The Judiciary and the Media

AN ADDRESS BY
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For hundreds of years now there has existed a convention relating to public statements of judges made outside the court room. This convention has been expressed in various ways. Mr Justice Thomas, in his excellent book, *Judicial Ethics in Australia*, records it as follows: 'Out of Court a judge does not make any public comment, to the press or elsewhere, about cases in which he is involved.'[1] Canon 3A of the American Bar Association Code of Judicial Conduct is in these terms:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.[2]

When I commenced practice as a barrister over 30 years ago, it was apparent that the convention extended in Australia beyond public comments about cases in which the judge was involved. Its exact boundaries as to other comments were somewhat vague but they certainly included controversial matters generally. The scope of the convention in those days is well reflected in the Kilmuir Rules, promulgated in the United Kingdom in 1955 by a Lord Chancellor of that name. Lord Kilmuir decreed

> as a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or to appear on television. We recognise, however, that there may be occasions, for example charitable appeals, when no exception could be taken to a broadcast by a Judge.[3]

The references to electronic media only are explained by the circumstance that Lord Kilmuir was writing to the Director-General of the BBC. The letter also contains the oft quoted, and sometimes mischievously used, statement:

> So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism.[4]

It was commonly understood that the Kilmuir Rules related to all types of media.

Thus, the convention was very wide ranging. It is often forgotten why this

* Chief Justice of the Supreme Court of Victoria. This is the edited text of an address delivered for the Monash University Law School Foundation on 2 December 1993.

[1] J B Thomas, *Judicial Ethics in Australia* (1988) 23.

[2] Id 107.

[3] Id 120.

[4] Ibid.

was so. The convention first arose in the 18th century — an age of extravagance of speech. The breadth of the convention was directly related to the intemperance, and the corresponding damage, which often characterised public judicial utterances while it was being formulated. This is well illustrated by the contretemps in 1879 between Chief Justice Cockburn and the prominent writer on the law of evidence, John Taylor.[5] In that year, Chief Justice Cockburn had presided at the trial of Henry Bedingfield, accused of the murder of his laundress girlfriend. The Chief Justice ruled that a statement by her, 'See what Bedingfield has done to me', made shortly after her throat had been cut and in the absence of the accused, was inadmissible. Bedingfield was convicted and hanged.[6] Mr Taylor wrote to the editor of *The Times* arguing that his Lordship's ruling lacked legal principle, whereupon the Chief Justice published a 29 page pamphlet attacking him. Taylor's letter, sneered Cockburn, was nothing but an incitement to popular resentment. He accused the evidence expert, who happened to be a judge of a subordinate court, of posing 'as the champion of the law of evidence', and of discourtesy to another member of the Bench. Taylor's book on the law of evidence, published some years earlier, was described in contemptuous terms. However, Taylor had the last word, again putting pen to paper and pointing out that Cockburn had sent to him a fulsome letter of congratulations upon the publication of his book, adding 'it is barely possible that you were all the while practising on me the arts of the Parisian beggar.'[7] So much for Chief Justice Cockburn!

There have been, both informally and formally, alterations to the convention in relatively recent years. Firstly, the range of occasions when judges make public statements likely to be reported by the media has greatly broadened and has come to include the very many conventions, seminars and like occasions that the judiciary have come to habitually attend. Judges have frequently delivered papers concerning legal history, law reform and, on rare occasions, government policy. In 1970, the Lord Chief Justice of England, Lord Parker, made a speech at the Mansion House urging that the right of a suspect to decline to answer questions should be removed. Lord Widgery did much the same thing several years later. In 1987, Lord Mackay of Clashfern, the present Lord Chancellor, amended the Kilmuir Rules so as to permit public statements by judges on matters other than their judgments. When the present Lord Chief Justice, Lord Taylor, was appointed a few years ago, he became the first Lord Chief Justice to hold a press conference. By all accounts, it went very well. A second occurred more recently. This time, I am told, the questioning was much sharper and included: 'You send a lot of people to prison — when did you last visit a prison?'

