#05122013](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_news2013#05122013); NSW Bureau of Crime Statistics and Research, “NSW Recorded Crime Statistics: September 2013 Quarterly Report” (December 2013)

<sup>11</sup> NSW Bureau of Crime Statistics and Research, ‘Public Confidence in the New South Wales criminal justice system: 2012 update’ (Crime and Justice Bulletin No. 165, Nov 2012) p 8-9; NSW Bureau of Crime Statistics and Research ‘Public confidence in the NSW criminal justice system’ (Crime and Justice Bulletin No 118, August 2008); NSW Sentencing Council, “Public Confidence in the NSW Criminal Justice System” (Monograph 2, May 2009) p 15.

<sup>12</sup> NSW Sentencing Council, “Public Confidence in the NSW Criminal Justice System” (Monograph 2, May 2009) at p. 8 citing Kershaw C. et al (eds) *Crime in England and Wales 2007/08. Findings from the British Crime Survey and police recorded crime*, Home Office Statistic Bulletin, July 2008.

<sup>13</sup> NSW Sentencing Council, “Public Confidence in the NSW Criminal Justice System” (Monograph 2, May 2009), p. 9.

deterrence, punishment and retribution, although these are all key considerations.<sup>14</sup>

21. What is telling about this misinformation is that when members of the community are provided with accurate information about the facts of a particular case and offender, they overwhelmingly support the sentences imposed, and many would impose more lenient sentences than the sentencing judge.<sup>15</sup> That is not to say, of course, that there is not a spectrum of legitimate and informed opinions about the appropriate punishment of crime, some of which would support greater severity than that imposed at present. What the research does suggest however, is that on many occasions the opinions that judges are out of touch are based on misunderstandings, and that those opinions alter when the individuals holding them are presented with accurate information. Emotional responses by the community based on misinformation are sincerely held and understandable, but they cannot shape the administration of criminal justice.

### **The courts' obligation to victims**

22. There is however, I believe, a subtly different although related meaning to the accusation that judges are soft on crime and out of touch with community expectations. Particularly when it comes from victims of crime or their families, it often appears to be a means of saying that the court has not done enough, in their eyes, to assuage the pain they have experienced. Victims and their families, particularly of violent crime, speak of sentencing in very personal and emotional terms; of being horrified, bewildered and hurt by the imposition of what they perceive as a lenient sentence. Such a sentence is often seen as a proverbial kick in the guts and a mark of lack of respect for the victim.

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<sup>14</sup> See references collected in the Hon TF Bathurst, "Beyond the Stocks: A Community Approach to Crime" (Keynote Address to the Legal Aid Criminal Law Conference, August 2012).

<sup>15</sup> See discussion in the Hon. JJ Spigelman "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876; Warner et al, "Public judgment on sentencing: final results from the Tasmania Jury Sentencing Survey" (AIC, Trends and Issues in Criminal Justice, No. 407 Feb 2011).



23. I can well understand the anguish that victims of violent crime and their families experience, particularly at the loss of a family member through a violent and unnecessary death. I also understand, as I believe do all judges, that “victims come to the criminal justice system seeking recognition and validation of what happened to them”.<sup>16</sup> Victims rightly enough see the courts as responsible for publicly acknowledging the seriousness of what has been done to them. Some victims may want retribution; for the offender to experience something comparable to what they have suffered. Most want to know that what they have experienced will not be repeated, either by this offender or others.

24. In that context, the accusation that courts are ignoring the interests of victims needs to be considered carefully. As the High Court recently made clear in *Munda v Western Australia*, there is undoubtedly an obligation to victims in sentencing. The Court stated:

“To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community’s disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community”.<sup>17</sup>

25. Courts should not dismiss or ignore the validity of victims’ emotional responses to crime. Nor do I believe judges currently do so. However, it is a mistake to see an excessively punitive approach as the only way

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<sup>16</sup> Jo-Anne Wemmers, “Where do they Belong? Giving Victims a place in the Criminal Justice Process” (Paper presented at the National Victims of Crime Conference, 2008) p. 6.

