Judicial Conference of Australia

THE DOGS BARK BUT THE CARAVAN ROLLS ON: EXTRA JUDICIAL RESPONSES TO CRITICISM[1]

The subject matter of this speech concerns the topic of judges and magistrates speaking out in defence of their decisions and in court conduct. The topic can be easily disposed by providing the usual advice given to any judicial officer in doubt about doing anything, namely do not do it. However, the rationale for that advice needs exploring because, if the advice was taken to its logical conclusion, judicial officers would withdraw from all social, religious, sporting, cultural and community contacts. Instead we would eke out an existence as some kind of a judicial Trappist monk. No doubt such a life may appeal to some but I doubt that it ultimately makes us better people or for that matter better judges.

This is especially so with the magistracy. By a large margin, magistrates make the most judicial decisions of any branch of the judiciary. They are the only point of contact between most of the public and the judicial branch of government. A magistrate that is engaged with their local community is in a better position to make judicial decisions that both reflect community standards and show fidelity to the law than a magistrate who withdraws from those around them.

That said there is an established understanding that judicial officers will not comment publicly on their own decisions. What I will seek to do is identify the scope and source of that understanding and its basis. I will also address

---

[1] Justice Robert Beech-Jones, President of the Judicial Conference of Australia, address presented to a conference of South Australian magistrates on 8 May 2017.

the difficulties that this limitation may present and the means by which it might be addressed. I am the current President of the Judicial Conference of Australia (the "JCA") a body that represents the Australian judiciary. The JCA's membership includes just over half of the nation's judges and magistrates. I will address the relevance of the JCA to this topic.

The Guide to Judicial Conduct

In 2007 the Australasian Institute of Judicial Administration published on behalf of the Council of the Chief Justices of Australia the second edition of the *Guide to Judicial Conduct* (the "*Guide*"). The *Guide* is neither legally binding nor meant to be prescriptive although, as I will explain, it has been held to have some legal effect. Instead the *Guide* states that it is intended to give "practical guidance" to judicial officers.[2] It represents a synthesis of various conventions and received wisdom affecting the conduct of judicial officers.

Of present relevance is clause 5.6 which is entitled "Public comment by judges". This part of the *Guide* has evolved from a statement by the United Kingdom's Lord Chancellor, Lord Kilmuir, who in 1955 declined a request from the BBC to participate in a series of radio broadcasts about great judges in English history. Lord Kilmuir stated it was "undesirable for members on the Judiciary to broadcast on the wireless or to appear on television". He said that this would ensure judges remained "insulated from the controversies of the day".[3]

Clause 5.6.1 of the *Guide* deals with the participation by judges and magistrates in public debate. The *Guide* represents a shift from Lord Kilmuir's statement. It recognises that "[a]ppropriate judicial contribution" to the public's consideration of issues concerning the administration of justice and the functioning of the judiciary "is desirable" but warns that "[c]onsiderable care should be exercised to avoid using the authority and

---

2 *Guide*, 1–2.

3 See Matthew Groves, "Public Statements by Judges and the Bias Rule" (2014) 40(1) *Monash University Law Review* 115, 133–134.

status of judicial office for purposes for which they were not conferred". Amongst various matters, the *Guide* warns about becoming involved in public controversy unless it directly affects the operation of the Courts and that such involvement could give rise to perceptions of bias. However, while the *Guide* contains warnings about participating in public debates on controversial topics, it does not suggest that it should never occur.[4]

My present concern is clause 5.6.2 of the *Guide* which is more emphatic. It states:

> "It is well established that a judge does not comment publicly once reasons for judgment have been published, even to clarify ambiguity.
>
> On occasions decisions of a court may attract unfair, inaccurate or ill-informed comment. Many judges consider that, according to the circumstances, the court should respond to unjust criticism or inaccurate statements, particularly when they might unfairly reflect upon the competence, integrity or independence of the judiciary. Any such response should be dealt with by the Chief Justice or other head of the jurisdiction."

Three points about this should be noted.

First, this statement is made against a background that public discussion of issues surrounding the administration of justice and the functioning of the judiciary is entirely legitimate. That discussion can extend to criticism, even trenchant criticism, of judicial decisions.

