# Judicial Conference of Australia
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# SHOULD JUDGES SPEAK OUT?

## The Hon John Doyle, Chief Justice of South Australia

The purpose of this session is to stimulate debate today, and hopefully reflection later. We have the opportunity here to share the views and experiences of members of the Conference drawn from all parts of the Australian judiciary. It is not often that opportunities like this present themselves.

The issue, as I see it, is whether and when members of the Australian judiciary are at liberty to, or even obliged to, speak publicly about matters affecting the judiciary as an institution, about its judicial work, and about matters of public interest which might or might not relate to the judiciary or the work of the Courts.

Different answers may be appropriate to different situations. There is, I suggest, no universally right answer. And it may be that sometimes no confident answer can be given. We should also bear in mind that our answers should be consistent with the principles which support an independent judiciary.

I propose to be as brief as I can. Our purpose as speakers is to stimulate debate. I have expressed my views on some of the issues that we are canvassing today on other occasions[1], and to some extent I will summarise what I have said on other occasions.

**Principles**

One of the fundamentals of our system of government is the existence of an independent judiciary which administers justice according to law in public. Judicial independence is of the utmost importance to our judicial system, and to our system of government. It underpins the judicial system.

In our society, judicial independence is not at risk from direct assault. It is, I suggest, at risk rather from gradual erosion, from ignorance or from indifference.

The maintenance of judicial independence will be assisted if the principle is accepted by the public as important, and supported by the public. Without public support, the principle is in real danger. The judiciary need to be confident of public support when we identify infringements. Otherwise, those who infringe will not be easily deterred.

The efficacy of our judicial system also depends upon public confidence in the judicial system. Courts ultimately depend upon the executive government to enforce their orders. But the real

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[1] *"The Well-Tuned Cymbal"*, in Fragile Bastion, Judicial Commission of New South Wales, Sydney NSW 2000 ISBN 0 7313 0281 8; *"The Courts and the Media: What Reforms are Needed and Why"* in The Courts and The Media, UTS Law Review, 1999 No 1, ISBN 1 875684 28 X.

effectiveness of a system of justice depends on public acceptance that the decisions made by the judiciary are just, and public acceptance that those decisions should be obeyed and respected. A system of justice must be able to call on the force of the state on occasions, but cannot depend upon force as its foundation. It is public confidence in a judicial system which is its real foundation.

Although judicial independence is for the public benefit, members of the judiciary have a particular responsibility to uphold judicial independence. We do this by the way in which we conduct ourselves as members of the judiciary, both publicly and privately. In all respects our own conduct must be consistent with the requirements of judicial independence.

In my opinion it is also our responsibility to defend judicial independence when necessary.

The judiciary also has a responsibility to do what it can to ensure public confidence in the system of justice. Once again, the way in which we discharge our judicial office, and our conduct generally, should be calculated to enhance public confidence in the system of justice and in the judiciary. The duty to maintain public confidence is the explanation, I believe, for many of the rules and conventions that govern how we conduct ourselves, both publicly and privately.

None of what I have said is, I suggest, at all controversial.

It cannot be denied that it is important that the public understand the meaning and the importance of judicial independence. Nor can it be denied that it is important that the public have confidence in the system of justice which applies to them.

If we accept my premise, that we have a responsibility to uphold judicial independence, and to act so as to enhance public confidence in the judiciary, surely that obligation would extend to communicating with the Australian public if that will achieve those objectives, and to the extent that it will achieve those objectives. In other words, if communication between the judiciary as an institution and the public will sustain judicial independence, and enhance public confidence in the judiciary, is it not our obligation to engage in that communication? Accordingly, my starting point is that fundamental principle supports the proposition that the judiciary has a responsibility to foster public support for judicial independence, and to enhance public confidence in the judicial system by engaging in communication with the public, if that communication will achieve those objectives.

**Practice**

How can communication between the judiciary and the public achieve these ends? I argue that we can do this by doing as much as we can to inform the public about the nature and importance of judicial independence, and also about how courts function and why they function as they do. I refer here to what might be called institutional information. I mean information about the courts and their work, of the kind that will help the public understand the meaning and practical application of judicial independence, and the workings of the system of justice. If the public do not understand these things, can we really expect the public to value them and to support them if they are under threat? If the public do not understand the workings of the judiciary, can we assume their confidence in the judicial system when others challenge that confidence, depict the system in a way that might undermine confidence or when decisions are made which might test that confidence?