<sup>17</sup> (2013) 87 ALJR 1035; [2013] HCA 38 at [54].

courts can recognise the interests of victims. It is unfortunate that the number of years an offender will spend in custody has come to be seen, at least in some sections of the media, as the only measurement of whether the experience of victims has been acknowledged by the justice system. Not only can no sentence of imprisonment erase the psychological and physical scars of violent crime, but, I reiterate, most victims want to see a non-repetition of criminal activity and protection of the community. The length of a prison sentence, while important, is not necessarily the best way to achieve this.

26. In sentencing, judges must take account of a number of sentencing purposes including punishment, deterrence, denunciation, accountability, rehabilitation, protection of the community and recognition of the harm done.<sup>18</sup> Community protection from criminal activity flows through several of these legislative “purposes” and is a central factor in the sentencing process. However, as was stated by Justice Howie in *R v Zamagias*:

“although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation.”<sup>19</sup>

27. That is not to say that long custodial sentences should not generally be imposed for the most serious crimes or that courts should not necessarily respond to outbreaks of particular criminal conduct. Rather, it is to recognise that sentences which focus on rehabilitation are not imposed because judges do not care about victims and their families, but because this appears to be the best way to achieve the purposes of sentencing in those cases.

28. Recognising and alleviating the harm done to victims is not the courts’ sole obligation in criminal proceedings. Nor do judges have a discretion at

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<sup>18</sup> *Crimes (Sentencing Procedure Act) 1999*, s 3A.

<sup>19</sup> [2002] NSWCCA 17 at [32].

large to reach a sentencing result within their own moral compass. The aggravating and mitigating factors to be taken into account in sentencing are specifically provided for in the legislation. The obligation of judges is not to express their own abhorrence at a particular offender's conduct. It is to dispense justice according to law.

29. In sentencing, this means that the court must not only balance the overlapping and sometimes contradictory sentencing purposes to which I have just referred, but must also take into account the individual circumstances of the offender and the offence. While administering individualized justice, judges must also strive to treat like cases alike, ensuring that cases which provoke newspaper headlines are addressed in the same way as the countless others that receive no public attention and garner no outrage. This consistency is essential to ensuring equality under law and respect for the equal dignity of each person.<sup>20</sup>

30. Judges are also constrained by a complicated web of legislative and common law principles, by decisions of courts superior to them, and in the adversarial system, by the manner in which parties conduct their cases. Judges would be derelict in their duty if they ignored the parties' submissions in reaching a conclusion. Judges often comment, with good reason, that sentencing is one of the hardest things they do. None of this is about privileging an offender over a victim, or ignoring community concerns about crime. It is about fulfilling the judicial duty to dispense justice according to law.

31. That is why it is misconceived to say that judges are not properly performing their task simply because a number of sentences have been considered by the community, or sections of it, to be inadequate. In this context it must be remembered that there is an appeal process and the Attorney General or the Director of Public Prosecutions has the right to appeal to the Court of Criminal Appeal against any sentence imposed. In

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<sup>20</sup> The Hon. Sir Gerard Brennan, "Courts for the People – not People's Courts" (The Inaugural Deakin Law School Oration, 1995) p. 3.

2013 the Supreme Court sentenced 94 offenders. In the 12 month period ended 30 September 2013 the District Court imposed 2,889 sentences. In the same period 51 Crown appeals were lodged. Twenty-nine were allowed, 14 dismissed and eight abandoned. That is hardly indicative of systematic failure by judges to apply correct sentencing principles.

### **The role of the judiciary in a democratic society**

32. This, in fact, feeds into a broader point often ignored in criticisms of the judiciary. It is commonly said that judges have an obligation to serve the community. While certainly true, it is important to consider what this obligation consists of. The judiciary does not serve the community by formulating its own policy agenda, or by enshrining into law the opinions of particular sections of the community, or even the policy platform of a political party. We serve the community by applying and upholding the laws that have been passed by democratically elected legislatures, by determining cases based on established principle and judicial methods of reasoning, and by upholding the rule of law in an impartial and just manner. This does not mean that the judiciary should not take account of community expectations. Judges must have regard to informed public opinion – a difficult task given the breadth of views that exist in the community. Further, in many cases the legislation that the courts apply in fact represents a codification of public expectations and opinions. What it does mean, however, is that courts should not be responsive to media or community outrage in particular cases or categories of offence.