However, Lord Taylor has been generally praised for his openness and accessibility to the media. He has given several interviews to selected journalists. His most recent achievement was to appear on one of Britain's most

[5] Id 23–4.
[6] *R* v *Bedingfield* (1879) 14 Cox CC 341.
[7] Thomas, op cit (fn 1) 24.

popular television shows, *Question Time* on BBC1. When he announced his intention of doing this, he was exhorted to change his mind by Mr Bernard Levin, a distinguished journalist who writes for *The Times*. Were his Lordship to appear on the show, Mr Levin declared, he would be obliged to offer opinions on things of which he was entirely ignorant, or which were both trivial and silly.

Returning to Australia, I have to tell you that when my respected colleague Chief Justice Nicholson of the Family Court appeared on a television show, he too was praised by the presenter for his openness.

Late in 1992, in Darwin, Justice John Toohey of the High Court delivered a speech entitled 'A Government of Laws and Not of Men'.[8] His Honour referred to the presumption that, in granting powers of the Commonwealth Parliament, the Australian electorate did not accept that there would be any erosion of fundamental common law liberties. He described events consequential upon this presumption, and stated:

> If such an approach to constitutional adjudication were adopted, the courts would over time articulate the content of the limits on power arising from fundamental common law liberties and it would then be a matter for the Australian people whether they wished to amend their Constitution to modify those limits. In that sense, an implied "bill of rights" might be constructed.[9]

The next day one newspaper headline shouted, 'Activist High Court may set own rights Bill'.[10] Senator Michael Tate, the then Minister for Justice, was outraged. He described the Judge's speech as 'breathtaking' and called for closer scrutiny by politicians of appointments to the Bench, declaring that the High Court would be shut out of any attempt to usurp Parliament.

While leaders of the profession spoke up in his defence, Justice Toohey and his High Court colleagues remained silent, apparently in accordance with the long established convention. In a later interview, the Chief Justice Sir Anthony Mason was to say that Justice Toohey's judgment 'would have been — as my judgment was — that it was better for the controversy to exhaust itself naturally rather than to give it more life'.[11] Sir Anthony went on:

> That's generally the best way of dealing with controversies of that kind — at least the best way for judges to handle it. Now, that's not to say that a judge is disqualified from entering the fray if he or she wants to. I just happen to think that in most instances, the judge is ill-advised to do so.[12]

Sir Anthony gave that interview after another controversy had arisen over the High Court's decision in the *Mabo* case. The interview from which I have quoted was given to the Law Council of Australia publication *Australian Lawyer*. But Sir Anthony also made some statements about the *Mabo* decision

[8] Referred to in B Virtue, 'The End of Democracy' (1992) 27(10) *Australian Law News* 7.
[9] Id 7.
[10] Ibid.
[11] B Virtue, 'High Court is Planning New Rules' (1993) 8(6) *Australian Lawyer* 18, 27.
[12] Ibid.

which were reported by major newspapers and the electronic media although he had said to the *Australian Lawyer*:

> If you look at the position of a Justice of the High Court, it's difficult to envisage the circumstances in which it would be proper for a Justice to speak about the implications and consequences of decisions such as *Mabo*.[13]

In these statements the Chief Justice denied that the decision in *Mabo* reflected 'naive adventurism'. This was an obvious reference to remarks in that vein made by a particular critic. It must be that Sir Anthony came to conclude that criticisms of the High Court, which had at that time assumed a personal character (at least from some quarters), were such that a response by him was necessary. I entirely support the decision of the Chief Justice to exercise his discretion in that way. As no doubt some of you are aware, I wrote an open letter to the Editor of a Melbourne newspaper[14] following upon the publication of an editorial to which I took exception. I shall have more to say about that incident, and its consequences, later.

A particular problem exists concerning public judicial comments, outside the courtroom, on government policy. When Lord Parker was Lord Chief Justice of England during the 1960s he decreed that judges should not state their opinions on government policy or proposed legislation in a public fashion. Communications as to these matters, he said, should be private and conveyed to the relevant Ministers. Most, but not all, of the English judges obeyed. In Australia, an unwritten convention to the same effect also applied and was generally honoured. Sometimes, however, judges have publicly commented on government policy which did not directly concern their jurisdiction. The problem is that, by its very nature, much government policy is translated into legislation. It falls to the judges to apply and interpret that legislation. Were judges generally to comment critically on government policy in the public arena, they would be faced with government saying they should be disqualified from involvement in cases concerning legislation which was the product of that policy. I do not think there is any way around this.

