

CONFERENCE

Confidence in the Courts

9–11 FEBRUARY 2007 | CANBERRA



Public Confidence in the Judiciary: Some historical observations, and a proposal

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PUBLIC CONFIDENCE IN THE JUDICIARY: SOME HISTORICAL OBSERVATIONS, AND A PROPOSAL

In an era of close scrutiny of the work of the courts, judges and what may generally be called the criminal justice system, a few observations and speculations from history may be useful.

In 2006, the Australian courts and judges are subjected to more scrutiny than has historically been the case. It is true that the exposure of the courts to public view is a long-standing principle of the Anglo-Australian legal system, but in the 21st century new technology has dramatically increased the level and the nature of that exposure. It would be an unusual judge indeed who took no notice at all of public comment on the law, even if only for the purpose of consciously ignoring it. There are good reasons for judges to be interested in the way in which their activities are judged by the commentariat, which includes the public who ring up radio stations, those who respond to them, and those who editorialize in mass newspapers.

I would like to make some observations about this subject by attempting to identify some pertinent questions, and then asking how those questions might relate to the courts and judges in three historical eras: 1806 and thereabouts, 1906 and thereabouts, and the present: 2006, 2007.

What are the issues?

The general subject areas of public confidence in the courts and judges requires some linguistic analysis before anything meaningful can be discussed. One may ask:

Who is the public? Is it the entire population, or particular groups or institutions within the population? Is it necessarily to be assumed that public confidence in the courts and judges is always a good thing? Is “confidence” to be regarded as relating to the whole court and judicial system, or only to parts of it? At what point in time is public “confidence” to be considered a single point in time, or over time? As to what in particular may the confidence be said to relate to the strict application of the law? To the fair application of the law? To the application of the law in a particular interest? To honesty and freedom from corruption? To the physical or mental competence of the judge? To the judge’s degree of contact with ordinary people? To the religious affiliations (if any) or the judge? To the judge’s racial background? If there is a loss or failure of confidence in the courts or judges, what should follow?

It seems to me that it is necessary to contemplate some or all of these separate but related questions, rather than to ask one bald question as to whether or not the public has confidence in the courts and judges. No doubt there are other relevant questions, but I will

consider some of the ones I have identified, in the course of this very brief historical conspectus.

Circa 1806

Let us imagine ourselves back in the year 1806, shortly after the establishment of the institutions of what became modern Australia. Although there was then no radio, people still talked about and evaluated those who ran the criminal courts, such as they were. The Judge Advocate was Richard Atkins, who in 1796 had succeeded the fair-minded Captain David Collins as the closest thing to an overall administrator of the new colony's criminal justice system. The Atkins period lasted from 1796 until 1810, with some interruptions.

“Atkins was to prove one of the most interesting judicial appointments in Australian history. A man who has both a serious drinking problem and the power of life and death over his fellows is almost bound to be a problem; and so Atkins proved to be.”

The *Sydney Gazette And New South Wales Advertiser* for 1806 records much of Atkins' splendid judicial work, and that of his fellow magistrates in the new colony, from the official perspective. The reports emphasise the temporal and divine rightness of the punishment of those punished, the certainty of punishment and the wisdom of the authorities.

This was a time of fear about France, the ideas of the recent French Revolution and of the ambitions of Bonaparte. The *Gazette* of March 30th 1806 records this:

“Joseph Smallsalts, a prisoner for life, was on Tuesday last brought before the Judge Advocate, charged with having uttered expressions of an inflammatory and seditious tendency ... the offender was ordered 100 lashes ... and sent to public labour at the Coal Mines at Newcastle. He was permitted to travel to Newcastle ... with a label on his back, on which Thomas Paine was decyphered in large characters, the culprit having declared that “he would be worse than Tom Paine if thwarted.””

This was the official mood in Sydney during a time of serious hunger brought on by crop failures, and worry that the large numbers of prisoners in the population would be unmanageable unless the authorities, including the courts, showed a firm hand.

During 1806 there were many instances of people attempting to stow away on vessels leaving the colony, thereby to avoid their sentence of transportation, and of the reverse: sailors on vessels trading to Sydney trying to desert to avoid the appalling conditions seamen suffered in that era:

“William Stabler was yesterday brought before a Bench of Magistrates; and ordered to Castle Hill, for harbouring two seamen, deserters from the Aurora South whaler, in disobedience of a General Order issued the 22d of September 1804...”¹

For ordinary kinds of crime, penalties were very severe, by modern standards. The *Gazette* of October 5 1806 reported that:

“On Friday the Court [of Criminal Jurisdiction] met, and proceeded to the trial of Henry and Matthew Jackson ... for stealing wheat the property of Government.