Second, it is notable that the person nominated as the responder for any comment is the Chief Justice or the relevant head of jurisdiction. There is no reference in the *Guide* to what some consider is the role of the Attorney-General as a defender of the judiciary. As I will explain the debate over that role of the Attorney-General has some relevance to the role of the JCA.

---

[4] A former President of the NSW Court of Appeal took a robust view of the right and even duty of judges to speak out on contemporary issues: Mason P, "Should Judges Speak Out?" (Speech delivered at the JCA Colloquium, Uluru, April 2001); see also McMurdo P, "Should Judges Speak Out?" (Speech delivered at the JCA Colloquium, Uluru, April 2001).

Third, the statement in the *Guide* focuses on the fact that reasons for judgment are available. I do not need to spend any time elaborating upon the significance of a judge or magistrate's duty to give reasons. The *Guide* proceeds on the basis that the judicial officer's reasons will provide a sufficient exposure of the reasons for a judicial decision. It also appears to proceed on the assumption, perhaps heroic, that the reasoning will be accurately reported.

At this point I note that in explaining the basis for a judicial decision magistrates are in the most difficult position of all the members of the judiciary. As a general rule the higher the level of the judiciary the lesser the caseload, the greater the time and resources to prepare reasons and the greater the capacity of the Court to have them published including on a court website. The sheer volume of decisions that must be made by magistrates means that there is a much reduced capacity, if any, to produce written judgments on contested matters.

It is my untested theory that, the more often written reasons for judgment are available, the quicker they are available and the more widely they are available, the less likely it is that a judicial decision and the reasons for it will be misreported or misunderstood. Bail decisions are an illustration of this. They are one of the most controversial areas for judicial officers at all levels. As we know bail decisions are usually made in crowded lists under pressure of time. The reasons provided are usually oral, brief and rarely published.

However, the *Guide* has no legislative support. What is legally wrong with a judge or magistrate going beyond their reasons to defend their decisions? Judges and magistrates are human. In an age flooded with commentary why shouldn't judicial officers embark upon a full defence of their decisions? Wouldn't that promote transparency and public confidence in the judiciary?

Epeabaka

It is at this point that the law of bias intrudes to reinforce the wisdom of the Guide. This is best illustrated by two Australian decisions, *Re Minister for Immigration and Multicultural Affairs; ex parte Epeabaka* [2001] HCA 23; 206 CLR 128 ("Epeabaka") and *Gaudie v Local Court (NSW)* [2013] NSWSC 1425; 235 A Crim R 98 ("Gaudie").

In *Epeabaka* a member of the Refugee Review Tribunal maintained his own website and published a commentary on how he approached refugee applications. The commentary included the following reflection:[5]

> "When I was first appointed, a colleague who shall remain nameless said to me, 'Let 'em all in, …!'. But while I would like to let in to Australia at least 95% of the applicants who come to us, who are usually deserving cases and decent human beings even if they lie through their teeth (as they *often* do) in their desperation to find a better life, it's not as simple as that." (emphasis added)

An unsuccessful refugee applicant brought an application for a constitutional writ claiming the contents of the website created an apprehension of bias on the part of the tribunal member. All five members of the High Court rejected the application. The plurality considered the comments were "regrettable"[6] but held that when they were read in context they "would not lead to a reasonable apprehension that he might not have brought an impartial mind to bear upon an assessment of the present applicant's credibility".[7] The plurality also stated:[8]

> "For people who hold judicial, or quasi-judicial, office to set out to give the public 'some idea of where [they are] coming from' might be regarded by some as reflecting a commendable spirit of openness; but it has dangers. It may compromise the appearance of impartiality which is vital to public confidence in the administration of justice. It is the recognition of such a

---

5 Epeabaka, [13].
6 Ibid [34] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
7 Ibid [34].
8 Ibid [12].

> danger that has traditionally caused judges to exercise caution in their public conduct and statements."

Gaudie

These observations came to the fore in *Gaudie*. In *Gaudie*, an application was made to the Supreme Court of New South Wales to restrain a magistrate from hearing a domestic violence charge against a client of the Aboriginal Legal Service (the "ALS") on the grounds of apprehended bias based, amongst other matters, on statements made by the magistrate to the media. The application was successful.