Dr Gerard Henderson, the Executive Director of the Sydney Institute, addressed this year's conference of the Supreme Court of New South Wales. In a thoughtful and carefully constructed address,[15] Dr Henderson offered the view that, whatever the reality, Australian judges certainly seem remote. This is so, he said, because the public knows little of them. They are not seen or heard, generally speaking, being interviewed on television or radio. Their views on matters they consider important rarely receive public coverage. Dr Henderson suggested that some judges, preferably the most senior, should be seen occasionally on quality electronic media and should use such opportunities to comment on the key issues of law reform, in particular court practice. The staff of Courts should attempt to monitor as much of the general and

[13] Id 26.
[14] *Age*, 10 September 1993.
[15] G Henderson, 5(7) *Judicial Officers Bulletin*.

specialised media as possible, and where appropriate make corrections and supply information — even if this is not for quotation or attribution.

These views appear to be shared by Sir Louis Blom-Cooper, QC, a former Chairman of the Press Council of Britain. Sir Louis has recently written acknowledging that some aspects of press comment on judges and their conduct are unfair and perhaps, in given instances, mischievous. But he argues that the media can be forgiven for these shortcomings, or at least many of them, by what he calls the 'official isolation' imposed on judges by the current conventions. This isolation, Sir Louis contends, has actually harmed the judiciary by depriving the public of any real understanding of the law in action. Isolation, so the argument goes, breeds suspicion. He concludes that 'a remote judiciary not unnaturally has excited speculative journalism'.

There is no doubt that in some parts of the media, in literature, and in popular entertainment a stereotype of judges is commonly presented — elderly, remote from reality and of extreme narrowness of background. Our patient friends in the clergy have had to put up with this for much longer than judges. Of course, there is no harm at all in a deal of fun being poked and so it has been, from Charles Dickens' portrait of a geriatric judge easily bested by the astute Sam Weller to Rumpole doing the same in Mr John Mortimer's deservedly popular television series. Other aspects of the stereotype, compiled by oft-repeated assertions, are not so acceptable. Thus, it is said, again and again, that Australia's judges come to their professional lives from a background of wealthy middle class privilege via an exclusive and expensive education. This has become Current Correct Thought and it is, for example, quite useless for a judge to say, 'Look, I'm just a knockabout type from the De la Salle Brothers or the Christian Brothers where I rubbed shoulders with the likes of Mr "Crackers" Keenan', because Current Correct Thought equates a robust establishment of the Brothers with some sort of antipodean Eton. The Battle of Waterloo may or may not have been won on the playing fields of Eton, but there have been many courtroom battles for justice won on the playing fields of the Brothers. Another oft-repeated claim is that judges, generally, lack empathy with or an understanding of the Aboriginal people. In my Court alone there are three judges who, between them, have had well over a decade of direct involvement with Aborigines. One of them was senior counsel assisting the Royal Commission into Aboriginal deaths in custody.

It is time to return to the letter I wrote to the Melbourne newspaper.[16] I took exception to its editorial because of its factual inaccuracies and unwarranted conclusions. As I determined that a prompt response was necessary I only had time to consult with one other senior judge of the Court. We both decided, I think independently, that the prior policy of judicial silence had not only encouraged criticism of the judges but had encouraged baseless and intemperate criticism. In the letter I acknowledged that I was departing from convention and set out the reasons for my departure. I have conducted no poll to ascertain the degree to which my colleages on the Supreme Court approved of my action, but I believe it would have been their support.

[16] *Age*, 10 September 1993.

