

Getting justice wrong: Nicholas Cowdery QC speaks up for rationality

Nicholas Cowdery QC, NSW Director of Public Prosecutions hopes his new book, *Getting justice wrong: Myths, media and crime* will go some way to countering the distortions and lies about crime and criminal justice perpetrated by radio talk-back hosts and politicians in public forums.

"It's essential that we not abandon rationality as the basis of social institutions," he told *LSJ*. "I hope ordinary people will read the book ... and that it will help them to recognise misinformation and dumb reaction, to acknowledge facts, and to accept and support policies based upon reality and guided by common sense."

In particular, Cowdery wants to "put paid to the 'law and order auctions' that seem to have become a feature of state election campaigns".

Getting justice wrong, he said, grew out of some 'musings' he wrote for the *Australian Financial Review* and a subsequent challenge from Patrick Gallagher, the managing director of Allen and Unwin, to turn the newspaper items into a full-scale book. (Royalties go to the Office of the DPP which "needs the money".)

The Director's easy, lucid style – the hallmark of a practised barrister – witty turn of phrase and willingness to tweak a few tails, makes for an entertaining read that should be accessible to a wide readership.

There's no mistaking the seriousness of his intent, however, and his reflections ought to cause some citizens to examine more carefully the rhetoric and polemic they are daily subjected to by opinion-makers on the subject of crime and punishment.

Legal argument resting as it does on appeal to authority, Cowdery liberally seasons his text with citations that are wide-ranging, apt and sometimes memorable (if depressing), like "Men think in herds: it will be seen they go mad in herds, while they only recover their senses slowly and one by one."

Talkback radio more than print or

television seems to be the herd's favourite hunting ground according to Cowdery. "Politicians feed off it and politicians make public policy."

Much of the information in *Getting justice wrong* will be new and very likely intriguing to ordinary readers who may well never have heard of the DPP or how it runs cases or the problems it has with discovery and how it longs to know in advance what argument the defence will raise to defend its client. It may well be that the community will see the common sense in the Director's claim that we should be concerned with getting to the truth of a situation and not just winning an argument. Stands to reason, doesn't it?

Readers will also respond favourably to the Director's way with short punchy sentences and his sometimes sardonic tone.

"Horrific crimes make horrific reporting. There are some horrific reporters about."

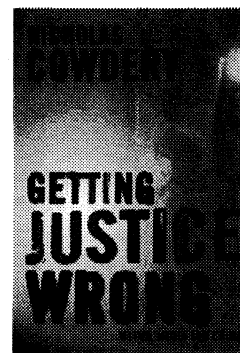
"Elections cause crime waves. They must – just listen to the candidates. For months it becomes unsafe to leave your homes – or even to stay in them."

After describing the roles of police, counsel, and judiciary in the criminal process, Cowdery discusses some of the issues that recur in the media, especially on radio talkback programs.

Major ones treated include the drug 'problem', children in law – as offenders and as victims – domestic violence, how to stop crime increasing, protections for the accused, sentencing and Australia's place in the world as defined by its subscribing to international conventions. This last subject, always a difficult one for the community and the media to understand, is explored in the clearest possible terms.

It also provides an opportunity to deliver a serve to John Howard, the Prime Minister, elsewhere referred to by the Director as the "Prime Miniature". ("Not my own phrase," he said, "but one I find exceedingly appropriate to describe his mindset.")

Quoting from a *Sydney Morning Herald* report of an exchange between radio broadcaster John Laws and the Prime



Minister, the Director draws attention to a comment that casts light on the selectivity Australian governments (including the current one) demonstrate in meeting the international standards of behaviour they commit themselves to in treaties.

The Prime Minister said: "You can ignore your obligations under an international treaty if you choose to. The reason why you can ignore them is because in the end there is no sanction against you other than the sanction of being seen as having potentially breached some agreement that you have signed."

Says Cowdery: "So it's okay to break an agreement so long as there is no punishment. And it doesn't matter if others think you won't keep your word. What kind of message does that send, Mr Howard? Oh, great leader ..."

He then goes on to point out that in deferring to the International Narcotics Board on safe injecting rooms, the Prime Minister had chosen to be dictated to by an international body that did not even have the power to dictate to him.

This kind of criticism, normally left to retiring bureaucrats or politicians, reflects to some degree the independence the Office of the DPP has managed to secure since its creation in the mid-1980s.

The nature of the relationship between the Office and the Government had to be worked out over time, Cowdery said.