¹ *Gazette* (cited before) June 22, 1806.

“The prisoners pleaded guilty to their indictment, and showing a proper contrition, were sentenced severally to receive 300 lashes, and the gaol gang.”

On the same day, however, William Organ was indicted for stealing nine sheep, and (with one other) found guilty after trial,

“... the Judge Advocate expatiating with his usual fervour on the heinous nature of their crimes, which demanded the severest retribution...”

Organ was sentenced to death on the Friday and in fact hanged on the Saturday, the day usually appointed for such business.

1806 was the year in which Captain Bligh arrived to take over the colony as Governor. The officer class of the colony immediately and hypocritically expressed their congratulations to the reformist Bligh. Their formal address to him upon his arrival included the following:

“... it is the indispensable duty of us all to combine with our endeavours ... a reverential regard to the Laws, and a cheerful acquiescence in such measures as Your Excellency may adopt, to improve the true interest of the colony.”²

Those who were responsible for these constitutionally very proper observations were the very people who, less than two years later, perpetrated a coup against Bligh, for reasons which at least included the financial interests of the officer class in maintaining control of the liquor trade in the colony.

1806 brought news to Sydney of the great event of 1805 – the battle of Trafalgar and the death of Nelson – and the Admiral’s famous order before the engagement: “England expects every man to do his duty.” That formulation says a lot about Britain and its colonies, and indirectly speaks about the courts and the law. Like the tars at Trafalgar, England expected every man assisting in the new colony of New South Wales to do his duty. This particularly included courts, one of the main instruments by which failure in duty was supposed to be punished. In this context, the kind of examination which is being undertaken at this conference would have appeared an oddity. What did it matter if Joseph Smallsalts preached for Tom Paine and liberty? No doubt it mattered to Joseph Smallsalts, but it mattered not at all to those charged with administration of the law, except to the extent that the invocation of Tom Paine was a threat to security, just as the invocation of freedom for Ireland had been a threat in 1804 when convicts had attempted a rebellion at Vinegar Hill near Toongabbie, north-west of Sydney. The clear point of the courts, lawyers and law in Sydney in 1806 was social control: a just outcome in court may have been desirable, but it was incidental.

There were at that stage no radio commentators, no elections, no party politics in the modern sense – although there was intense factional fighting among and between the officer class and the settler class in the new colony – and no newspapers except the one authorized and rigorously official outlet, *The Sydney Gazette And New South Wales Advertiser*. This is not to say that the courts and magistrates were not the subject of

² *Gazette*, August 17, 1806.

comment, but most of this would have been oral, and unrecorded. There were official comments, as governors sent back to England despatches dealing with various aspects of the administration of the colony, but these were not couched as judgments of juristic ability. Rather, they were generally concerned with the availability of someone who could be regarded as at least minimally qualified. It was not until the appointment of Francis Forbes to a proper civil court in 1823 that New South Wales had the benefit of a real jurist. Between 1788 and 1823 New South Wales was essentially a penal settlement, and any question of whether members of the public at large had confidence in the courts, magistrates or the courts was essentially irrelevant. What convicts thought would have been regarded at that time as supremely irrelevant.

Turning to some of the questions which I raised above: the “public” consisted of the soldiery, convicts and some settlers. Their views were by no means all the same. Convicts generally regarded the system of courts and judges as one with the political system which had sent them in chains to Botany Bay.

Generally, they could expect that if they were dealt with by the law, they would be dealt with harshly in the sense that they would be disbelieved if their version of events conflicted with that of an official or a settler. They might expect, in fact, no hearing at all. The soldiery were concerned to maintain law and security above all, particularly if in so doing they could make some money out of it. Similarly, in general, with the settlers. As to the actual behaviour of the magistrates, in 1806 there was no doubt a belief by many people that Judge Advocate Atkins would not necessarily be sober or alcohol free during the proceedings. There was, of course, no mechanism for ensuring correct judicial conduct on the bench or in judgment, other than an appeal to the de facto emperor of the colony, the governor. The governor in 1806 was King in his last days, and Bligh from August onwards. Neither Governor was deeply interested in whether the public – however defined – had confidence in the courts and the judges: the question always critically before the governor in the early days was “Do the courts assist me in keeping control of the colony?” As the rebellion of 1808 demonstrated to Bligh, the answer was “not always”.