The magistrate in *Gaudie* was based in western New South Wales (NSW). In October 2012 an article appeared in *The Australian* newspaper under the title "Courts 'Harsher' on Aboriginal Driving Offences". It stated that there was a high rate of incarceration of indigenous driving offenders in regional and remote NSW. The principal solicitor of the ALS was quoted as stating that country magistrates had fallen into "errant, idiosyncratic and overly harsh sentencing patterns".[9] On 5 January 2013 there was a follow up article published under the title "Black Sentences Soar". It included comments from the ALS solicitor stating that "certain magistrates" were "regularly imposing extraordinarily harsh sentences on Aboriginal youth that simply cannot be justified under the state sentencing law".[10]

The next day the magistrate wrote a letter to the editor of the newspaper.[11] He identified himself as one of the magistrates the subject of the story. He expressed concerned that the "underlying tone" of the articles was that magistrates in western NSW were racist. He explained the difficulties faced by the Local Court in dealing with high rates of offending and social disadvantage. He referred to the vulnerability of Aboriginal children and women to domestic violence.

---

9 Gaudie, [41].
10 Ibid [42].
11 Ibid [43].

The letter was not published. Instead the journalist contacted the magistrate and he agreed to an interview.[12] The interview was recorded and the tape of the interview was played in the disqualification proceedings. The magistrate commenced the interview stating that he would not comment on individual cases.[13] He reiterated many of the frustrations he expressed in his letter. At one point he told the journalist that he had not advised anyone that he was intending to speak to the media because he would have been told not to.[14] The magistrate rejected the reported comments of the ALS's principal solicitor and was critical of him for speaking out.[15] Critically he accused the ALS of doing a "disservice" to its clients by not entering a guilty plea in some 90 per cent of domestic violence cases and then proceeding to a hearing in the hope that the victim would not turn up at court.[16]

The contents of this interview formed the basis of two articles published in *The Australian* newspaper, one on 8 January 2013 and the other on 18 January 2013.[17] The latter article was titled "Magistrate attacks ALS over rash of not guilty pleas".[18] The contents of those articles formed the basis for three applications for the magistrate to disqualify himself, all of which were refused. In refusing the first of these applications the magistrate referred to the application as the "ALS's next little enterprise to have me removed from the circuit [but] that will fail as well".[19] One of the disqualification applications concerned the plaintiff in *Gaudie,* who was a client of ALS. He had been charged with domestic violence offences and had entered a plea of not guilty; ie he fell within the category of case that the magistrate complained of.

Justice Johnson identified the appropriate test for apprehended bias as the so-called double might test, that is whether a "fair-minded lay observer

---

12 Ibid [44ff].
13 Ibid [47].
14 Ibid [54].
15 Ibid [61].
16 Ibid [62]–[63].
17 Ibid [64]–[67].
18 Ibid [67].
19 Ibid [71].

might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind" to the resolution of the proceedings.[20] His Honour then applied this test in accordance with the two step approach enunciated in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [8]. The first stage is to require the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits. The second step is to articulate the logical connection between the matter "and the feared deviation from the course of deciding the case on its merits".[21]

Justice Johnson concluded that the test for apprehended bias was made out in relation to the plaintiff's case. His Honour accepted that, had the magistrate's comments been confined to general comments about domestic violence including domestic violence in Aboriginal communities, then the plaintiff would not have succeeded.[22] However, his Honour concluded that the comments to the reporter about the approach of the ALS[23] together with the other events and statements including the pre-emptory refusal of the disqualification application justified a conclusion that the objective bystander might have concluded that the magistrate might not bring an impartial and unprejudiced mind to the resolution of his case.[24]

Justice Johnson devoted a significant part of the judgment to analysing what knowledge would and would not be attributed to the reasonable bystander as part of the application of the test of apprehended bias. His Honour referred to the weight that the bystander would place on the statement of the magistrate that he should not speak to the media and the fact he was doing so was contrary to the passages in the *Guide* to which I have referred.[25]

In that context under the heading "Some closing observations" Justice Johnson stated that "at a human level" the magistrate's upset at the articles

