A JCA View of Sentencing

Australian judicial officers – judges and magistrates alike – are bound by the oath or affirmation of their office to administer justice according to law, without fear or favour. Justice so administered is essential to the survival of Australian democracy.

A free and fearless media is equally essential to good democratic governance. It is the media's job to observe the exercise of power, and to expose impropriety and inadequacy in that exercise. The courts exercise power. So the courts are very much fair game for media scrutiny.

The media also exercises power. It sometimes does this in ways designed to increase its audience rather than fulfil its proclaimed mission to meet the people's right to know. When, on important subjects such as sentencing, those segments of the media which devote a large proportion of their space to it obscure for commercial reasons information essential to an informed knowledge, the media becomes a threat to democracy. Public confidence in the courts is necessary for their legitimacy; and without the acceptance by the public of that legitimacy, the administration of justice will be ineffectual. To take one example: victims need to have sufficient confidence in the system to report crime. And without the co-operation of complainants, witnesses and jurors, prosecutions would not be effective.

On a more general and fundamental level, a lack of confidence in the criminal justice system will adversely affect confidence in the courts as the independent third arm of government whose duty it is to preserve that essential element in any civilised society: the rule of law.

The right and duty to punish those who offend against the criminal law is confined to the courts as the judicial arm of government. They must act in accordance with the law in so far as it enacted by Parliament, and otherwise as declared by those courts whose judgments bind the others. Judicial officers are under the most solemn duty to sentence accordingly, regardless of the attitude of the media or of government.

The media is interested generally in the administration of the criminal law, and some in the media are particularly interested in issues surrounding sentencing. That interest is reflected in news stories about particular sentences which courts have imposed on convicted offenders, and in commentary about sentencing in general. These stories and commentaries are very often intended to carry a message to the community, and the courts. That message is that the courts are too lenient.

The courts hear this message. They know that it resonates with the public. So does the tabloid media. The more that segment of the media can encourage that resonance, the better are its interests served. The difficulty is that, on the best available evidence, the message is false. The media know that it is false; yet the tabloid media persist in telling their audience that what is false is true.

Rigorous research over decades and across many countries, including Australia, conducted by properly qualified experts, has produced consistent results. Among these is a conclusion which is beyond rational challenge. It is that the media is selective in its reporting about sentences. It selects stories, and aspects of stories,

with the aim of entertaining rather than informing. In particular, it either ignores entirely, or submerges, the opinions of bodies such as sentencing advisory councils which were established by parliaments to facilitate the dissemination of accurate sentencing data and to provide advice, education and information to the community on sentencing issues. These bodies could be expected to provide a different, but particularly well informed, perspective.

The result is that public misconceptions are rife.[1] This in turn leads to a conclusion of especial importance to the judiciary. It is that the punitive public, a public demanding harsher penalties, does indeed exist – but it is a creation of media misinformation. When given details of the considerations which were taken into account by a judge or magistrate in reaching a sentencing decision, public sentencing preferences change. They become very similar to those adopted by the courts.[2]

This is a perspective which the tabloid media does not generally make accessible to their audience. On the contrary, the views of "judges, lawyers, academics and libertarians" - views to which the media do not enable their audience to have anything like full access - are summarily dismissed; and those who hold them are said to be in need of "a reality check" (The Melbourne *Herald Sun*, Monday 5 December 2011, p 5). In the process, the tabloid media paints a picture of crime that overestimates its prevalence; and it concentrates on sentences which it can portray as lenient.

The most recent research on this topic, and its treatment by the media, powerfully supports these propositions. On 10 February 2011, the Federal Minister for Home Affairs and Justice (Brendan O'Connor) released *Public judgment on sentencing: final results from the Tasmanian Jury Sentencing Study*. The study enquired into the reaction of jurors to the sentences imposed following trials in which those jurors have decided whether or not the accused was guilty. It was led by two eminent legal academics, Professor Kate Warner of the Faculty of Law at the University of Tasmania and Dr Julia Davis, a member of the School of Law at the University of South Australia. It was funded by the Criminology Research Council of Australia. It was the first to consult jurors who participated as such in real criminal trials.

The study examined the responses of 698 jurors who between them had participated in 138 such trials. 90% agreed that the sentence handed down following the trial in which they had found the accused guilty was "very" or "fairly" appropriate. 52%, many of whom agreed that the judge's decision was appropriate, chose a *more* lenient sentence than that which the judge imposed.

The results of the Victorian State Government's sentencing survey, published in December 2011, must be seen against this background. That survey had its usefulness. In particular, it gives an idea of the respondents' views of the relative seriousness, or gravity, of different offending. But as a survey of the attitudes of the public generally, it has its limitations. It amassed the opinions of 19,000 Victorians out of a total of some 4 million. The respondents were those who bothered to respond; they were not selected according to criteria accepted as statistically valid.

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1 *Myths and Misconceptions*: *Public Opinion versus Public Judgment about Sentencing*, Sentencing Advisory Council of Victoria, July 2006, 13.

2 *More Myths and Misconceptions*, Sentencing Advisory Council of Victoria, September 2006, 2.

There is no comparison, if one is concerned with the rigour of the research, with the Tasmanian jury study. But the Tasmanian study had no influence at all on media insistence that there is widespread "despair that judges are out of touch with community expectations" and that the results of the survey show "a community crying out to be heard and expose a credibility crisis for the judiciary." (Editorial, Melbourne *Herald Sun*, 5 December 2011, p 24).

These assertions completely ignore the imperative that judges must have regard to the best available evidence – and that evidence points not to it being time to get tough, but to the opposite conclusion. That is undoubtedly so if "the community" is taken to be the informed community – of which the Tasmanian jurors were and are the paradigm example. The tabloid media may look to its own audience - to its letters to the editor and its talk-back responses - and gain self-justification from it; but the representative character of that audience cannot compare with that of the Tasmanian jurors, who presumably had among their number no more "judges, lawyers, academics and libertarians" than the general public.

Those who appear in the courts are entitled be secure in the knowledge that the judge or magistrate will not be influenced by the fact that one of the parties may be more powerful or more influential than the other. The power of the powerful, among whom may be the watching media, must be neutralised at the courthouse door, so that all who enter do so as equals. It must not matter to the court that, for example, one party to the case is the government and the other a mere citizen without means; that one is a large and wealthy corporation and the other a battling sole trader; or that one is the Crown and the other an accused from the streets. All those who have an interest in court proceedings, including criminals about to be sentenced, should have confidence that the judge or magistrate will not bow to the will of the powerful, or bend with the shifting winds of community sentiment.

That confidence rests on the obedience of all judges and magistrates to their oath or affirmation of judicial office. In the face of overwhelming evidence to the effect that an informed public agrees with the sentences generally handed down by the courts, no judicial officer could, consistently with that oath or affirmation, seek in sentencing to appease perceived public concerns generated by powerful media interests whose aim is to attract an audience by stories about sentencing which tend to show that the courts are unjustifiably lenient.

No civilised system of justice can tolerate the punishment of offenders on the basis of false precepts propounded by a powerful media. It follows that, while being astute to correct particular instances of unjustified leniency, the judiciary is in duty bound to sentence without regard to media claims that the public demands harsher punishments across the board. This is as true now, after the publication of the results of the Victorian Government's sentencing survey, as it was before.

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