CRIMINAL JUSTICE AND THE COMMUNITY

MR Chairman, ladies and gentlemen, thank you for dealing in such a generous way with all my previous convictions and thanks to all of you and the organisers of this event for having invited us here and for the excellent arrangements which have been made. *"Criminal Justice and the Community"* is my brief in the general topic *"Criminial Justice — Towards the 21st Century"* and I think if the question were asked of the ordinary man, one might say the man on the Glenelg tram perhaps, as to what he thought justice meant in the community, his reply would probably be something like, "A fair ring of the old neck", or, "A fair deal", or "A fair go", and I think this view has some sort of support from the former Master of the Rolls in England, Lord Denning, who some years ago said that the nearest we can get to defining justice is to say that it is what "the right-minded members of the community, those who have the right spirit within them, believe to be fair". Then he went on talking about lawyers a little bit!

I cannot imitate his accent of course. It was so nice to hear that story at the dinner the other night about the jurors in 1356. That story is one of his favourites. He used to love telling that, indeed he still does, and saying in a deprecating way about himself that he has all the virtues except that of resignation, although, in the end, that was eventually granted to him as well. At to justice, he is fond of saying that when he was a single judge he did justice in every case, but when he was appointed to the Court of Appeal his chances of doing justice were two to one against.

But, anyway, he went on in his particular work, *"The Road to Justice"* by saying,

> "This conception of the task of the lawyer finds its finest expression in the words of the judicial oath, taken by every judge in the land on his appointment. Every word of it is worth weighing. 'I do swear by Almighty God that . . . I will do right to all manner of people after the laws and usages of this Realm without fear or favour affection or ill-will.' Take this oath word by word —
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> 'I swear by Almighty God' — herein he affirms his belief in God and implicitly his belief in true religion.
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> 'I will do right' — those are the guiding words which govern all the rest — I will do right, which means, 'I will do justice', not 'I will do law'.
>
> 'To all manner of people' — rich or poor, Christian or pagan, capitalist or communist, black or white — to all manner of people he must do right.
>
> 'After the laws and usages of this Realm' — Yes, certainly, it must be according to law, but **justice** according to law, not injustice according to law.
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> 'Without fear or favour, affection or ill-will' — Those are the words of the oath most frequently quoted, and highly important they are, enshrining the independence and impartiality of the judges; but still they follow the leading words 'to do right' — to justice."

Now, I would like you to imagine the following circumstances and to consider the following actual case where my two colleagues and I with the Juvenile Court in London — we sit in benches of three — were sitting in a little room in the south of London, a rather tin-pot court with a plastic coat-of-arms behind us, and a black lad was brought in and charged with the offence of causing actual bodily harm. The facts of the matter soon emerged, and he admitted them. He had swung around his head a heavy dog lead and hit with it a caretaker on the property where he lived; on the council estate where he lived. What emerged was that that black lad had been the subject of taunts and threats and insults and all manner of unpleasant verbal abuse for a very long period running back over months. He had been provoked in all kinds of ways and finally this fellow, this caretaker, had made some particular uncouth racialist remarks about this boy in the presence of his girl-friend and he had just lost his cool and he struck out with this blessed thing and hit the man with it. Well, of course, the boy had to be found guilty because in English law provocation is no defence to a charge of assualt. Some may argue that such an unfair verdict can be mitigated by mitigation of penalty. But I think that even a conditional discharge leaves a teenager stigmatised by a conviction against his good name for what is technically a serious crime of violence.

Now I would observe three things about this case. The finding of guilt on the instant facts does not reflect in any way the long antecedent history between the parties. Secondly, it deals with the matter as though only one party were on trial and blameworthy. Thirdly, it takes no account of the fact that the parties have to live together on the housing estate and somehow get on together in the future.

Now the first point, which relates to the inadequacy of the traditional criminal trial procedure appropriately to take account of antecedent histories, was well explained by Mr Kevin Anderson, until recently the Deputy Chief Stipendiary Magistrate in Sydney, in 1982 when he said, "Adjudication is typically concerned with questions of right and wrong, winner and loser, guilt and innocence. The conventional justice system rarely even claims to be dealing with the underlying continuing tension and conflict. Magistrates recognise from experience the inappropriateness of conventional legal procedures in these disputes".