Now let us look at another point of view. In April last, the distinguished Justice Michael Kirby, the President of the New South Wales Court of Appeal, addressed the New South Wales District Court Judges' Conference. After describing a series of incidents in which one of his judgments had been grievously misreported by the media, his Honour said this:

> I remind you that I was appointed in 1974. In my time in the Australian Law Reform Commission I had a lot to do with the Australian media. I confess to having been hardened by the years in my dealings with the media.[17]

Justice Kirby went on to refer to

> the debased standard to which media reporting so often descends in Australia today. Generally speaking, the media are not now really interested in communicating information in a neutral and informative way. . . . The electronic media (and especially television) our print media, in so few hands, have now fallen to the levels of the broadsheet. . . . Attempts by judges to correct the media record will more than often be manipulated and presented as suggested errors or further folly on their part. We have seen some notable recent illustrations in Australia. They teach, I think, the wisdom of the convention that judgments and court pronouncements must (subject to appeals or review) stand or fall as they were spoken or written.[18]

It is to be noted, I think, that these remarks come from the Australian judge who has had more to do with the media than any other over the last 25 years. They are, in my view, very significant remarks. They may have been occasioned in part by an experience His Honour had last year, to which I earlier made reference. Justice Kirby published a judgment in a compensation appeal. In the course of it he suggested an apparent need for reform of a particular piece of legislation which had been introduced into the New South Wales Parliament by Mr John Fahey who had been, at that time, Minister for Industrial Relations and Employment. At the time of the publication of Justice Kirby's judgment, Mr Fahey was Premier of New South Wales. A week or so later His Honour's breakfast was disturbed by a headline in the Sydney Morning Herald 'Appeal Judge Attacks Fahey Over "Unjust" Law'.[19] After careful scrutiny of the accompanying article, Justice Kirby was eventually able to recognise that it was based on his own judgment in the compensation appeal. But this was just the start. His Honour observed the convention and made no comment. The media went to Mr Fahey. He was upset by the headline and said so. The following day, another headline appeared 'Fahey Lashes Out at Kirby Comment'. And, the Premier was quoted as saying that 'Justice Michael Kirby should run for Parliament if he wanted to launch political attacks over workers' compensation legislation'.[20] Justice Kirby tried to limit the damage. He sent a copy of his judgment to the Premier's office. The

[17] M Kirby, 'Judiciary, Media and Government' (1993) 3 *Journal of Judicial Administration* 63, 70.
[18] Id 70–1.
[19] Id 68.
[20] Id 69.

Premier seemed to interpret this as an apology and announced on radio that Justice Kirby had sent a message of apology to him, and so the next headline read, 'Fahey Hits Back at Kirby's Compo Attack'. You can see why it may well be that this saga is the source of some of his Honour's misgivings that I have earlier quoted.

No paper on the judiciary and the media would be complete without reference to his Honour Judge Pickles, the English circuit judge. Judge Pickles had his own very strong views on the matter and from the early 1980s he was regularly in the news with his comments on matters which included prisons, the parole system, prostitution, the police and sentencing. He even interviewed, in a radio show, some criminals he had dealt with. A readily available, ebullient and outspoken gentleman, he was a media favourite, seen as being at least one judge prepared to talk to them from his Yorkshire retreat. He was, however, widely criticised in the legal profession. When there were calls for the resignation of the Lord Chief Justice, Lord Lane, the Chairman of the Bar commented that 'the very best reason why Lord Lane should not resign is that Judge Pickles says that he should'. Inevitably, he fell foul of the Lord Chancellor who gravely admonished him, saying that his conduct showed that

> you have not heeded the warnings which those senior to you have given. This must be the result of foolishness or a complete lack of sensitivity.[21]

There are some who would say that there is a place in our world for many Judge Pickles, but perhaps one per country is sufficient.

Let me tell you something of my own experience with the media. In July 1990 I became Chairman of the National Crime Authority. I confess I had not followed its fortunes closely prior to my appointment. Within a few days I realised that it had a problem in the form of repeated adverse media comment about its activities. Prior to this, I had had very little to do with journalists. That suddenly changed, and I had a great deal to do with them. I came to conclude, with help from some of them, that the Authority's problem was generated by an attitude of secrecy about itself. The solution was greater openness. Originally out of necessity, but later by preference, I extended a measure of trust to the many journalists with whom I dealt. I found that, although there were two or three who were a disgrace to their profession, journalists as a group were very professional and were really only interested in getting the facts of an article correct. And so, my trust was not misplaced.