The traditional approach has been that courts are open to the public, the public can come and observe if they wish, we submit our processes and decisions to their scrutiny, and therefore the public will value judicial independence and will have confidence in the judicial system.

But almost all of the judiciary these days seems to agree that the traditional approach is proving inadequate. We know that many Australians have no understanding of judicial independence, or of the work of the judiciary, and their support for independence and their confidence in us must be fragile indeed. We know that the picture conveyed by the media is often incomplete or inaccurate and that this incomplete or inaccurate picture shapes the perception and understanding of many Australians. If we accept that, are we going to sit on our hands and let the situation continue, or are we going to recognise that we have an obligation to try to change things?

The task should not be left to the Attorney-General. Justice McMurdo has touched on this issue. The Attorney-General has a part to play, especially in defending particular decisions from attack. But in my opinion the judiciary has its own responsibility in this area.

Justice Mason and Justice McMurdo have dealt with the so-called Kilmuir rules. They have exposed the difficulties of the approach that these rules reflect. Those rules are now widely rejected.

We are entitled to look to the education system to provide young Australians with a better understanding of the legal system than has been provided in the past. Things are improving in this respect. But I suggest that we cannot leave it entirely to educators.

We can, if we like, blame the media. It is particularly influential in shaping the public perception of the judiciary. Express and implicit criticisms of the judiciary by the media are influential. But blaming the media is not going to change anything. The media do not accept that it is their role to educate the public. As well, often journalists involved in reporting and commenting on the work of the courts themselves do not adequately understand the work of the courts. Of course, this is not true of all. Australia has a number of well informed commentators on the judicial system.

We need to counter inadequacies in the impression conveyed by the media, and we need to encourage the media to give the public a more accurate picture of our work.

I believe that we have the means of improving things. A number of courts already employ appropriately skilled staff to deal with the media. This is a first step. It makes sense to assist the media to provide the public with better quality information. There are many aspects to this. It can extend from things as simple as ensuring that an accurate copy of sentencing remarks is made available quickly to journalists; to providing (as we do in South Australia, on request) a precis of a judgment when it is delivered; to providing media handbooks to assist journalists who deal with the courts, and to providing forums at which members of the media and of the judiciary can discuss issues of concern. The first step is to realise that it is worthwhile working co-operatively with the media. The next step is to see the media as a means by which we can provide the public with better quality information.

The next step, and it is one which I hope we will take soon in South Australia, is to employ a public information officer, in addition to our media liaison officer. I mean a person who will be responsible for improving communication at all levels with the public at large. This will range across informative videos, pamphlets available at the court, encouraging visits to the court, improving how witnesses and others who come to court are treated, considering the sort of information provided to jurors and so on. Liaison with Education Departments is another important function. Part of all this is judges speaking to clubs and to the public using the media. Again, the message will always be what we do and why.

Last year in South Australia we held a conference which we called "Courts Consulting the Community". About 30 representatives of the judiciary and court staff met with about 100 members of the general community. The meeting extended over one and a half days. We discussed many issues in small groups and in general sessions. What emerged most strongly was that the public want more information about the courts, are critical of the quality of the information that they get at present, but look to the courts as the source of information about the work of the courts. The traditional idea that it is for the public to find their way to the courts, to find their way to the courtroom, and then to sort out for themselves what is happening, is not accepted by the Australian public today. For better or worse, the traditional approach simply does not work.

In South Australia we are trying to develop a comprehensive approach to public information. This will require the commitment of considerable resources. It will not change things overnight, but I believe that we can accomplish a good deal over time.

A coordinated strategy is required. We need the assistance of skilled staff. The strategy is one which requires judges to be willing to involve themselves in communication with the public, but within the context of an overall strategy. Court staff as well have a part to play.

A strategy like this will work best if implemented at the local level. There is a limited role only for peak bodies such as the Council of Chief Justices, the judicial conference and the AIJA.

What I advocate is not risk free. Sometimes mistakes will be made. My point is that the risk in doing nothing is substantially greater.