THE second point that the parties are stereotyped — one as the innocent and the other as the guilty one — falls short of justice in failing to take into account that in many situations blame is shared. If it is not a matter of six of one and half a dozen of the other, at least it may be seven to five or eight to four. One knows, I suppose, that two-thirds of all violent offences take place in and about public houses and bars. By the time the police arrive there is a general fracus going on and it might be difficult to tell who deserves the tea and sympathy and who is going to get prosecuted for assault. In England, in some cases, it is almost a matter of chance.

But I remember when I was a child in a small fruit growing valley in Tasmania, of which there are quite a lot in that fair island, there was a dreadful dispute between the apple grower living next door to us and his neighbour, the butcher. I do not know how it arose, but the culmination of it was that the butcher got up one morning to find that the orchardist had slaughtered

MR JOHN C. FREEMAN

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John Freeman gave a most interesting and illuminating address to the conference. When reading it, it should be remembered that what appears in this article is a report of a speech and not a prepared written paper. Any misreporting should, therefore, be laid fairly and squarely at the feet of the Editor!

six of his little pigs. The following day the orchardist got out of bed to find that the butcher had chopped down six of his young apple saplings. Now, if the butcher had been prosecuted for criminal damage to the six trees, it would, I think, have been no defence that his neighbour had killed his piglets. The feud would, perhaps, not even have been investigated.

The third point in the case of the black boy is that what was intended to restore the Queen's peace between the parties, if that is a purpose of criminal justice in the community, was likely to have made some matters worse. Again as Mr Kevin Anderson put it, it may be that both parties to a conflict were legally culpable, but one became the defendant because the other was the one who called the police. In these circumstances it is highly likely that at least one party, and probably both parties, will leave court dissatisfied, smarting from a sense of injustice, suffering feeling of not having been allowed a full say, embittered, burdened with costs and determined to retaliate in some way.

Well, in mentioning the Queen's peace, I am referring to a concept which grew up in England round about the 12th century. What happened after the Norman Conquest, as everybody knows, was that the Norman people came over to England and took possession of the country. They were strong administrators and pretty quickly they centralised the administration of justice and law and order by setting up a central system, sending judges out on assize, and by deeming that an offence by one man against another was not only that, but also amounted to a breach of the King's peace. I think that this of an important doctrine which lasts to the present day because these days ordinary citizens do not exact vengeance on the person who has wronged them. That is done by the courts, centrally, in the name of all; in the name of the whole community; but in carrying out that task on behalf of the whole community, I personally would think it the duty of judges not only to listen to public opinion, of course, but also to lead it, to set standards and not just to reflect mass opinion. Of course, from that time, the Queen has been viewed as the fountain of justice; the judges are Her Majesty's judges; the courts are the Royal Courts of Justice; even the "nicks" are Her Majesty's prisons, and so on. But, whether that doctrine really applies as warmly today as it did in former times, I am not quite sure. I refer to that public interest in justice which was so manifest from the reign of Henry II; the public aspect of justice.

Do you know that they say that trials should be open to the public? Well, in parts of London and perhaps in parts of Australia, too, it really becomes a piece of street theatre and one finds outside a busy court like Bow Street or Great Marlborough Street on a cold winter's day a pathetic straggling group of people who are waiting for the doors to open so that they can get inside for the bit of free theatre and see the defendants being put through their misery. I do not really know whether it advances the cause of justice particularly to expose all these trivial incidents to the public gaze. It is more in the nature of voyeurism, but there it is. Of course, I am not denying for an instant that there are more serious and major matters which have every right to be the focus of public concern, but whether it is necessary to have all these trivia exposed and developed in the public gaze I am not quite sure. I think that whatever the doctrine of the Queen's peace might have produced in the 12th century, it is right to ask if it still makes any sense in the present one, let alone in the 21st.