33. It is not part of a judge's function to react directly to political concerns or policy agendas. If that were the case we would lose both the separation of powers and the impartiality that the rule of law demands. Imagine for a moment that we elected judges - a proposal bandied around from time to time on talk back radio. A hypothetical judge, let's call him Justice Jeffrey, then ran and was elected on the basis that in all criminal cases he would guarantee that the minimum sentence he would give would be six months longer than the previously imposed maximum. This sounds absurd to us,

but I would direct you to the elections for the Supreme Court of Texas, where aspiring judges run slick political ads proclaiming their “proven conservative record” and featuring endorsements describing them as “the judicial remedy to Obamacare”.<sup>21</sup>

34. To put it simply, with good reason, judges with official partisan positions would not be considered impartial. If judges were to respond to political concerns of this nature, our decisions might be popular in the immediate sense. This popularity, however, would come at the expense of community confidence that the judiciary administers the law impartially and independently, something that in the medium to long term is far more harmful to public confidence and to the rule of law than any hostility currently directed at the courts. As Chief Justice Gleeson has pointed out, there is a difference between public confidence and day-to-day popularity.<sup>22</sup> It is protecting the former that is of central importance.

35. Now I don’t mean to suggest from anything I have said so far that judges should be immune from criticism. As I stated at the outset, the administration of criminal justice is a matter of significant and legitimate concern to the community. Courts have nothing to fear, and indeed much to gain from informed, honest and balanced criticism. Nor am I saying that judges never get it wrong. However, the nature of the judicial role, in my view, entails that so long as judges are doing their work conscientiously and with integrity, criticism should be directed toward the decision or the relevant legal principle, as opposed to the judge personally.

36. Towards the end of 2013 we saw two contrasting situations play out in the media. First, a judge of the Supreme Court delivered a verdict that many people found unsatisfactory. This resulted in extraordinarily aggressive and vitriolic criticism being levied, not just against the decision but against

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<sup>21</sup> The Atlantic “Would you Trust these State Judges to Review your Case? (Oct. 2012) <http://www.theatlantic.com/national/archive/2012/10/would-you-trust-these-state-justices-to-review-your-case/262480/>

<sup>22</sup> The Hon. Murray Gleeson, “Public Confidence in the Judiciary” (Judicial Conference of Australia, 2002).

the judge personally. Overwhelmingly, that criticism, which included defamatory and threatening material, failed to consider the reasoning process that had been undertaken. By contrast, in another case shortly thereafter, another judge reached a decision that seemed to satisfy the media and public. The judge in question was then treated as some kind of folk hero. The accolades heaped on her, while by no means undeserved, were irrelevant to the proceedings in question. This personalized approach to commenting on judicial decision making, while it may sell newspapers and advertising space, is deeply problematic.

37. In the last twelve months at least three judges of the Supreme Court have received death threats, for having done no more than make a decision that was unpopular in the community. Some might say that this is part and parcel of the judicial role. If so it is a highly undesirable element of it. One assurance I can give, however, is that judges, consistent with their judicial oath, will continue to apply the law as they perceive it without fear or favour. That, I would suggest, is the true mark of judicial courage.

38. Most importantly, the fundamental problem with individualized criticism however, is the effect it has on community confidence. It leads to a totally false appearance that judges sentence according to their individual perception and beliefs. As was said in *R v Whyte*, “nothing is more corrosive of public confidence in the administration of justice than the belief that criminal sentencing is primarily determined by which judge happens to hear the case”.<sup>23</sup> I would add to that, that public confidence would also be undermined if the community believed that a judge’s approach to sentencing depended on his or her own idiosyncratic view.

39. Indeed this really raises the central reason as to why the public’s opinion of the judiciary matters. The community’s opinion is an issue not because judges want to be liked, but rather because it is of central importance to

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<sup>23</sup> (2002) 55 NSWLR 252; [2002] NSWCCA 343 at [190].

community confidence in the administration of justice and in turn the rule of law. As former Chief Justice Brennan has put it:

“The rule of law depends on and is perhaps synonymous with confidence in the courts. If we regard the law as the expression of the values of our civilization, to govern the conduct and the relationships of powerful and weak, rich and poor, government and governed, the majority and a minority, there must be an arbiter whose authority will be accepted by all parties. The law would not be effective if conformity to its precepts depended on force or the imminent threat of force. Such a situation would consume the resources of the nation if it did not first destroy the nation itself....No, the rule of law must rest on a surer foundation than force...It must rest on the common acceptance by all who are subject to the jurisdiction of the courts of the authority of the courts to determine cases and controversies”<sup>24</sup>