---

20 *Johnson v Johnson* [2000] HCA 48; 201 CLR 488 at [11]; see *Gaudie*, [78].
21 *Gaudie*, [79].
22 Ibid [183].
23 Ibid [184].
24 Ibid [197].
25 Ibid [110]–[111].

was understandable. However, his Honour added that the approach of the magistrate towards the media "illustrates the difficulties which may occur where the approach advised in the *Guide* is not adopted".[26]

Gaudie was discussed in detail by Professor Mathew Groves in an article that addressed the wider topic of extra judicial statements by serving judicial officers generally, including in academic writings.[27] Like Justice Johnson, Professor Groves expressed regret about the circumstances that unfolded in *Gaudie*. He said it was understandable how each of the magistrate, the solicitor and the journalist acted in the way they did. He commented that it was depressing that a "judge and solicitor who clearly shared a common concern about the appalling problems faced by many indigenous Australians in rural areas appeared to become protagonists in a public discussion of an issue both clearly care about deeply". [28] He identified the real problem that arose was the magistrate moving from speaking about wider issues to addressing the specific claims of the solicitor. He finished his article by stating that "[p]erhaps the lesson is that judges who feel strongly enough about issues to speak to the media are those who need the most caution about doing so".[29]

Thankfully *Gaudie* is one of the relatively rare cases where statements were made by a judicial officer to the media that was capable of impacting upon a particular case they were hearing. While the writing of the letter and the participation in the interview were problematic, the real problem was the commentary on the alleged approach of the ALS to domestic violence cases. However, what if we take that aspect out? Can or should a judicial officer publicly respond to a public accusation or an insinuation that his or her decisions are affected by racism or sexism? Instinct suggests that a strong reason would need to be shown before a judicial officer is prevented from doing so. No other public official at any level of government operates under

---

26 Ibid [211].
27 Groves, above n 3, 133–138.
28 Ibid 147.
29 Ibid.

such constraint. That said there are obvious circumstances where it is strongly inadvisable to do so. The case may be ongoing and the person making the accusation may be associated with a party. The case may be over and subject to an appeal and the judicial officer's conduct maybe an issue on the appeal.

Media Criticism

In *Gaudie* there was no suggestion that the journalist reporting the comments of the solicitor and the magistrate did not accurately report what was stated or sensationalised what was stated. It was clearly a good news story on an important topic. For my part I have found court reporting to be accurate in the vast majority of cases I was involved in as a barrister or have presided over as a judge. However, the editorialising or commentary that takes place above the level of court reporting can be problematic. Often it seeks to fit the decisions into a preconceived narrative such as the courts being too soft or the judiciary being out of touch etc. As I will explain, sometimes the JCA responds to aspects of this but we always must recognise, respect and even welcome the free and open discussion of judicial decisions. That said a considered response to criticism is not inconsistent with respecting the right of others to exercise free and open discussion of judicial decisions.

Sometimes, but not often, the reporting of the decision is simply inaccurate. Sometimes the reporting does not refer to the reasons of the judicial officer or, if it does, it omits some crucial fact or consideration. In some cases even the actual outcome is reported inaccurately. In one case I made a decision to vary bail for an accused person who had been living in the community for over six months. It was reported on the front page of a major newspaper that I decided to release them from jail. The correction came some days later on page 40. Sometimes a particular decision leads to the personal denigration of the judge including reflections on their suitability for office. The publicity can be distressing for the judge and affect the Court they serve on.

Potential Responses

What is the appropriate or even permissible response by an individual judge or a Court to these various scenarios?

I will briefly mention contempt and the law of defamation but only to dismiss them. There is the potential for some statements of the kind I have just mentioned to constitute a contempt of Court. In an extreme case they might be an attempt to influence the outcome of current proceedings or they may "scandalise" the Court.[30] These are severe remedies reserved for exceptional cases.[31] In some cases to invoke them as a response to even virulent criticism has the potential to harm public respect for the Court in question not enhance it.