Circa 1906

By 1906, the political, demographic, social and economic circumstances were radically changed.

During the intervening century, one colony had split, and others had been established. Responsible government had been established beginning in the 1850's. At century's turn, the various colonies had federated. There was semi-universal suffrage based on substantial protected industries in the two main colonies, and whereas in 1806 the substratum of the colony was comprised of convicts and emancipists, by 1906 there was a politically active electorate in both city and country. There was an identifiable working class whose egalitarianism was a distinct factor relevant to all social institutions. It was certainly relevant to the courts and judges, because the system of trial by jury, inherited from the English common law, had been established in all the colonies mid-nineteenth century.

The fact of the widespread use of common law juries in both civil and criminal trials dissipated some of the cynicism which the emancipist class certainly felt about official law

a century before. There was a major battle with officialdom before juries were introduced into the colonies, and the argument that there would be greater confidence in legal institutions with civilian juries was vigorously and successfully put.

Juries alone, circa 1906, were no guarantee of perfect justice. Sydney was a small town, and the male jury panellists who assembled on the lawn outside Darlinghurst court for jury trials were often targeted by the touts of various crooked solicitors in order to secure, in due course, the magic two words in the jury's verdict. This practice continued up until about the middle of the twentieth century. And not only in New South Wales, but throughout Australia, the verdicts of country juries were regarded as likely to be biased in favour of locals.

Notwithstanding these deficiencies, the use of juries in the majority of important legal cases at least engendered some confidence in the less well-off sections of society that courts would not necessarily be run entirely for the benefit of the rich and powerful.

In 1906, there was a case in which the state Premier, Wade, became very disgruntled over a High Court decision (*Prior v Sherwood*, 3 CLR 1054). It related to the legality of betting shops, as did *Ex parte George* (1906) 6 S.R. (NSW.) 82, a State full court decision. There, Chief Justice Darley expressed frustration at being required to rule that the appellant whom he no doubt regarded as a low life character was able to escape conviction. The charge under appeal was wrong because although the accused had been found at betting premises at 239 George Street Sydney, he was wrongly charged with being found without lawful excuse in a room which *had been* used on the said day for illegal betting. The charge should have related to the *time of the defendant's arrest*. The Chief Justice said:

“These men, as a rule, have large means, and can afford to employ Counsel, whose duty, of course, it is to take every possible pointing favour of their clients; and thus, time after time, miscarriages of justice occur, and this nefarious business is carried on with impunity.”

I mention this case to raise the relevance of one of the question I posed above: if there is a loss or failure of confidence in the courts, what follows? Bloody revolution? The abolition of courts? Refusal to permit lawyers to appear? In this instance, Darley C.J. was pointing the way to parliamentary amendment of the law, so that what he regarded as a loophole could be closed. He was not suggesting anything more radical than that. And indeed the Gaming and Betting Act was amended frequently thereafter, to close off various alleged loopholes. Gaming and betting continued to be a central theme in NSW politics over the next century.

Circa 1906, parliament amended the law in another area to promote confidence in court proceedings. In 1907, a grudging step towards the modern system of legal aid in criminal cases was established, in the form of the Poor Prisoners Defence Act. This followed an English statute of 1903. In comparison with modern legal aid legislation, the 1906 mechanism was inadequate, but it did provide a capacity in certain cases where there may have been a real defence which could not otherwise have been properly advanced by an indigent accused, for that to be done.

One pointer to public scepticism about the law and the legal system a few years before 1906 was the reaction to a case in 1902 when Attorney General and Minister of Justice B.R. Wise was criticized. On the 26th of September 1902, Wise (purporting to exercise his powers as Minister of Justice) advised the Governor Sir Harry Rawson that he should order the remission of the balance of a sentence imposed on one Moss Morris Friedman.