Before going on further with this question, one might ask whether there are any feasible alternatives to trial which might work better justice in the community. My answer to that is, "yes", and I would like to discuss with you for a moment the subject of mediation, of which the celebrated Institute for Mediation and Conflict Resolution Scheme in New York is one model. I hesitate to expound further about this, remembering, as some you might, the story of Peter Quinksi who was the sole survivor of the Great Dam Burst in Little Valley, Arkansaw, in 1923 — it might have been 1926, I do not remember exactly, but some of you might. You will recall that in that great disaster there was a tiny little village in the valley and the dam burst and virtually everybody was swept away and their lives lost with the exception of Peter Quinski. He travelled all over that State, and all round that part of the United States, after that, talking about his experience as the survivor of the dreadful dam burst and so on. He got quite a name and a reputation as a public speaker in little halls everywhere about that particular thing. Well, eventually, Quinski died and he went to heaven as a good chap and St Peter said to him, "I hope you will be very happy with us. If there is anything we can do for your comfort you have only to let us know" and he replied, "Well, there is, St Peter, just one thing. I'd rather like to give a little talk about the Great Dam Burst in Little Valley in Arkansaw in 1923." St Peter said, "Yes, that would be very interesting. Of course, we will arrange it." The hired the galactic hall. The great day came and the cherubim and serafim and saints and martyrs, apostles, priests and kings and the whole heavenly host were there. Everything was ready to go and the chairman came up to Peter Quinski and said to him, "We are all looking forward very much to what you have got to say and I think you will be interested to know that Mr and Mrs Noah and their family are in the front row." I must say, therefore, I am well aware of the excellent experiments in mediation which are already being conducted elsewhere in the Commonwealth and I hope that they will be extended.

BUT, in talking about mediation as alternative to prosecution, what I really envisage, and what the proponents of these kind of techniques envisage, is a small informal room with a little table in the centre, perhaps. I see the victim on one hand, the offender on the other each telling their story in their own way. There will be no question of whether or not it is proper evidence; or of "wait until you're asked;" or of anything like that. The just tell it as they feel it, each in turn, and the proceedings are controlled by a trained mediator. The mediator's training is very important. His role is only cataclytic. In no sense should that person be an authority figure or necessarily chosen from the ranks of social workers or lawyers who are trained in solving other people's problems. The importance of mediation is in letting members of the community find their own solutions and so those who are serving as mediators should be chosen from the ordinary community. Of course, the proceedings are conducted in private.

I could explain that in more detail, but I am sure that you know well enough, in general, what is talked about when mediation is mentioned. It seems to me that the advantages of this mode of procedure are several. First of all, it does allow the parties to tell their stories in their own ways. Our present rules for criminal trials are very constrained in that regard. Often times, one leaves the court with the sensation that the defendant would have liked to have put certain questions himself or to have said what was to be said in some different fashion, but his lawyer took it up. The same thing goes with the other parties in the process.

I think, secondly, that it has the advantage of putting the victim in the centre of the stage instead of the victim just being about as one of the Crown witnesses. We are, no doubt, all well aware of the way that victims are all too frequently treated. Simply being shepherded in and out. You know, "May this witness be excused?" "Yes, of course." Then out they go and they are probably not even told the outcome of the trial at the end, unless they chase around and make some enquiries.

Of course, in mediation I must emphasise right now that it is nobody's intention that victims of crime should be put into situations of confrontation with offenders if they do not wish it. It might very well be that the last thing that any victim would want would be ever again to meet that awful man. Well, of course, that must be respected. If the victim does not want to take part, he or she should in no way be coerced; and the same thing goes with respect to the defendant. If he does not want to take part in the mediation process, he too must not be coerced.

He has his right to a trial and he cannot be denied it. But, if both parties agree, then it gives the victim a central role to say just how he or she does feel about all this and what he or she wants to see done and so forth. It also allows the respondent to make his reply to those things and say, "Well, how about all this that's been going on for the last six months, all this abuse?" Or, "How about your killing of my little piglets?", and so on.