There are instances of judicial officers suing media organisations for defamation over statements made about their performance in judicial office.[32] I will not outline the cost, complexities and risks of such litigation as no doubt you are familiar with them. I would simply add that there are particular complexities that arise where there is a risk that defamation proceedings would involve a re-litigation of the proceedings that gave rise to the defamatory publication.[33] Those complexities and the security of tenure afforded to judicial officers led two members of a five member bench of the Court of Appeal in NSW to conclude that judicial officers were incapable of suing for defamation in respect of publications concerning their conduct, competence and capacity for the carrying out of their judicial functions.[34]

Letting Dogs Bark?

The most common, and sometimes the most advisable, approach to adopt in response to such criticism is to let it pass. Hence the title of this talk. Decisions like *Gaudie* illustrate the dangers of responding. In letting it pass,

---

30 *Gallagher v Durack* (1983) 152 CLR 238.
31 Ibid 243.
32 See for example Herald & Weekly Times Ltd & Bolt v Popovic [2003] VSCA 161.
33 *O'Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315, [112]–[122] (Beazley P).
34 Ibid [241] (Basten JA); [263]–[264] (McCallum J).

we should not underestimate the capacity of the public to appreciate they might not be getting the full story but instead are being dished up agenda based reporting. Tens of thousands of people interact with the judicial system each year especially the Magistrates Courts. In doing so they experience a system that may not be perfect but is fundamentally transparent and fair. There is a large reservoir of respect for the fairness of the Courts. In deciding whether or not to let it pass, we should remember that many members of the public understand that both Courts and individual judges either do not or cannot respond to criticism much less abuse.

In relation to this approach of not directly responding to a particular criticism, I should make reference to the capacity of the Courts to communicate directly with the public about its processes. There are some indications that the shrillness of some sections of the old media is increasing at a rate that is proportional to a diminution in their overall influence. Sections of that media are preaching to an older audience they have already converted. Newer audiences are looking to their own sources of news and read the old media with suspicion. This presents dangers of its own but the internet does provide the Court with the opportunity to make its reasons directly available to the public. The online editions of a number of overseas newspapers sometimes provide direct links to the reasons for judgment of Court decisions they are reporting on.[35] So far as I am aware no Australian online newspaper does likewise.

However, on many occasions a response is warranted. This is not because it is necessary to vindicate the reputation or even feelings of the individual judge by correcting the misapprehension. Instead the necessity to respond arises because some criticisms, considered individually or cumulatively, have the capacity to seriously undermine public confidence in the particular court, courts generally and ultimately the rule of law.

---

[35] For example, the *New York Times* and *The Guardian*.

The most egregious example in recent times is provided by the United Kingdom media. In November 2016, the United Kingdom Court of Appeal held that legislation was required before the United Kingdom (UK) could trigger Article 50 of the European Union (EU) treaty to commence the process of removing the UK from the EU.[36] After that decision, the UK *Daily Mail* published an article entitled "Enemies of the people".[37] It carried photographs and profiles of the three judges and described one of them as an "openly gay ex-Olympic fencer". The article referred to "Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger a constitutional crisis". The article was a calculated and cowardly attack on the judiciary and took place in the context of the most significant political issue facing the UK in decades. The potential damage to public confidence in the judiciary from the article was considered so grave that the UK Bar announced a program to educate school children about the importance and impartiality of the UK judiciary.

However, it is just not an attack on an appellate court as a whole that can undermine the judiciary and the rule of law. Selective attacks on individual judges and magistrates at a trial level can be very damaging. I will briefly mention another UK example which, to an extent, has been replicated here. In 2006 *The Sun* newspaper carried an article entitled "We put judges on trial". It included photographs of ten judges and carried the caption "Today The Sun names and shames ten of the top judges guilty of being soft on killers, child sex beasts, rapists and other violent criminals". The article announced a campaign for "tough action – including sacking – taken against judges who hand down lenient sentences". The ten judges were chosen because there had been successful Crown appeals against their sentences. As Justice Eames, formerly of the Victorian Supreme Court, pointed out

---

36 R (Miller) v The Secretary of State for Exiting the European Union [2016] EWHC 2768.

37 James Slack, *Enemies of the people* (2016) *Daily Mail* <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>.

"they had also been subject to successful defence appeals against unduly severe sentences [but that] was not thought worthy of comment".[38]

The Attorney–General

If a response is necessary, who is to respond and what should they say? As I said, the *Guide* refers to the head of jurisdiction. I am not a head of jurisdiction and do not speak for any court. Instead, for the moment I will refer to a position not referred to in the *Guide*, namely, the Attorney-General.