Of itself this was not unusual. Since 1880, the Minister of Justice had given similar advice to the Governor in hundreds of cases. In this instance, however, there were three problems: firstly, Moss Friedman had served only one day in gaol of a term of twelve months for an offence of receiving stolen goods; secondly, Friedman was freed from Darlinghurst gaol at 5 pm on the 26th, but the Governor did not sign the order for release until the 27th; thirdly, there was a placard campaign around Sydney asserting (which was widely believed) that the Attorney-General and Minister of Justice B.R. Wise was under financial obligations to Friedman, a dealer and moneylender. The controversy over this error of judgment (if that were all it was) came within a hair's breadth of causing the government of Premier John See to fall – as Parkes had fallen in 1874 over the release of the bushranger Gardiner. Gardiner had at least served ten years of his savage 32 years sentence; Friedman had served only one day.

Charged with receiving stolen goods, Friedman's solicitor Nathan briefed J.H. Want KC for the defence. The jury trial was held before Acting Supreme Court judge Rogers KC. Rogers was highly regarded, having previously been a District Court judge, first President of the Land Appeal Court, and a Royal Commissioner. Charles Wade KC (later Attorney-General and Premier) prosecuted.

The trial commenced at Central Criminal Court Darlinghurst on the 24th of September 1902. The key prosecution witness was the young man who had been left in charge of a shop. During the owner's absence overseas, the youth sold off a quantity of goods without the actual authority of the owner. However, he had been left in charge of the shop, and it might have been thought that he was authorised to sell the goods in the shop.

Friedman was a moneylender and dealer in goods. On 30 July 1902 he bought several boxes full of "fancy goods" from the youth. Friedman took the goods back to his own shop and displayed them. The owner of the business returned from overseas, accused the boy of theft and Friedman of receiving stolen goods. Friedman was duly charged.

The point was, when Friedman bought the goods, did he know that they were stolen? Or did he just think that they were a bargain of which he might profitably but legitimately take advantage? The jury found the accused guilty, and the judge felt compelled to impose a gaol sentence, even though he personally felt that the jury decision was wrong. Wise's precipitate decision to remit the sentence – thereby effectively annulling the jury verdict – was based largely on the expression of the view by the judge that Friedman was innocent, coupled with strong representations from other legal quarters. Thus the agitation, and the parliamentary motion against Wise.

The significance of the Wise-Friedman case is not that Wise was a crook – he probably was not, in fact – but that there are many and varied ways the public can become

concerned about the correctness of the system of justice. One could not seriously criticize Carruthers, leader of the opposition, from heavily attacking Wise and the government. The action by Wise was injudicious, if not corrupt. There are mechanisms, where Parliament is available, to expose error based on corruption. And in the Freidman case, it may have been possible for Friedman to have had the matter dealt with by a post-conviction inquiry under section 475 of the Crimes Act, although it would have been difficult for any inquiry of that kind to have directly negated specific finding by a jury based on at least some evidence against the accused. It was only in 1912 that the Criminal Appeal Act was passed, allowing a more effective mechanism for the correction of error leading to miscarriage of justice, including erroneous fact-finding by juries.

Circa 2006

Moving along a further century to the present, we note once again profound social, demographic, political and economic changes providing an environment in which courts and judges operate. The population has increased from about four million people in 1906 to over twenty million now. Australia remains a federation under a sovereign, but the reins from Downing Street have become mere phantoms. The English common law tradition remains the foundation of our legal system, but juries now sit in judgment in but a sliver of our total legal caseload. The former capacity of judges to deflect the focus of controversy onto the jury has disappeared in all except very serious criminal cases: nowadays the great bulk of decisions are made by judges or magistrates sitting without juries, and the focus of attention is on the judicial officer.

That focus is intense. Whereas in 1906 the camera was a rare mechanism into which one peered, surrounded by family members making an effort to remain still, these days it is ubiquitous. It captures still moments and all kinds of indoor and outdoor activities. Television cameras are thrust in front of defeated litigants or complainants who are invited to express their outrage at the legal system for the benefit of the nightly news bulletin. Ministers of the Crown facing elections are expected to comment publicly on decisions made minutes or hours before, as to evidence of which the Minister can have but the slightest idea, and that conveyed second-hand by a reporter who may have himself or herself not actually been present in the courtroom when the relevant evidence was being presented.