Thirdly, I think it reduces the burden on overloaded courts and allows proper attention to be given to cases that need it. Our courts tend to get loaded up with these minor disputes, which the courts are, perhaps, often ill-suited to sort out. It means, of course, that longer and more imporant cases have to be put back and delayed and do not necessarily get the time they deserve. It would rid the courts of trivia and of the kind of disputes where the prosecution of just one party does not necessarily work the best justice.

Fourthly, it would reduce delays in trials. Somewhere I have with me a little cutting from the recent press in England. I cannot put my hand on it at the moment, but it talks about how, in the space of twelve months, in one of the counties in England delays in trials rising from three months to six months. In many jurisdictions this is a sustained problem: trials being delayed because the courts are overloaded. Well, of course that not only bogs down the system, but it causes litigation neurosis; great burdens on all parties as memories begin to fade as to recent events. The evidence is, from such schemes as are working, that mediation can get on with a dispute far more quickly than that.

Again, the mediation process meets the need for privacy. I have spoken about that already and agreed that while there are some cases that need a public airing, in little tin-pot matters where A has assaulted B, or taken this or that, whatever it might be, I personally cannot see what advantage there is to wash all that linen in public or to give free copy to the gutter press and local newspapers and so forth, which are full of trivial scandal of that sort. It might very well be that ultimately privacy serves the interests of justice better.

Again, it serves as a mode of diversion from the criminal justice system for offenders. Diversion is talked about a lot these days. It is a means of diversion.

Further, it can be cheaper. It depends on how you organise your mediation system and what the through-put is and so forth, but properly run it can be cheaper than conventional justice. Further to that, it does recognise and I think this is an important point, that both parties may be blameworthy in different ways and hence mediation can effect better justice.

After that, it enhances the parties to reach a settlement which is suitable to them in their own terms and hence the resultant solution is more likely to prevent recurrence than a punishment which is dished out to one only of the parties by a court.

WE have heard a lot during this conference, at least I have, about deterrence and preventing the repetition of offences. Well, the evidence seems to be that people are much less likely to repeat their misbehaviour if an agreement is reached about it which is acceptable to them, than if they are simply hammered down by a penalty handed out by the Court — a penalty which seems to them to be one-sided.

Perhaps, above all, it needs to be recognised that crime is a community problem. We have heard this too during the conference. It involves the community directly in its solution. Community traditions are marked in the jury system and in the system of lay magistrates, but, of course, over time neither juries or the lay justices are as representative of the community as might be desired. Well, the lay mediators could be. There are plenty of people able and willing to serve in that sort of capacity who with training would be excellent in the doing of it.

Once more, it is not suggested that every possible sort of criminal case is suitable for mediation. Of course, you can at once think of matters which would not be. The cases in which mediation seems to work best are those with a prior history like the two that I have instanced to you. Or, those where there is a continuing relationship. For instance, in a neighbourhood or in the workplace or at school — those kinds of things — where the parties have got to get on together, or live together, afterwards.

One ought to be thinking in justice as to how to keep the peace in the future as much as punishing what's gone on in the past. Mediation is suitable for minor crimes. Things like criminal damage and petty thefts and minor assaults and all those sorts of little cases that bog down our lists so much.

But, of course, just because something is successful as an experiment in one jurisdiction does not necessarily mean that it will be ideal elsewhere. There are amongst us here those who enjoy travelling to foreign countries and you might recall the tale another chap who died after living a blameless life on Earth and he was on his way to the Pearly Gates. The Lord said to him, "Before I admit you to Heaven, I will just give you a glimpse of the alternative". They looked down into the nether regions. There the deceased saw a lot of his former friends. He saw singing and dancing and gorgeous girls and casinos that pay out all the time and Wolf Blass wines and everything like this freely flowing. He said, "Well in a whole heart, I quite like the look of that. I'd like to go there if you don't mind". And the Lord said, "Well, very well, if that's your wish, so be it". Down he went and when he actually got down there, he found scourging and racks and tortures and torments and the flames of everlasting fires and shrieks of souls in torment and that kind of thing. He cried up to Heaven and said, "What on earth is this, you know? What have I come to? When you showed this to me there was singing and dancing and gorgeous girls and Wolf Blass wines and now look at all this". And God's reply was, "Oh, yes, but then you were a tourist. This is the real thing."