In 1999 a former Chief Justice and Attorney-General of this State, the Honourable LJ King QC, presented a paper to the Fourth Annual JCA Colloquium entitled "The Attorney-General, Politics and the Judiciary".[39] I cannot do the paper justice in this talk other than to note that it was a tour de force. It touched upon the then recent commentary that had arisen over the role of the Federal Attorney-General in defending the judiciary in light of adverse comments made about the High Court following its decision in *Wik Peoples v Queensland* [1996] HCA 40; 187 CLR 1 ("Wik").

As part of that debate Sir Gerard Brennan delivered a paper in September 1997 in which he stated that the Courts did not need the Attorney-General to "attempt to justify their reasons for decisions" but posited why an Attorney-General should not "defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law".[40] Mr King QC endorsed that view stating that it was an aspect of the role of the Attorney-General "to defend the integrity of the system of justice against attacks which threaten public confidence in it, even, if necessary, against political colleagues".

---

38 See Geoffrey Eames, "The Media and the Judiciary" (2006) 2(2) High Court Quarterly Review 47.

39 L J King "The Attorney-General, Politics and the Judiciary" (Speech delivered at the JCA Fourth Annual Colloquium, November 1999); later reproduced as L J King, "The Attorney-General, Politics and the Judiciary" (2000) 74 *Australian Law Journal* 444.

40 Speech to the 30th Australian Legal Convention on 19 September 1997 cited in King, above n 39.

Sir Gerard Brennan's statement was made in the context of, and in response to, the articulation of a more limited role for the Attorney-General by the then Federal Attorney-General Mr Daryl Williams QC MP. He contended that the Attorney-General could not simply abandon his or her role as a politician and member of the executive government "and expect to stand as an entirely independent defender of the judiciary" although he did accept that the Attorney-General might intervene in the event of "sustained political attacks ... that are capable of undermining public confidence in the judiciary ...".[41]

I do not intend to re-agitate the merits of the debate about the role of the Attorney-General. I can state that the JCA's strong preference is that Federal and State Attorneys-General should adopt the view articulated by the Honourable Len King. However, whether one agrees with it or not, Mr Williams QC's view appears to represent the approach adopted by most Federal and State Attorneys-General since that time. I suspect but do not know that it was in recognition of that fact that the first edition of the *Guide to Judicial Conduct* published in 2001 made no reference to the Attorney-General in this context. As I already noted, this continued in the second edition.

To be fair, Mr Williams QC's view about the role of Attorney-General was not first articulated during the Wik debate. Instead, he enunciated it in 1994 while he was still in opposition and spoke at a conference entitled "Courts in a Representative Democracy". He contended that the judiciary should accept the position that it could no longer expect the Attorney-General to defend its reputation. He pointed to alternative mechanisms to defend against criticism and communicate with the public about matters affecting the judiciary. He identified the then newly formed JCA as one such body.[42]

---

41 Daryl Williams, "Judicial Independence" (1998) 36(3) *Law Society Journal* 50, 50–51; Daryl Williams, "The Role of the Attorney-General" (2002) 13 *Public Law Review* 252.

42 See French AC, "Seeing Visions and Dreaming Dreams" (Speech delivered at the JCA Colloquium, Canberra, 7 October 2016) 4–5.

The JCA

So this brings me to the JCA.

In a speech to the 2016 JCA Colloquium, which was delivered just prior to his retirement as Chief Justice of the High Court, Robert French, AC noted that the origins of the JCA coincided with the debate about the role of the Attorney-General in defending the judiciary.[43] He observed that the JCA is a "well-established part of the Australian legal landscape as the representative body for the Australian judiciary" and that it has "not hesitated to speak out for judges and courts which come under unwarranted or unfair criticism from politicians and the media".[44] He noted that the "judiciary today expects, and is expected, to stand up for itself as the third branch of government distinctive and independent in its functions".[45] Thus to an extent, by reason of history and practice, the JCA fills the role that many Attorneys-General used to perform but no longer do.