The strategy that we are implementing is one that involves individual judges speaking out, but doing so pursuant to a coordinated strategy. It involves speaking out about what the courts do and why, most of the time. It is not a charter for individual judges to engage in public debate.

So, to this extent, in my opinion there is an obligation on the judiciary as an institution to speak out about their work. It is an obligation which those members of the judiciary who have the right skills should be willing to undertake and to share.

My contention is that as an institution we have an obligation to speak out about the principles that underpin an independent judiciary, and about our work. We need to make a real commitment to this. Individual members of the judiciary should be willing to help.

**Public Controversies**

What I have said so far has no direct application to the question of whether members of the judiciary should involve themselves in public controversies that are relevant to the work of the judiciary. There are plenty of recent instances of such controversies. I refer by way of illustration to the question of mandatory sentencing, to the ongoing complaints about the inadequacy of sentences, to criticisms of the conduct of individual judges. Some of these controversies will have political overtones, some will be nothing more than criticisms of a particular aspect of the working of the judiciary and of the judicial process.

The question of judicial participation in these controversies raises somewhat different issues.

However, my starting point once again is that if the issue affects judicial independence or public confidence in the judiciary, it will be appropriate for the judiciary to consider a public response. The reason is, once more, that a response may enhance support for judicial independence and sustain

public confidence, by putting forward information and arguments that otherwise will not be presented.

We should also remember that these days the public want to "hear it from the top", not from a proxy.

To begin with, there will be a role for the Attorney-General and for the legal profession here. There always has been and there always will be, as long as they are willing to discharge it. The Attorney General should be willing to use the forum of Parliament when that is appropriate. The Attorney-General and the leaders of the profession have a responsibility to speak out too, especially when the criticism or attack is one which it is difficult for the judiciary to respond to, such as an attack on a particular decision.

Secondly, there is a role for the head of the relevant jurisdiction, and for the local Chief Justice. As all would realise, particular caution is required here. Sometimes it will be an appropriate response to controversy to explain publicly and clearly what the relevant judicial function is, and what are the limitations upon it. Although I avoid commenting on particular sentences which attract public criticism, for obvious reasons, I do not hesitate to engage in public debate about the general principles upon which sentencing proceeds, and to respond to criticisms of a general nature about judicial sentencing. Within certain limits I will do that even when I know that in the background is public dissatisfaction with a particular decision. Sometimes it will be appropriate to re-state and to explain the principle upon which the judiciary operates. Caution is required because sometimes it is difficult, sometimes almost impossible, to avoid entering the political arena in particular. And, in my opinion, that is an arena to be avoided in all but truly exceptional circumstances.

Other points to bear in mind here are, in my view, that it is inappropriate to get involved in what might be called a slanging match. Also, sometimes it is better to let a controversy pass. One must choose the right occasion to intervene in public debate. There is not much one can do about an attack on a particular judgment, because of the importance of members of the judiciary avoiding public debate about particular decisions. If the controversy is about some suggestion of judicial misconduct, care is again required to avoid either appearing to condone the conduct, or to pass judgment upon another judge.

Bodies such as the Council of Chief Justices and the Judicial Conference of Australia have a limited role to play here. This is so simply because usually the issue will be a local one, and is best handled locally by people who have the full picture. But sometimes an issue will have general ramifications which justify intervention by such bodies.

To my mind, individual members of the judiciary need to be particularly cautious before joining in the controversy except with the approval of the head of jurisdiction. I am speaking here of occasions when an institutional response is called for. If an individual member of the judiciary enters the debate, either before or after the head of jurisdiction, that can compromise the position of the head of jurisdiction or local chief justice. And individual intervention may seem to conflict with the institutional response, or may constrain the way in which the institutional response is provided.

This may seem unduly constricting. But my point is that it is the institution that should respond, and for better or worse the institutional response should be managed by the head of jurisdiction.

I believe that in most of these situations when an institutional response is appropriate, it should be left to the head of jurisdiction and local chief justice to decide whether or not to provide that response, and on what terms. It does not mean that the response will necessarily come from them.

Rather, that the decision whether to respond, when and how, should be made by one of those persons.