The proponents of mediation are not recommending that, because the method is seen to work well on a visit to one jurisdiction, it can necessarily be rail-roaded all over the criminal justice system, but just that it deserves some modest experimentation.

Now, in discussing criminal justice and the community, it is fair, I think, to ask again what the community expects. Tabloid papers might suggest an answer in terms of the punishment of offenders and even severer and harsher sentences and more imprisonment — so long, of course, as the new prisons are built in somebody else's suburb. Well, I think that punishment is a confused and compound notion. It involves elements of deterrence and retribution and expiation, denunciation, reparation, prevention, incapacitation, and so and so on.

Well, I believe that prevention and incapacitation are concepts which are more relevant to crime control than to justice and in my submission most of the other components can be very well met through mediation. Despite the clamour in certain newspapers and other media, there is some evidence, at least in England, that the community is not as vindictive to offenders as might appear. For example, we have the British Crime Survey of some 11,000 households which shows that when victims are asked about particular things that have happened to them what they want most of all is the restoration of their property; and what many of them would accept, above anything else, would be some kind of apology. Even in the gravest cases, if the offender had the grace to say he was sorry, then that would be acceptable. It seems surprising, perhaps, but many smaller studies bear out the same thing and so do the reports of experienced probation officers in the field. Others have experience in working with both offenders and with victims. This aspect, I think, is proving to be of considerable importance.

The traditional criminal justice system itself has not been so very successful in its achievement of deterrence. I have a statement from the Home Office's own research unit on the effectiveness of sentencing. It said, "It has seemed therefore that longer sentences are no more effective than short ones, that different types of institutions work about equally as well, that probationers on the whole do no better than if they were sent to prison and that rehabilitative programmes whether involving psychiatric treatment, counselling, case work or intensive

contact and special attention in custodial or non-custodial settings have no predictably beneficial effects". The conclusion is forthright. "It can be concluded that there is no evidence that longer custodial sentences produce better results than shorter ones." In fact, the Lord Chief Justice of England was saying the same thing in a public speech at the Mansion House recently. He said that the public have got to come to terms with the fact that longer sentences are not necessarily going to achieve better deterrence.

I THINK that claims of retribution are not always easy to ignore, but to my mind the concept of retribution has about it somehing of the unpleasant aura of legitimated vengeance and that it smacks more of the lex talionis of the Old Testament and less of the forgiveness which is found in the New. I think, that a mediation solution goes some way to serve an Aristotelian notion of corrective justice which is to redress inequality produced by some activity.

Towards the 21st century I would hope to find a criminal justice system which is based less on retribution and more upon reparation. Reparation has been nicely expressed by Martin Wright as meaning "making good". The idea of retribution brings one back to the involvement of the State or the Crown in justice. I mean that, if statistics tell us that there were 20,000 burglaries prosecuted by the Crown, it does not mean that Buckingham Palace was literally raided 20,000 times. The idea of the Queen's involvement is purely notional or nominal. It is almost a legal fiction.

That pioneering figure of Marjorie Fry in a book "The Arms of the Law" many years ago wrote about that as follows. She gives an instance. She says, "A girl, rather simple, was imprisoned for failing to pay a fine for stealing a pair of shoes. She was somewhat agrieved. 'Well, anyhow, they got the shoes back, and I thought I needed the 10 shillings more than what the King did.' Her feeling was a natural one. No conception of justice had been awakened in her. She would have understood a compensation to the owner for her worry and trouble. Have we not neglected over much the customs of our earlier ancestors in the matter of restitution? We have seen that in primitive societies this idea of making up for a wrong done has a wide currency. Let us once more look into the ways of earlier men which may still hold some wisdom for us." And she ends this particular chapter saying, "Compensation cannot undo the wrong, but it will often assuage the injury, and it has a real educative value for the offender whether adult or child".

