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News as Entertainment and Celebrity: The judge in an era of familiarity

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NEWS AS ENTERTAINMENT AND CELEBRITY: THE JUDGE IN AN ERA OF FAMILIARITY

All it need take is being at the wrong place at the wrong time.

Thus it was when Robert John Walker came before Adelaide Magistrates Court on the 26 October 2005 to apply for bail. Walker had been charged with possession of child pornography. A psychiatric report relevant to Walker's application was unavailable. The magistrate remanded Mr Walker in custody and adjourned the hearing of the bail application until the report could be made available to the court.

The magistrate no doubt thought all this to be both mundane and unremarkable.

But later that evening Bob Francis the host of a talk back programme on 5AA made something much more of it. Amongst the derogatory comments about the magistrate he broadcast during the course of that evening was the following statement made by Mr Francis:

The worst thing about this whole situation is that bail has been refused until at least Monday. They're even thinking about bail, the judge. The judge saying 'To let him into the community without a psychiatric examination would be irresponsible' Irresponsible! Oh, smash the judge face in!

I don't pretend to any knowledge of how these comments affected the magistrate—but I think we can all put ourselves in his shoes and imagine how they might have. For his tirade of bitter and sustained attack on the magistrate of which this is only a tiny fraction Mr Francis was subsequently convicted of contempt of court. He was sentenced to 9 weeks imprisonment wholly suspended on his entering into a bond to be of good behaviour for a period of 18 months¹.

I want to look back to and examine where we have come from, where we have got to and what we might do to improve the way in which our community and our judges interact.

The dignified parts of the constitution

Bagehot, writing in 1873, referred to the Crown as the head of the dignified part of the constitution. When he wrote Queen Victoria was remote and formidable. So too were Her Majesty's judges. That is not to say the legal system was beyond criticism. Charles Dickens drew attention to the delays and the 'fog' of Chancery in Bleak House. But the right of the judiciary to be treated with dignity was little questioned. Little more than one hundred years later that assumption is under constant assault.

¹ *Director of Public Prosecutions v Francis and Anor* (No 2) [2006] SASC 261.

Those who in Bagehot's time comprised the 'dignified parts of the constitution' now find that not only their official and ceremonial conduct but also their private lives have become the grist of talkback radio, current affairs television and salacious gossip magazines. The monarchy has had little choice but to come to an uneasy accommodation with the intrusion of the media and the cult of celebrity. The Crown is no longer remote.

It would be silly to suggest that most judges face the same pressure as do members of the troubled and hounded Royal family. Many, probably most, judges and magistrates survive their judicial careers in spectacular anonymity.

Yet judges and magistrates also now live in a different age to that of Bagehot. However we may wish it to be otherwise it is no longer realistic to expect, let alone to demand, unquestioning respect for those holding judicial office.

And as the talk-back radio attack on the magistrate who dealt with the Walker case demonstrates, the walls of a judicial officer's personal anonymity can come crashing down at any time. No judge or magistrate can be wholly confident that this may not be their fate.

Mr Francis's outbursts were punished, most attacks on judges are not—nor for a community that values free speech, can they be.

Anyone in this room could give their own examples of extreme and sometimes personal attacks on magistrates and judges—even some made under the protection of Parliamentary privilege.

Consider what His Honour Justice Kirby had to endure, in his case with courage and humility, in the face of Senator Heffernan's widely reported allegations that His Honour had misused his Commonwealth car to trawl the streets of Sydney for rent boys. Those allegations were later proven to be false—but not before they had been published and republished many times

'Something must be done'

And, just as the tip of an iceberg is merely the visible aspect of the larger mass under the water, such ferocious attacks on judges are just the most obvious—and probably the least important—manifestation of a larger phenomenon.

Newspapers now openly 'campaign' on law and order issues. The print media and TV and radio broadcasters often trivialise decisions reached after great care by both judges and juries.

The use of brutal language to attack individual judges or the judiciary as a whole is not just an Australian phenomenon.

Prominent CNN presenter and commentator, Nancy Grace, on 17 October 2006 devoted her programme to a show entitled "Judges in Contempt" to focus on US judges' alleged indifference to victims and undue sympathy for perpetrators. The most superficial of research will discover thousands of similar examples in that country's media.

Repeatedly presented with such stories any community is likely to become persuaded that ‘something must be done’.