Is this immediate and almost unlimited exposure a good or a bad thing? We may think it has two aspects. Judges privately and rightly fume when they hear or see off-the-cuff and damaging remarks made by people in positions of authority based on inadequate information, reflecting adversely on courts and the legal system in particular cases. This in fact happens often. On the other hand, the public has a right to be informed about court decisions, and a right to hear what relevant people have to say about them. Court decisions, and court processes, are not the private province of judges and court officials. They often affect the way people live and relate together; and they are often intrinsically fascinating. Lawyers in private often discuss with passionate interest the behaviour of witnesses, the character of litigants and the political ramifications of decisions by courts.

In 2006 we share with 1906 the possibility of scrutiny by Parliament and the newspapers, but there is added to that a more extensive appeal process, whereby civil litigants can

expect to have their case reviewed by the Court of Appeal, and criminal litigants can have cases reviewed in the Court of Criminal Appeal. Newspaper editors, Ministers of the Crown, litigants and their friends and associates should always bear in mind that these are very real avenues. The results of cases heard by a single judge are often altered on appeal. Not a day goes by in the Australian legal calendar without some primary decision being reversed on appeal. Although I have seen no precise research on the point, my impression is that the regularity of such occurrences nowadays is in distinct contrast with the position circa 1906.

No Crisis

Whatever be current concerns and speculations about confidence in judges and courts, we need to keep some perspective. Criticism of the courts is not new, even though it may take new and different forms. Well before 1788, English literature is replete with satires on law, lawyers and the courts. Around 1600, the reverend doctor Donne, sometime reader in Divinity at Lincoln's Inn, made some observations about the character of lawyers which would have struck a chord with the observant public. He wrote in his famous Second Satire that time

Hath made a Lawyer, which was (alas) of late
But a scarce Poet; ... he throwes
Like nets, or lime-twigs, wheresoever he goes,
His title of Barrister, on every wench..."

Mid nineteenth century "Bleak House" doubtless did not inspire public confidence in the processes of the Chancery Court, and the defective English law and procedure which Dickens savagely satirized was reflected in colonial New South Wales. An inquiry into the unreformed procedures in Equity in the colony of New South Wales showed them to be grossly deficient, in that it was necessary for preliminary fact finding to be conducted by an unqualified court official; and then only, in a second exercise at further expense, the law was dealt with by the judge. There were delays of "Bleak House" proportions. There was very little public confidence in such processes; that very lack of public confidence, and the criticisms published in the press reflecting it, actually helped in the process of law reform. Sometimes a lack of confidence in the processes of the courts is entirely justified, and leads to improvement.

Of course, it is not only lawyers who are subject to scrutiny: these days, all professions attract criticism, not much of it as literate as the famous quatrain by Humbert Wolfe about the fifth estate:

You cannot hope to bribe or twist,
Thank God, the British journalist.
But seeing what the man will do
Unbribed, there's no occasion to.

As I write, on the 15th of January 2007, a street poster for the *Sydney Morning Herald* screams out about "Rorts" by "cancer doctors". The story related to allegations or findings of overcharging by specialist medicos, and the banner poster would hardly have been calculated to raise the spirits of the medical profession. But doctors have to accept, as journalists and judges and lawyers have to accept, that we live in a world where there is

close scrutiny of professional and public conduct. Much of the reporting of this scrutiny is exaggeration, or even simple calumny; but some of it is true. Even the most meretricious of television “public affairs” programs, with their 6.30 p.m. doses of new diets, feuding neighbours and trash celebrity, sometimes engage in investigative journalism of the highest order. In a society which free speech is a treasured value, it is simply necessary to accept that sometimes we just have to take the good with the bad, and do our best to separate value in public comment from dross. Judges do this all the time in the courtroom, in the assessment of evidence; there is no reason to think that the public generally is incapable of similar evaluation in important matters. As both Abraham Lincoln and Phineas Barnum are supposed to have concluded, “... *you cannot fool all the people all of the time.*”

I recall as a law student in the early 1960’s the powerful impact of de Smith’s groundbreaking book on administrative law entitled “*Judicial Review of Administrative Action*”. This synthesised a great deal of English and Commonwealth public law after the flowering of the welfare state either before or shortly after World War 2. The statutory regimentation necessary to win the two great military conflicts of the twentieth century, coupled with the legislated compassion which was the welfare state, resulted in much arbitrary exercise of governmental power. Many – perhaps most – of those governmental or tribunal decisions were socially beneficial, but some were unjust in the particular, if not in the general.