The JCA's membership consists of just under 700 serving and retired judicial officers. The serving judicial officers comprise around 52% of all judicial officers of Australian Courts specifically the High Court, the Federal Courts, the Supreme Courts, District or County Courts and the Magistrates or Local Courts of the States and Territories and the various specialist Courts, such the Industrial Relations Court of South Australia. Each court, other than the High Court, has a representative on the governing council of the JCA which meets three times a year. The representative for the Magistrates Court of South Australia is Deputy Chief Magistrate Andrew Cannon. His Honour Judge Wayne Chivell of the District Court of South Australia is a member of the Executive Committee. For many years when he was the Master of the Supreme Court of South Australia, His Honour Brian Withers, AM was the Treasurer of the JCA.

---

43 Ibid 3; Secretariat of the Judicial Conference of Australia, *A brief history of the early days of the Judicial Conference of Australia* (2016) Judicial Conference of Australia <http://www.jca.asn.au/wp-content/uploads/2013/10/P79_02_10-Short-history.pdf>.

44 French, above n 52, 2.

45 Ibid 7.

The principal objective of the JCA is to ensure the maintenance of a strong and independent judiciary as the third arm of government.[46] It does this in a number of ways including by informing the community about the judiciary's role and the significance of its independence, communicating with other arms of government for the purpose of promoting mutual understanding, and undertaking or supporting research that will benefit these aims. Specific examples of its work include communicating with governments about matters affecting the judiciary such as superannuation, sponsoring research about matters affecting the judiciary such as temporary judicial appointments, the facilitation of country wide judicial interaction by organising an annual colloquium held in a different state or territory each year and, of present relevance, responding to adverse commentary about the judiciary and, on occasions, individual courts or judges.

This latter part of the JCA's functions can be illustrated by reference to two examples of media releases recently issued by the JCA. In January of this year an opinion piece was published in *The Australian* newspaper entitled "Courts must dispense justice, not therapy". The article suggested that a form of "revolutionary court" has emerged in Australia "without a parliamentary vote or public consent". This "revolutionary court" was said to involve a "transform[ation of] court practice from black letter law to therapy culture" in which there is not a "faithful application of legislation and just punishment for crime" but instead judges "manage" the emotions of offenders. Although the article was discussing a supposedly Australia wide phenomenon, it made particular reference to Victoria including the terrible events in Bourke Street.

When the article came to the attention of the JCA executive it was determined that a response was appropriate. The article did not name much less attack any individual judge. However, it conveyed a number of misconceptions which, if allowed to stand, could contribute to the undermining of public confidence in the judiciary. The JCA responded to

---

46 Judicial Conference of Australia Rules, r 3(a).

this article by addressing a letter to the editor. When the letter was not published the JCA issued the letter as a media release.[47] Its releases are sent to all major media organisations as well as to the representatives of the legal profession such as the Law Council of Australia and the Australian Bar Association. The JCA's response was republished by some of those organisations. The JCA's response identified that courts who sentence offenders and pay regard to rehabilitation were faithfully applying the law because in all jurisdictions rehabilitation is a significant factor in sentencing. The response pointed out that there is a system of appeals in place which allows for the correction of errors including the placing of undue weight on the need for rehabilitation as well as correcting sentences that are manifestly excessive or inadequate. The response also pointed out that specialist criminal courts such as Drug Courts were not illegitimate but created by legislation and that legislation was faithfully applied by the judges sitting in those Courts.

The other example concerns an article which was critical of a NSW District Court judge that was published in a major metropolitan newspaper in December 2015. The article was entitled "Bench him" and included a call for the judge not to be allocated cases that could require the imposition of a long custodial sentence. The article was not dissimilar to the article published in *The Sun* in the United Kingdom in 2006, that I referred to earlier. The article included a quote, taken out of context, from an interview the judge gave to the NSW *Law Society Journal*, in which he had expressed concern about the effect of increasing maximum sentences and imposing longer custodial sentences on the protection of the community and rates of reoffending. The context of the article made it clear that the judge acknowledged that it was his duty to give effect to increases in maximum sentences.