In a recent paper² Nicolas Cowdery DPP (NSW) prefaced his remarks by referring to the following passage from the NSW Law Reform Commission’s ‘Sentencing and Juries’ Issues Paper³.

It is right and necessary that the media report on crime and punishment and generate public debate ... However, stories on sentencing are often scant on detail to the point of inaccuracy, and fail to present a balanced picture. This can slant public opinion unfairly, and create unwarranted fear by suggesting that crime is out of control, and that the courts continually flout public opinion by imposing excessively lenient sentences. In this way, while claiming to reflect public opinion, the media are in fact creating it, with no realistic or accurate basis. This can feed into the legislative and policy process, since no policy maker wants to be seen as unresponsive to public views, or soft on crime.

Judges in the public spotlight

Getting the law right affords a judge no immunity against harsh criticism. Judges who decide cases on grounds firmly rooted in the soil of legal and constitutional rights nonetheless can be, and have been, attacked by politicians and media commentators. They can find their decisions portrayed as the product of a legal culture too concerned with minority issues and out of touch with mainstream democratic values⁴.

Nor is there any guarantee of immunity from media blood sport outside the court room. Consider the treatment by News Ltd of His Honour Ian Callinan while attending the 2004 biennial Australian Bar Association conference in Florence. Whatever the wisdom of the ABA in holding such conferences overseas it can hardly be controversial that Justices of the High Court attend. They have always done so—and much to the benefit of the relationship between bench and bar and scholarship within the legal profession.

However, to give ‘colour’ to a series of articles and editorials about judicial travel entitlements and the tax deductibility of overseas conferences for Australian professionals, photographs taken by the media of Justice Callinan ‘shopping’ were presented under the headline ‘Judges’ Florentine foray on the taxpayer’.⁵ In the text His Honour was described as ‘dressed to beat the heat in a cream linen suit and a panama hat’ and ‘strolling through cobbled streets bursting with monuments and bustling with summer tourists’. The article continued, ‘after a late lunch at La Madia trattoria, the judge wandered past the Duomo, admired tapestries at a market and peered at jewellery along the Ponte Vecchio—known as the “bridge of gold”—before retiring to his five star hotel’. Perhaps His Honour should wear a tracksuit and take up power walking?

² Tabloid Justice? Conference Paper, 10th International Criminal Law Congress, Perth, 22 Oct 2006.

³ ‘Sentencing and Juries’ NSW Law Reform Commission, Issues Paper No 27, June 2006, par 3.20.

⁴ See for example the lead article by Chris Merrit in the Weekend Australian which characterised the decision of the Victorian Court of Appeal to overturn the conviction of Mr Thomas as ‘allowing a mate of Osama bin Laden to walk free in Melbourne’ The rule that prevents confessions and admissions of guilt to be admitted in evidence unless they are voluntary was dismissed as a ‘nice legal argument’. The Weekend Australian, *Legal system releases the enemy*, 19–20th August 2006.

⁵ Natasha Bitá ‘Judges’ Florentine foray on the taxpayer’ *The Australian* 5 July 2004.

Justice Callinan was simply the fall guy—at the wrong place at the wrong time.

Few judges seek or enjoy any aspect of this increasingly voracious public spotlight—even when the media’s attention flatters them as sometimes, if much more infrequently, it does.

Australian judges and magistrates would shrink from emulating the example of Judge Lance Ito who appeared to revel in the public attention he received when he presided over the OJ Simpson ‘trial of the century’ in the United States of America. But as that case revealed, in the modern media age, even a judge can become a ‘celebrity’.

It is increasingly difficult, and possibly counter productive, for those holding judicial offices to stand aloof from all this. Of course we should be wary of falling for the trap of harking back to ‘the good old days’.

There never was a time when all media criticism of judges was fair and balanced. Sensational reporting of crime has been the staple of tabloid journalism since newspapers gained a popular audience. But we are simply burying our heads in the sand if we don’t recognise that today’s magistrates and judges face increased pressures and challenges from media that, in an ever more competitive environment, has been forced to increasingly privilege controversy, entertainment and ratings over hard news.

What is realistic?

How realistic is it for judges to continue to follow the advice given by Sir Frank Kitto only a couple of decades ago?

Every judge worthy of the name recognizes that he must take each man’s censure; he knows full well as a judge he is born to censure as sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all.⁶

Can the underlying judicial values of integrity, independence and openness that lawyers value as vital components of the rule of law survive the judiciary’s modern engagement with public familiarity?