A key event in the process occurred when the Victorian Director, Bernard Bongiorno QC (now a Supreme Court Judge), resigned from his position in 1994 after the Kennett government revealed plans to reform his office. Many critics

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argued that the plans, later implemented in a modified form, were an attempt to curb the Director's powers. Bongiorno had previously threatened to lay contempt of court charges against the Premier for his public comments about Paul Denyer, who pleaded guilty to the murder of three women in the Frankston area in 1993.

In NSW, according to Cowdery, government quickly accepted the necessity for an independent Director of Public Prosecutions and neither he nor his predecessor, the current Chief Judge of the District Court, Reg Blanch, has had any significant difficulties on that score.

As inaugural Director, Reg Blanch had responsibility for establishing the Office and creating relationships with other agencies.

This latter task is ongoing, Cowdery said. "The Attorney General's Department tries but is fairly ineffective in bringing agencies together. We should be able to generate freer exchange of information."

He worries about the danger of burnout that threatens many of his staff because of the volume of child abuse they've been swamped with.

"Dealing with children and family relationships is incredibly wearing for prosecutors."

A hundred more weeks of sittings in the country by the District Court and a 57 per cent increase in the sittings of the Court of Criminal Appeal in 2001 adds to the workload of his 320 lawyers and 210 administrative staff based at 11 offices around the State.

Nonetheless, "I'm still enjoying working with a terrific team," the Director said (looking remarkably free from burnout, himself) and he will certainly continue with the task of educating the community to take a more rational view of crime in society and the ways to respond to it.

Getting justice wrong: myths, media and crime, by Nicholas Cowdery, Allen and Unwin, Sydney, 176pp, \$19.95, published 9 March 2001.

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ADVOCACY Objective Counsel

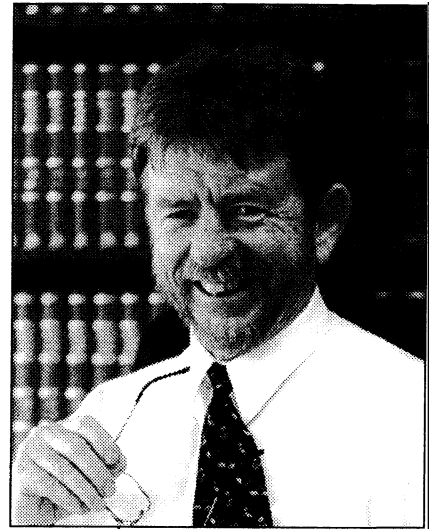
"The trouble with lawyers is they convince themselves that their clients are right."

Charles W. Ainey

We are familiar with the proverb that he who is his own lawyer has a fool for a client. The logic behind that observation also applies to the advocate who fails to maintain a professional distance between him or herself and the client. The extent to which a client is dependent upon the advocate is obvious. Any appearance in Court is likely to be important for a client. The more serious the issue to be resolved at that hearing the greater is the significance of the occasion to the client and the greater is the demand upon counsel. When you appear you do so with a view to achieving the best outcome available for the client. The best outcome may be something less than the client would wish for and often expect when you commence to take instructions. Counsel must be in a position to provide clear and firm advice as to what is and is not achievable.

In a lot of cases it will be difficult not to feel sympathy for your client. In many cases such feelings are to be expected. In most of those cases there is no reason why you should not express your feelings of sympathy to the client. Similarly it is often easy to accept in its entirety the version of events provided to you by the client, however you would only do so after a critical appraisal of the evidence of the client and an assessment of all of the objective evidence surrounding the matter.

Notwithstanding your feelings of compassion for your client, in order to fulfil the obligations and responsibilities undertaken when you appear for someone as counsel it is necessary for you to maintain an emotional distance from the client and the circumstances in which the client finds himself or herself. You must do so to enable you to make informed and balanced decisions and to provide objective advice.



Hon Justice Riley

If you allow yourself to become too emotionally involved in the cause of your client, too enmeshed in the client's troubles, too caught up in the sense of grievance the client is experiencing, the danger will be that you are no longer able to provide objective counsel to your client.

In the course of a trial and in the preparation leading up to a trial, the advocate must make many difficult and important decisions. To allow an emotional involvement in the matter to develop is likely to result in your judgment becoming clouded or affected in a way that is not in the ultimate interests of the client. You may be less able to identify points sought to be made, or arguments put, that are in satisfaction of some emotional need but which, when the interests of the client are objectively assessed, should not be raised at all. You may be less likely to identify inconsistencies in the case you are instructed to present. It may not be as clear to you that settlement on terms less than a full victory to your client is desirable.

In relation to the presentation of the case and to the desirability of settlement your client is entitled to receive objective and practical advice. Sometimes that advice will not be welcome and will need to be put firmly and even forcefully. An effective presentation, or a settlement

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