40. Sadly, I think the appeal to maintaining community confidence in the judiciary is often seen as self-serving – a cry by judges to protect themselves from criticism. Let me be clear. Community confidence in the administration of justice is not something that judges want to maintain for our personal benefit. It is something that is necessary for the functioning of the administration of justice and for the maintenance of the rule of law. Community confidence in the administration of criminal justice is critical to the willingness of victims to report crimes, to the readiness of witnesses to testify, to the peaceful acceptance of verdicts – even those which are vehemently disagreed with – and to compliance with court orders. It is for these reasons that the judiciary is anxious to preserve confidence.

41. Maintaining community confidence does not mean that there should be no criticism of the judicial system or judicial decisions. There will always be unpopular decisions, and it is a democratic right to comment on them. Moreover, confidence is not maintained by stifling legitimate criticism.

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<sup>24</sup> The Hon. Sir Gerard Brennan, “Courts for the People – not People’s Courts” (The Inaugural Deakin Law School Oration, 1995) 2-3.

Debate, robust scrutiny, and discussions about reform are essential to the legal system. We must not be too defensive about our faults, because it is only by acknowledging them that we can improve.<sup>25</sup> The law is a product of society and as society evolves, so too must the legal system. No doubt there is room for improvement today, as there has always been.

42. Constructive criticism does not undermine the rule of law; in fact it helps preserve it. However, unconstructive attacks on the judiciary that are based on partial and sensationalist information, and which perpetuate community misinformation about the judicial system, “do a disservice not only to the judiciary but to the community at large...for [they] undermine without adequate cause, the judiciary’s trusteeship of the rule of law and...put nothing comparable in its place”.<sup>26</sup>
43. We should debate the adequacy of the legal system; but let it be informed debate. Take one topic of some controversy at present – mandatory sentencing. To the extent that such legislation is enacted then the courts will implement it. That is their duty.
44. However, an informed debate on the issue must go further than simply attacking sentences currently imposed by the courts, particularly if such attacks are without regard to the common law and legislative principles which underpin such sentences. There are a number of questions which must also be considered. They include, first, is the minimum penalty intended to apply generally to most offences the subject of the mandatory minimum, or is it really a minimum for the least serious cases only? Second, does the minimum apply in circumstances where the offender has pleaded guilty, or has provided assistance to the authorities? Third, will juries convict in circumstances where they know that particular penalties will be imposed regardless of the circumstances in issue? Fourth, will the imposition of minimum sentence be a disincentive to early guilty pleas and

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<sup>25</sup> See The Hon. GL Davies, “Judicial Reticence” (1998) 8 *Journal of Judicial Administration* 88 at 100.

<sup>26</sup> The Hon. Justice Susan Kenny, “Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium” (Lucinda Lecture, Monash University, 1998) p. 12.



to offenders seeking to rehabilitate themselves, with a consequent increase in the prison population?

45. It is not my role to attempt to answer these questions or to join in the debate. However these are the types of matters that should be raised and debated when discussing legal reform. Ultimately the question must be whether, regardless of the circumstances in which an offence was committed and regardless of the circumstances of the offender, a particular mandatory minimum sentence will always be justified.
46. In that context may I give one example of where, in my view, the debate on this issue has been misinformed. A justification for mandatory minimum sentences has been that the judiciary is not doing its job; that claim relying on statistics said to show that the average sentence for manslaughter over the period 2008 to 2012 is less than four years. There are problems with that approach on three levels. First, it begs the question of what is the job of the judiciary. I have already said something about that. Second, the suggestion is made without any apparent analysis of the myriad of types of offences which can fall within the crime of manslaughter, the particular facts of any case, the submissions of the parties and the many other matters a court is required to take into account. At the third level, the underlying premise is incorrect. The figure of less than four years presumably was taken from figures provided by the NSW Bureau of Criminal Statistics and Research. However, those statistics merge manslaughter and driving causing death. The correct position was that in the years in question there were 176 persons sentenced for manslaughter. The average term of imprisonment was seven years and one month, and the average non-parole period four years and five months. If one looks at the middle 50% range, the head sentences range from five years and eight months to eight years, and the non-parole periods from three years and one and a half months to five years and six months.<sup>27</sup>

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<sup>27</sup> Judicial Commission of New South Wales, Judicial Information Research System (JIRS) sentencing statistics concerning manslaughter 2008-2012.