Of course we lawyers would hope that the transcendent values underlying our legal system can survive any buffeting. But it is hard to deny that they are being challenged—and in danger of being eroded.

What then can be done? Just wishing things to be different will not change anything. One thing is clear—we have no big stick to wave. Freedom of speech and freedom to report the proceedings of courts are as fundamental to our system of government as is the rule of law.

Much as you might deplore irresponsible public statements by politicians about our judges and as much as we may be critical of the kind of reporting that Nicholas Cowdery condemned, a free society protects wise and unwise speech alike. Judges are not, and

⁶ Why write judgements? (1992) 66 *ALJ* 787 at 790.

cannot become, censors. In a representative democracy only the most egregious of comment can be prohibited.

So what can be done? I have no magic bullets but I do have some suggestions to make.

First, judges and magistrates need to clean up their own backyards and tackle anything that invites legitimate criticism. I know that much in that regard has already been undertaken. I applaud it.

Courts today are much more consumer focussed than ever before. Many courts have been pro-active establishing service charters that cover their administrative functioning—for example the Service Charter for the Registry of the High Court of Australia, the Victorian County Court's Customer Service Charter, the Service Charter of the Federal Magistrates Court and Court Charter of the Northern Territory Magistrates Court. These are important steps.

However not all Courts have followed these examples., Even Courts that have, have rarely (if ever) developed fair, transparent and efficient protocols extending their charters to the performance standards of, and complaints made about, judges and magistrates acting in their judicial capacity.

Agreeing a method of extending consumer rights without compromising the necessary fierce independence of judges' and magistrates' substantive decision making⁷ is a challenge we need to rise to.

Second, courts should get rid of all anachronistic rules that prevent televising or radio broadcasts of their proceedings. We cannot complain about distortion if we compel it.

But Courts should do more. Don't just rely on selective reporting. Be pro-active. Stream court video on the web. Make it routine. Let people see what actually happens—except where there is legitimate policy reason for non-disclosure, such as in family and child matters. Modern technology now makes this possible (and relatively inexpensive) for Courts at all levels of the judicial hierarchy. Sunshine is the best disinfectant.

Where media interest is obvious and misunderstanding of a complex decision likely, judges and magistrates should follow the example of the High Court and the Federal Court of Australia and make available a short accessible summary for the media—particularly if their actual decision is necessarily much longer.

Third, courts shouldn't be afraid of taking a few carefully considered risks. There are potential opportunities to go on the front foot. In that regard I hope the decision of the Victorian Chief Magistrate, Ian Gray, to allow his court to participate in the filming of *The Code—Crime and Justice* screening this year on commercial television is vindicated. If the

⁷ The ordinary appeal system is a strong guarantee allowing redress of substantive error—the kinds of matters I refer to here are the more humble issues like delay and complaints about unnecessary inconvenience, discourtesy or rudeness.

protocols have been carefully thought out in advance it seems to me to be a risk worth taking.

There are also going to be occasions when it may be necessary for a court, through its chief justice, chief magistrate or a media officer to communicate directly with the public.

In an address to the Australian Institute of Judicial Administration given in 2006, the Chief Justice of Canada, the Rt Hon Beverly McLachlin PC, said the following;

It is clear as Chief Justice Murray Gleeson has said that ‘Judges cannot engage in the political process’. Yet beyond this, I believe there are times when Chief Justices must speak out for the justice system. The public is entitled to understand how the courts discharge their duties and the vital role they play in governance, and this understanding may at times be essential if confidence in the justice system is to be preserved ... A false attack on a judge may require a crisp statement setting out the facts. And an overt attack on the independence of the judiciary may demand response. All this is part of our tradition, and must be maintained.⁸

Fourth, juries need to be treated with greater respect. Jury service is where the general public interacts most directly with the courts. I am a fan of Lord Devlin. I believe the jury is a pressure valve and safeguard against misuse of the criminal law. But if we want to keep the jury system we need to treat jurors as responsible adults⁹. Jurors should be paid a decent wage for their time as part of the judicial system and we shouldn’t waste their time. Let’s insist on all but the most exceptional preliminary legal points being resolved before a jury is sworn.

And, subject to the need to persuade a sceptical High Court, let’s not force judges to parrot complex formulaic statements in their summing up to juries. Too much of what is now required to be told to juries by judges to appeal proof a trial is expressed in language, and subject to distinctions, well beyond the understanding of many law graduates, let alone most lay jurors.