---

47 Justice Robert Beech-Jones, *Media release by President of the Judicial Conference of Australia* (2017) Judicial Conference of Australia <http://www.jca.asn.au/response-to-the-opinion-piece-courts-must-administer-justice-not-therapy-7-february-2017/>.

The article also included the irrelevant fact that before he became a judge he had appeared for a notorious convicted rapist. Under the heading "soft serves" the right hand column of the article referred to four cases in which Judge Haesler had sentenced offenders. The Crown appealed in three of them and two of those appeals were successful. Again this was taken out of context. A search of the Supreme Court's website revealed that in four years there have been only 12 appeals from sentences or convictions involving the judge. In three of the nine sentence appeals the appeal court found that his Honour's sentence had been manifestly inadequate. On one occasion the sentence he imposed was reduced on appeal and no error was found in the other five sentence appeals. The judge sat predominantly in crime and had presided over possibly hundreds of criminal cases and sentences in that period. All up he had a good record on appeal.

Following consultation with the judge and head of jurisdiction the JCA released a statement pointing these matters out.[48] Like the other release I referred to, it was distributed widely. However, the newspaper that published the story did not refer to it. Equally, it did not return to the topic and the call to "bench" the judge went nowhere.

At present the JCA is in the process of preparing a policy paper addressing in a more formalised way the circumstances in which it will or may respond to commentary upon courts and judges. I do not want to pre-empt the outcome of that process and instead will outline its approach to this time. Consistent with what I have stated, the practice of the JCA has not been to respond on every occasion that a media article is published which is critical of a court, judge or a judgment. As I have said, we must respect the right of citizens to comment and criticise judicial decisions. However, on many occasions the JCA has responded to unfair and unwarranted criticism of a judicial officer or a court. In considering whether to do so it has consulted the judge in question and the head of jurisdiction. The latter step is

---

[48] Justice Steven Rares, *Daily Telegraph article unfairly attacks District Court Judge* (2015) Judicial Conference of Australia <http://www.jca.asn.au/wp-content/uploads/2013/10/P18_01_32-Press-Release11-Dec-2015.pdf>.

important as cooperation with heads of jurisdiction is critical for the JCA. The process of consideration and consultation that the JCA undertakes and the fact that everyone involved is a full-time judicial officer does mean that, in some cases, the timing of the response can be slower than what would otherwise be necessary. However, these processes are undoubtedly required given that a public statement is being made on behalf of an organisation of judicial officers.

The JCA's responses have been prepared on the basis that its ultimate aim is to promote the respect for the judiciary and the rule of law. It has not sought to win points in a contest with anyone or to provide any opportunity to anyone to circumvent the *Guide*. In some cases, such as the one just cited, it has addressed clearly verifiable errors or misleading impressions. However overall it has sought to make its response conform with a number of common themes that meet its principal objective such as the need to explain the judicial process, the importance of judicial independence and the rule of law, the accountability of judges through the process of giving reasons and the system of appeal. The responses have also referred to the inability of individual judges to respond to personalised attacks as a reason why such attacks should not be made.

I hope this paper has been of assistance and given you some insight into the JCA. I hope that many of you will join and most importantly attend the annual colloquiums. Can I just finish by returning to the United Kingdom for another salutary tale? By and large, I have tried to step around the problems for judicial officers who are active users of social media. I am a dinosaur and avoid it. I know other judicial officers use it heavily. It is a large topic in its own right. I will just mention that, a little over a month ago, a part-time judge was removed from judicial office by the United Kingdom Judicial Conduct Investigations Committee for using a pseudonym to post comments (some of which were abusive) on a newspaper website about a case in which he had been a judge and another in which he had

been a barrister.[49] According to a media report, after one of his decisions was reported and received adverse comment he posted online abuse about his critics in response. Apparently he stated "[a]re you too stupid to make a sensible comment" in one of his posts.

I will only say of that what some judges used to say to juries namely make of that what you will.

Thank you for inviting me.

---

49 Jason Dunn-Shaw, *Statement: JCIO 15/17* (2017) Judicial Conduct Investigations Office <http://judicialconduct.judiciary.gov.uk/wp-content/uploads/2017/04/Recorder-Jason-Dunn-Shaw-JCIO-Investigation-Statement-1517-1.pdf>.