I recognise that the line between what I have called institutional information, and institutional response to a controversy, at times will be very difficult to draw.

**Issues of the Day**

Quite apart from the situations about which I have spoken so far, there will be occasions when individual judges are moved to speak out. I am thinking now of issues which arise from time to time which are not controversies directly involving the judiciary, so much as controversies or issues to which members of the judiciary might make a useful contribution, or which have some relevance to our work. Debate over the referendum for a republic is one instance. The ongoing debate about mandatory sentencing is another. Misuse of drugs is yet another. Members of the judiciary will often have strong views on these matters, and will often be well placed to comment on them. Increasingly, they are tending to do so. Instances in recent times are the speech by Justice Wood, part of which expressed views about laws relating to illicit drugs, which will be touched on by Justice Mason; the speech by Justice Angel of the Northern Territory at a recent admission ceremony, implicitly criticising the Northern Territory Government; comments made by Justice Kirby on attitudes to homosexuals; the letter written to The Herald by Justices Wood, Fitzgerald, Beazley and Stein about mandatory sentencing; advertisements for and against the republic to which some members of the judiciary put their name, and statements about reconciliation.

Once again, I acknowledge that the line between matters in this category and controversies affecting the judiciary, will sometimes be impossible to draw.

Justice Mason will express his views about this topic. He identifies the difficulties with the traditional strict view against judicial intervention in public debate. He is generally supportive of the right of judges to speak out.

I recognise that this also is not an issue which is capable of a simple yes or no answer. But I wish to give briefly my reasons for taking a more cautious approach than does Justice Mason. However, I am not suggesting that judicial participation in such debate is never permissible.

I begin with the obvious proposition that the judiciary should keep out of politics. Entering these public controversies will sometimes make it more difficult to do that. I put it no higher than that. The letter to The Herald was seen by many as entering the political arena. Secondly, I believe that the public support for the judiciary rests on their belief that the judiciary apply the law fairly and dispassionately. If a public statement by a member of the judiciary reveals dissatisfaction with the law, that can shake public confidence, because many members of the public would think that that judge will not apply the relevant law fairly and dispassionately. Thirdly, if judges speak out more often than in the past, there will inevitably be occasions when members of the judiciary express conflicting views, perhaps strongly conflicting views. There will be occasions when judges express views that are shown to be wrong, even facile. We need to think about the impact of this over time. What effect will it have on the public if they come to see the judiciary as a group of people who are sometimes at loggerheads on issues of the day, who express views that sometimes are shown to be quite wrong?

There is another aspect to this last point. We expect the public to accept that on appointment to the bench, a lawyer is able to subordinate any existing biases, prejudices, commitments, philosophies

and so on to the requirements of the judicial oath, to do right to all manner of men. Will it be more difficult for the public to accept that we do this if we continue to engage in public debate? Does the office require for its effectiveness that we display a detachment from issues not expected of others?

Of course, we have the individual rights of all other Australians, but acceptance of judicial office brings with it certain restraints. Perhaps the acceptance of fetters on our right to participate in public debate is one of the restraints that goes with judicial office, in the interests of maintaining public confidence in our capacity to adjudicate dispassionately, fairly and soundly. On the other hand, perhaps I am a neo-Kilmuirean, afraid to let the public know the truth, that within our numbers very different views are held on many issues, and that outside our field of expertise we are usually no smarter than the rest of society.

I would add, that a particular problem of judicial intervention in public debate is that it tends to involve the judicial office. Is it right for a judge, expressing a private view, to do so using the judicial title, or when the judge knows that the judicial title will be attached to the views that are expressed? Should any intervention be made without attaching the judicial title to the participant's name? Does the same apply to retired judges? By so describing themselves, do they seek to use the judicial office to advance private views?

As I said, I realise that there is no single or simple answer here. I realise that there will be occasions when a firmly held moral conviction may compel a judge to speak out on a particular issue. But I have a concern about the long term implications of shaking off the traditional restraints.

**Conclusion**

I put these thoughts before you in the hope that they will stimulate debate and subsequent reflection. The best way forward is for us to test our views by canvassing the various situations that are likely to arise, and by a frank exchange of views. I hope that the discussion which ensues will lead to a deeper understanding and a better understanding of the issues involved.