Fifth, expanding on the last point above, judges and magistrates should take a critical look at how their decisions are written. Numbered paragraphs have been a good step forward. That has helped accessibility. But there are countervailing trends. The length of many judgments, and sometimes their turgidity, has if anything got worse in recent decades. Don Watson has written about the decay of public language¹⁰ and his critique would apply to much of what is written by judges.

A short decision expressed in plain English should be the objective—not always possible—but at least the aim, of judicial writing.

Sixth judges and magistrates should do whatever they can to address any problems of expense and delay within their courts.

⁸ Rt Hon Beverly McLachlin PC, Fourteenth AIJA Oration in Judicial Administration ‘The 21st Century Courts: Old Challenges and New’ April 28 2006.

⁹ We also need to make sure that the selection base for jury service is broader and more representative—far too many community members can claim exemptions.

¹⁰ Don Watson *Death Sentence The Decay of Public Language* Random House, 2003.

The Chief Justice of Canada, in the address I referred to earlier pointed out that assistance is readily available to the rich and, in criminal cases, to the very poor but there is a growing middle filled with people who cannot afford legal services—and that justice that is too costly for people to afford is no justice at all. Her Honour continued:

In societies such as ours where law has become so pervasive, the accessibility of legal services cannot be seen as a luxury.

Judges, together with the bar, are the guardians of the legal system. If they do not speak out for access to justice who will? ... Innovative alternative dispute resolution techniques, mediation, litigant help centres, Legal Aid, pro bono bar programs. The list goes on—and must go on—until we have addressed the problem of access to justice.

Seventh, and most importantly, judges and magistrates should become involved with civic education.

Neville Wran AC QC recently gave an inspirational speech¹¹ to a recent law faculty graduation I attended. Wran pointed out that lawyers are now among the very few in our society who receive a civic education—‘and it shows’. He explained:

Through [the lens of a civic education] we witness the overwhelming power of the state; and come to understand why its power must be controlled. We are exposed to constitutionalism, to the rule of law and to the principles of due process. It is a privilege indeed. And with it comes a grave responsibility; to protect the dignity of individuals and to safeguard their fundamental rights.

Wran continued:

As lawyers we know that democracy does not inhere in the popular will alone ... Democracy has certain objective values, which remain constant, no matter what the public demands today, tomorrow or next week. Among them; that government shall be subject to law; that all persons shall have the right to due process before being punished; that every citizen shall in every circumstance be entitled to the benefits and protection of the rule of law ... They are the values that guarantee the life of a democracy—from generation to generation.

If the community as a whole knows nothing about why our legal system values such underlying principles, there will continue to be, as Wran pointed out ‘a yawning chasm between the views of lawyers and the expectations of the community ...’.

Judges and magistrates who pre-eminently share the privileges and responsibilities of lawyers must not misuse their position to become partisan advocates—but they can properly, and in my view should, involve themselves, and the organisations they belong to, in fostering civic education and advocating universal civic education in our schools and institutions.

That should involve everything from judges and magistrates speaking to community groups and service clubs to their taking up positions on advisory bodies developing curriculum for schools, colleges and universities.

¹¹ Speech by the Honourable Neville Wran AC QC at the Graduation Ceremony, University of Tasmania, Thursday 21 December 2006.

A related reflection on the shrinking role of Attorneys-General

Finally, I want very tentatively to put forward a much more contentious idea. I have come to have a niggling doubt about the wisdom of the decisions of the Commonwealth and the States to establish independent offices of Directors of Public Prosecution.

I suspect those decisions played a part in fostering an increasingly unhealthy relationship between the elective and executive arms of government and the judicial arm. The rationale for establishing independent DPPs was wholly legitimate—it was to guarantee that any decision to prosecute would always be taken for proper reason and without partisanship. But the decision was a solution in search of a problem.

No one advocating these changes thought it necessary to put forward an argument that Commonwealth or State Attorneys-General had in fact misused their power to file or withdraw Crown indictments.

It would have been hard to abuse those powers¹². There were institutional safeguards. The ‘small c’ constitutional conventions surrounding the role of Commonwealth and State Attorneys-General as first law officers were robust. Deliberate abuse almost certainly would have required the connivance of other Crown Counsel and the senior legal officers who advised the Attorneys.