Now despite the clamour for retribution, there are sustained indications that reparation is becoming a primary concept in criminal justice towards the 21st century. We have it, for example in public form where a court in England has a power to make a Community Service Order. All right, it is not reparation to that particular offender, but it is reparation to society as whole. Secondly, the government has made reparation available to individuals in the Criminal Justice Act of 1972 by way of compensation orders, restitution orders, criminal bankruptcy and so on. It is all giving something back in the reparative sense to the victim. But it is, I think, doing more than that. The 12th century distinction was between the function of the civil law to compensate and the function of the criminal law to punish. Here we see, in this modern legislation, at last a blurring of that distinction with criminal courts themselves as part of their own process being given the power to compensate and restore and provide reparation for victims.

Indeed, I think, one of the obstacles to mediation is our historical way of defining crime and there are radical views about this which go, perhaps, further than I would like to go myself. Yet, I am fortified by having heard at least two people in the course of this conference say that we now have far too much law creating new offences; every day, new crimes. Well, Professor Luke Halsman, the Emeritus Professor from Rotterdam has said that we shouldn't speak any longer about crime as crime. We should discuss these incidents simply as problematic events. Professor Nils Christie has said the same thing from Oslo. In fact, Christie speaking in Sheffield in England on 12th July, 1987, said, "Crime does not exist. Only acts exist. They are given various meanings within various social frameworks. Crime is a myth, but people have troubles and we have to do something about these troubles. The danger lies in too hastily defining trouble as crime. By doing so, we lose sight of interesting alternative solutions."

Now, mediation between victim and offender takes the concept of reparation further and applies it in a more personal way.

An additional support for these ideas was gained from a speech made by the Home Secretary in England on 14th March, 1984, in which he said, "The idea of reparation appeals to me for three reasons. First, through reparation the criminal justice can concentrate its attention on the individual victim whose interests must never be ignored. Secondly, the principle of reparation can be used to ensure that the wider interests of society are better served and, thirdly, nothing is more likely to induce remorse and reduce recidivism among a certain all too numerous kind of offender than being brought face to face with the human consequences of crime".

Well, of course, change is neither easy nor easy to accept. Many of you know the story about the changing of the light bulb. You know the one about, "How many people does it take in a 'certain country' to change a light bulb?" The answer is, "It takes six — it takes one to hold the bulb, and five to rotate the ladder." Then the thing goes on — "How many social workers will it take to change a light bulb?" It is said again, "It takes six — one to change the bulb and the other five to share the experience". "How many psychiatrists will it take to change a light bulb?" And the answer here is, "It takes only one — but it takes a very long time and the bulb must want to be change". But the ultimate question comes. "How many lawyers will it take to change the light bulb?" The answer is, "They won't do it because they say the bulb worked perfectly well in the past".

Finally, mediation is enjoined upon us by two international documents. First of all, the resolution of one of the big four international groups, The International Association of Penal Law, meeting in Cairo in October, 1984. There were present about 600 of the leading criminal lawyers from all countries in the world and they (with, I ought to say, six abstentions from Costa Rica, and perhaps why those six abstained because the simultaneous interpretation broke down at the critical moment) all agreed unanimously on a whole set of resolutions endorsing mediation and ending with a final implementation clause in the following terms: "More emphasis should be placed in the furture on diversion and mediation programmes and research into the causes of conflict in methods of conflict resolution. The International Penal Law Association requests national governments to consider, and if appropriate to national circumstances and traditions, to institute diversion and mediation if they are not now recognised or to strengthen their acceptance and implementation by government officials and citizens."

The other international document to which I would refer is that which we have been told about so tellingly by Professor Waller. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power itself in clause 7 says that, "Informal mechanisms for the resolution of disputes including mediation, arbitration and customary justice or indigenous practices should be utilised where appropriate to facilitate conciliation and redress for victims".

Now, I just want to end by taking you back to something that I know many here will remember — *Winnie the Pooh* by A. A. Milne. Do you remember how this book begins? It starts, "Here is Edward Bear coming downstairs now. Bump. Bump. Bump. On the back of his head behind Christopher Robin. It is as far as he knows the only way of coming downstairs, but sometimes he feels that there really is another way if only he could stop bumping for a moment and think of it." Well, I say, "Why wait until the 21st century? Let's start now."