The regime which we now know as administrative law – reflected in the AAT and its clones or near clones, and even the Federal Court itself – is the product of a common law and statutory purpose of remedying the worst features of extensive statutory regulation in many spheres.

On the whole, this judicial review is a splendid thing, a great achievement of what might be called the common law enterprise during the twentieth century. Judicial review of the work of government doctors, hospital administrators, customs officers, police, town planners and even Minister of the Crown has, over the last half century, resulted in the righting of many wrongs in particular, and – in some cases – in the general.

However it could hardly be imagined that such scrutiny, applied by judges across a wide spectrum of public decision-making, would not stimulate corresponding scrutiny of the scrutineers. The question which the Roman satirist Juvenal asked in about 120 A.D. – “*Quis custodiet custodes ipsos?*” (“*Who will guard the guards themselves?*”) – has correspondingly been asked about modern judges and their judging. Juvenal’s *custodes* were the mothers of promiscuous young wives, supposedly guarding their virtue but in fact colluding in cuckolding foolish husbands. No such perverted impulse is relevant to a modern judge, but modern judges have been – and no doubt will continue to be – guilty of various human and professional failures. The scrutiny that may reveal such failures cannot, in the modern era, realistically be evaded. Modern judges have to accept that not only their judgments but some aspects of their conduct may be looked at with a critical eye. The days of the judge as a kind of secular god, like the era of the deified doctor, are long gone. We can expect continuing scrutiny, a lot of it unfair and much of it unhelpful. No doubt there are judges these days who will retire early because, given the burden of scrutiny,

they would rather be gardening than be subjected to a front page attack in the *Daily Claw* because of some sentencing decision – perhaps one in a busy day of twelve sentences handed down in a busy provincial court.

There may be such early retirements, but judges need to remember that they do not *have* to resign under pressure. Judicial independence means that judges can legitimately ignore unfair attacks on them. The judicial salary and pension are and should continue to be guaranteed. Judges cannot be bullied, unless they – or the system – allow bullying to be effective. Most Australian judges have a very clear understanding, always in the forefront of their minds, of the critical importance of the principle that they must not allow themselves to be bullied. It is an important aspect of maintaining public confidence in the judiciary and the courts that the public should be aware that judges cannot be bullied.

One modern position, expounded by some Attorneys-General, is that the role of that high office no longer extends to defending judges. For several centuries at least, it has been a convention of our system of government that the notion of separation of powers was assisted if the First Law Officer would from time to time, when necessary, publicly defend judges when criticized unfairly. Such defences can be found in the Hansards of all those Australian parliaments after the Hansard system was introduced, and before that, when there was only newspaper reporting. The observations which Attorneys would make in these cases usually involved a defence of the integrity of the judge, or an observation that the criticism was unfair because it was based on inadequate information.

The modern position of some Attorneys General in declining to play this role is, in my view, unwise. It demonstrates a refusal to acknowledge the importance of the doctrine of the separation of powers. The late Johannes Bjelke-Petersen was famously ignorant of the doctrine of the separation of powers, but at least it could be said for him that he did not have a law degree.

It seems to me that there is little immediate prospect that First Law Officers will resume their traditional role in this respect. This may be regrettable, but it is a reality.

A Proposal

Modern Attorneys General are rarely eminent counsel (such as Hughes QC was when he was in the Federal Parliament, or King QC was when Attorney of South Australia) and prefer a position on the sideline, out of the way of rough tackles by the *Daily Claw*. Few Attorneys in recent years (although there are several exceptions) have had the experience or fortitude to take the traditional approach. In these circumstances it is important that where judges are attacked, there should be a person who performs the function which most present Attorneys General no longer fulfil.

It is of course possible for a judge under attack or scrutiny himself or herself to go on television, or to arrange a newspaper interview, but this will only rarely be a sensible thing to do. Usually the traditional position of dignified silence will be preferable, since the alternative may be rancorous retaliation in the heat of the moment, with unhappy consequences.

A judge under attack might possibly be defended publicly by the head of jurisdiction of the particular court in question, but in New South Wales at least, that provides a problem. By statute, most of the heads of jurisdiction are members of the statutory body to which members of the public may direct complaints against judicial behaviour. Obviously it would be unacceptable for the Chief Justice or the Chief Judge to be on the television defending or explaining the conduct of a judge under current media attack if that very issue would possibly come before him and the other heads of jurisdiction should there be a formal complaint lodged, as distinct from a general newspaper “spray”.