47. Now I am not saying that a consideration of the factors to which I have referred would necessarily change a person's views or beliefs. However, it would contribute to those views being arrived at on a properly informed basis.

### **Measures to improve confidence**

48. Of course, you may well be thinking, "all well and good to lecture for twenty minutes, but achieving a sober, balanced and informed debate about law and justice is hardly an easy task". You would be right. While some members of the community gain their information about the judicial system through direct interaction with the court, most of the public's knowledge about crime and punishment comes through secondary information, the vast majority through television, radio and newspapers. What is required, therefore, is a shift in public discussion about crime and justice.

49. I recognise that the role of journalists and the media today is to report what their audiences will consider to be news, and that most of the courts' work does not fall in this category. Sensationalism sells, and I imagine that relentless media cycles do not always facilitate the careful digestion of judicial reasoning. A heart-wrenching set of circumstances, a crim "getting off" because of an out of touch judge, and a message of outrage are themes which make for an appealing story, and which resonate with the community's instinctive and understandable revulsion for crime.

50. If we are to improve community understanding of the sentencing process and the administration of criminal justice generally, then the courts must play a role in stimulating informed debate. There remains a judicial reticence to engage in public discussion, in keeping with Lord Kilmuir's old rule that "so long as a judge keeps silent when off the bench, his or her reputation for wisdom and impartiality remains unassailable". Thinking of some of the things that were said on the bench in past decades, I'm not sure if that rule ever held true. Any of you who have opened a newspaper

in the last five years will know that silence is certainly no longer deemed to imply wisdom.

51. Judicial reticence is understandable, and has much to recommend it. As Sir Anthony Mason has observed, judges are not renowned for their sense of public relations.<sup>28</sup> I am probably living proof of the wisdom of his comments. I do not think the judiciary should be regularly appearing on talk back radio, still less discussing individual cases or judgments. By the same token however, the days when judges could speak solely through their judgments and expect the confidence of the community are, I think, gone. If judges do not take an active role in explaining what we do and why, criticisms of the administration of justice are likely to go unanswered and thus be accepted by many as unanswerable.<sup>29</sup> Community confidence in the judicial system is too important to allow that to occur.

52. I do not pretend to have a clear solution. However, tonight I am proposing two measures that I hope will facilitate better community understanding of the judiciary's work. First, in 2014 I will be encouraging judges to produce summaries of their judgments that give an overview of the reasoning behind a particular decision in a simple and concise fashion. Links to these summaries and to the judgments themselves will be published on the Court's Twitter account, which was launched late last year. This will allow the community and media to readily access and digest judgments of interest and will further strengthen the transparency of the court.

53. Second, this year the Court, in conjunction with the NSW Bar Association and with the support of the Law Society of NSW, will host seminars on the process of judicial decision making in criminal matters. One seminar will be for the media, one for parliamentarians, and one for community representatives, including groups working with victims and offenders. These seminars will include an explanation by judges of the principal

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<sup>28</sup> The Hon. Anthony Mason, "Judicial Independence and the Separation of Powers – Some Problems Old and New" (1991) 13(2) *University of NSW Law Journal* 173 at 181.

<sup>29</sup> See The Hon. GL Davies, "Judicial Reticence" (1998) 8 *Journal of Judicial Administration* 88 at 90.

matters that the judiciary must take into account in sentencing and will seek to answer questions and address concerns in respect of the process.

54. I must immediately emphasize that these seminars cannot involve a discussion of particular judgments or cases, much less the quality or performance of particular judges. However, those will be the only limitations. The judiciary is ready and committed to better explaining how we function. I sincerely hope that the media, parliamentarians and community will respond so that these seminars can stimulate discussion, and go some way toward better informing the public about the administration of criminal justice.

## **Conclusion**

55. Community confidence in the judicial system is not an easy issue to address, but it is one that the judiciary cannot ignore and which is essential to the administration of justice and the rule of law. There are some things courts cannot do, but we can and should help stimulate informed discussion, explain how we operate, counter misinformation and reach out to the community. The ultimate aim of criminal law is to protect society from crime while doing justice to individuals. It is a goal I believe the public and judiciary share.