Attorneys-General had to defend their contentious prosecution decisions in the media and in the Parliament. They had actual responsibility for the prosecution policy of the Crown—a weight of responsibility that anyone who has not signed an indictment can have little understanding of. The burden of carrying that responsibility is a strong antidote to cheap populism.

The immediate gain achieved by the decision to create DPPs was the greater *appearance* of independence—but this gain may have come at an increasingly high price.

The accountability of the Executive to the Parliament for its part in the criminal courts was removed and replaced by an arms length professional—and with it was lost much of the understanding of the respective roles of the Executive and the Courts that that discharge of the Attorneys’-General high constitutional responsibility had required of him or her.

Now when relationships break down over controversial issues we can be awkward spectators overhearing a very public dialogue of the deaf between DPP and Attorney-General—each with very little understanding of each others role and little stake in each others success. It is hardly conducive to good governance. And as the recent controversial events in the Doomadgee case illustrate, in the end there can never be an entirely hermetical seal.

¹² I am not blind to the institutional corruption of some state governments in the not distant past. But corruption of the kind uncovered in Queensland by the Fitzgerald Enquiry extended into the police force and into other notionally independent agencies. A government prepared to debauch the appointments of senior police would hardly cavail at debauching the appointment of a DPP. If that was ever to happen again the absence of any accountability for the prosecution policy of the Crown would shield abuse, not protect against it.

The Attorneys'-General retreat from their traditional role of first law officer was hastened by this divestiture of power to independent DPPs. In 1994 Daryl Williams QC MP argued that it was no longer appropriate for Australian Attorneys-General to defend the judiciary.¹³

Mr Williams argued that Attorney-General was first and foremost a politician rather than the chief law officer of the nation. His argument drew heavily on the fact that the Commonwealth DPP had the independent statutory authority to control prosecutions.¹⁴ After his appointment as Attorney-General Mr Williams behaved as he had argued in 1994.

While there is no shortage of critics of this approach—as recently as January this year Julian Burnside QC attacked the current federal Attorney-General for failing to fulfil the traditional role of the office in defending the judiciary¹⁵—it seems to have become the norm.

Decisions of successive State and Commonwealth Attorneys-General to restrict their appearances as counsel—and lessened reliance on their Opinions¹⁶, have also played their part in the office of Attorney-General now being perceived primarily as a political office.

For those anxious about the future of judges in an era of familiarity, this is a regrettable trend. As Julian Burnside QC noted judges have limited ability to defend themselves lest they enter the political fray. He observed:

I am not aware of there being a time in Australia's legal history when attacks were as personal as they have been ... Certainly I can't remember a time when the attorney-general was responsible for some of those attacks. Traditionally, the attorney-general would step forward and defend the judge ...¹⁷

It would be helpful if all future Commonwealth and State Attorneys-General reconsidered where all this is leading to and committed themselves to the view that the job of first law officer must be more than ceremonial and that it still includes the duty to champion the independence and impartiality of the courts and to defend judges who cannot defend themselves against unjustifiable public vilification.

Given Australia's constitutional requirement for a separation of powers at the federal level each of the three arms of government has an interest in the health of and a requirement to respect the roles of the other parts. That is far from the current state of affairs. Even when the relationship is publicly courteous what is said privately is too often cheap, nasty and

¹³ Daryl Williams QC MP, Paper presented to the National Conference, Courts in a Representative Democracy, 11–13 November 1994.

¹⁴ Mr Williams acknowledged that the Attorney retained residual power to give directions to the DPP but correctly observed that the power was rarely exercised.

¹⁵ Ruddock 'fails to defend judges' *The Australian* 9 January 2006.

¹⁶ In the early years of the federation Commonwealth Attorneys-General regularly provided Opinions to other ministers and to heads of departments. The AGPS has published two volumes under the title *Opinions of Attorneys-General of the Commonwealth of Australia*. The first volume (published in 1981) covers the years 1901–14 and the second (published in 1988) 1914–23. The series has not been continued.

¹⁷ Above, note 14.

disrespectful—on both sides. It may be vital to restore aspects of the quasi-judicial role of the Attorney-General as first law officer if we want to see a better outcome.

The health of our judicial system is bound to continue to suffer if no one in the legislature or the executive feels any requirement to take some responsibility for the well being of the relationship between those arms, and the third arm of the Australian government, the judiciary.