Another means by which judicial decisions or conduct can be explained is through the institutional organs of the legal profession. The Law Council of Australia and the various law societies and bar associations are helpful in this regard. A strong Bar Association President, such as the present NSW incumbent Michael Slattery SC, can do much of value to assist in explaining or defending the work of courts. But such institutional officers are very busy, and are involved not only in their own legal practices, but in promulgating many and various messages which legal professional organizations wish to expound in their collective interests.

My suggestion is that the judges in their institutional capacity should nominate in each state or territory one or more retired judges or eminent academics who could, on an honorary but substantial basis, perform this defensive or explanatory function. The persons best suited to this task would be lawyers with some background in the rough and tumble of politics, and some political nous. Often, blunt talking will be called for. When court judgments are handed down at 10 a.m. and the matter is being reported on radio at 10.30 a.m. and throughout the day, only rarely will the judgment have actually been read by reporters or by Ministers of the Crown, let alone by radio commentators or callers.

Usually the only immediate comment by such retired judge or eminent academic will be to point out firmly that those commenting have apparently not read or taken into account all of the relevant evidence or the whole judgment, and to call for caution. Perhaps a further defence or explanatory comment will be justified over time, depending on the circumstances. Such a system would, it seems to me, assist in the proper maintenance of public confidence in judges and courts.

I say “proper” maintenance because, as I have indicated by some brief references to history, there are occasions when a lack of confidence in institutions leads on to legislative change – even to improvement. If a large proportion of the public of NSW lost confidence in the police force, or at least in some aspects of it, in the years before the Wood Royal Commission and its report, that was a good thing. Blind faith in institutions is the royal road to nasty forms of misgovernment. Some or all of that loss of confidence has no doubt been restored by the reforms effected following the Wood Report.

Like police, doctors, journalists and most public officials, courts and judges will continue to be accountable to the public, to the press and to Parliament. Levels of public confidence will vary, and will be different about different aspects of courts and the work of judges. Judges have to be vigilant institutionally to ensure that their work is understood and

appreciated for its value; and have to accept that judicial failings will not have a curtain drawn over them.

Politicians will forget at their peril that there is in modern Australia a deep seated and powerful commitment to the Rule of Law, however variously that notion may be defined. Members of the public are perfectly capable of holding firmly to this value, and at the same time resenting or denigrating a particular court, or judge, or decision – just as a mother who deeply loves her child may administer condign punishment to an errant teenager, and just as a wife who has a profound commitment to her husband may kick him out of the house when he comes home drunk. Lack of confidence is not necessarily permanent. So far as public institutions like the courts are concerned, my opinion is that in the year 2006 or 2007, most Australians are well satisfied that the courts are vitally important in the social fabric, and would not tolerate the tearing down of that fabric; but are equally well satisfied to join in any criticism or attack on the courts or judges which has merit in the particular.

For politicians, there is a narrow path to tread when they embark on attacking judges and the courts. As I write, a state election campaign is under way in New South Wales. As always, issues of policing and the court system are to the forefront in debate. Several senior politicians have employed rhetoric which, once the election is over, they might not be minded to employ for perhaps another few years. It is prudent for those engaged in election campaigning to remember that in cases where there is an appeal process available, or where there is a trial or other relevant legal process in the offing, or indeed actually in progress, the possibility of comment amounting to punishable contempt of court needs to be borne in mind. Of course, the law of contempt is generally obscure and its prosecution eccentric, but a core of situations where serious damage can be done to the legal process by comment or rhetoric remains. In a society valuing free speech, the law of contempt of court ought to have a very limited operation, as it in fact does. However in my opinion that limitation ought to arise through a limited definition of the offence rather than, as now, primarily through political control of the process of prosecution. For contempt not in the face of the court, it seems to me preferable that the decision to prosecute should be made by the independent Director of Public Prosecutions, rather than by the political decision of the Attorney-General.

I have in my time been a Ministerial Adviser to three Attorneys-General and three acting Attorneys, in two states. In my experience, Attorneys-General are not keen to prosecute and alienate the proprietors of the *Daily Claw* unless absolutely necessary. This necessity becomes more limited as elections approach. This is not the way the law should operate. However, a reform along these lines is unlikely, and I for one am not giving up all private pleasures until it happens.