Back to Sir Anthony Mason. According to the *Australian* newspaper[22] Sir Anthony 'lifted the 200 year-old vow of silence imposed on judges in the climax to the Australian Legal Convention in Hobart, one of the most critical in the history of the law in Australia'. The report went on:

> Under his edict judges will be free to explain their work and the issues they face while still being prohibited from expressing views about questions likely to come before them or of the legal implications of decisions they have made.

[21] Quoted by D Dawson, 'Judges and the Media' (1987) 10 UNSWLJ 17,18.
[22] B Montgomery, 'Chief Justice Loosens the Shackles of Silence on Judges', *Australian*, 1 October 1993, 1.

Sir Anthony had 'loosened the shackles' on Australian judges, the report concluded. I must say I know of no edict published as such, but the Chief Justice's *Mabo* response and his reasons for making it will doubtless be noted by the judiciary.

The last year has also seen the reporting of remarks or judgments by judges which are said to exhibit gender bias. Some of these have been subject to appeal because they form part of the structure of the proceedings and have received correction by this process. Others have been gratuitous remarks not capable of such correction. When gender bias is exhibited by a judge it is proper that it be subjected to criticism and comment. But by far the most reprehensible part of this controversy has been the preparedness of some persons and some parts of the media to translate a small number of individual incidents into the proposition that the judiciary, generally, is guilty of gender bias. Some of the most hurtful attacks of this sort have been made by lawyers and, in this process, some people of quite modest attainments have been elevated by the media to the status of leaders of our profession.

So what is a Victorian judge to do in the light of these conflicting opinions and varied experiences? I can only speak for myself. I have become convinced that the conventional silence of judges in the face of criticism had encouraged not only an increase in its volume, but also an increase in unfair and misleading criticism. I am resolved henceforth to reply to such criticism as I did in my letter to the *Age*. I feel strongly, though, that I should carefully limit the number of occasions when I do so. I am not interested in responding to pinpricks. I will respond only when really necessary. Of course, response to media comment on judgments may be curtailed or delayed by their being part of uncompleted proceedings or being subject to appeal.

In all this I shall have some valuable assistance for, as many of you are probably aware, the Victorian Law Foundation has funded the appointment of the experienced and respected journalist Ms Prue Innes, at least for the balance of this year, as Courts Information Officer for the Supreme, County and Magistrates' Courts. You will note Ms Innes' title: Courts Information Officer. She is not involved in public relations on behalf of the courts. Her duties include arranging for the provision to the public of the 'knowledge of the law in action' to which Sir Louis Blom-Cooper referred. Those duties also include giving advice and assistance to journalists newly assigned to work at the courts, and advising the media generally of the existence of judicial suppression orders.[23] Ms Innes also has very great responsibilities in terms of avoiding the cessation, delay or interruption of jury trials by reason of media actions. In the several months since her appointment, not one jury has been discharged for this reason.[24]

I have also formed a Courts Media Liaison Committee. This is chaired by my colleague, Mr Justice Teague, who, when in practice as a solicitor, was deeply involved for many years in media law. Its membership includes other

[23] A register of these orders is now being kept at the Court for the first time and journalists know how to discover information concerning them.

[24] The massive costs consequent upon such aborted trials have thus been avoided.

judges and practitioners with similar experience. There is a mechanism for media queries to be received and difficulties to be acknowledged and addressed. The United States Supreme Court has had a media relations office for many years although it was only modernised in the 1970s. The United States Federal Courts have had a similar establishment since 1971. In the American State Courts only two information officers existed in 1970 but by 1986 twenty courts had such appointments. All these officers involve themselves, as Prue Innes intends to do, in the training of court journalists and law reporters.

My thanks to the Monash Law School Foundation for the invitation to speak this evening. As you have seen, my chosen topic has warranted careful development and resort to considerable detail. I hope I have attained a satisfactory result.