Judicial Conference of Australia
Uluru, April 2001

SHOULD JUDGES SPEAK OUT?

Justice Keith Mason

The ambiguous title covers a multitude of sins, or at least challenges:

- Should the judiciary explain and defend itself? If so, is the responsibility joint or several and what are the respective roles of chief and puisne judges?
- When is it permissible for a judge to speak extra-judicially about "controversial", "political" or "ethical" issues?
- Are there issues where there is an ethical duty to speak out or at least where we should accept and honour the individual judge who does?
- What are the topics that judges should never speak about?
- What protocols should regulate individual speaking out?
- How can constraints be enforced internally?
- What role should the Judicial Conference of Australia play?

The purpose of this session is to stimulate debate. What follows is an amended version of a speech given by me at the Bench and Bar Dinner for the New South Wales Bar in May 2000 which is published in **Bar News**, Spring 2000. My focus is upon the rights and duties of individual judges, but I try to do so having regard to the "public interest" and not just private interest. I also attach a memorandum from Justice David Ipp based upon his experience in South Africa.

Until fairly recently, few doubted or challenged the view that it was the duty of judges always to keep their opinions to themselves and not to speak or write extra-judicially on any matters of controversy. Reference is often made to the so-called Kilmuir Rules. In a letter to the Director General of the BBC written in 1955, the Lord Chancellor had said:

> *But the overriding consideration … is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the actual performance of his judicial duties, must necessarily bring him within the focus of criticism….*

Somewhat sanctimoniously, Lord Kilmuir noted that it would in any event:

> *….be inappropriate for the Judiciary to be associated with … anything which could be fairly interpreted as entertainment.*

The entertainment that Kilmuir feared was a series of radio lectures about great judges of the past. Little wonder that many of us Scots have a reputation for being killjoys.

Now there were several unstated exceptions to the Kilmuir rules. It hardly comes as a surprise that the Lord Chancellor did not intend to limit his fellow Law Lords from plunging into controversial waters when wearing their legislative hats as members of the British Parliament. Indeed, there are many recent examples of serving Law Lords becoming involved in politically contentious issues. Thus, Lord Taylor of Gosforth, as Lord Chief Justice, supported a controversial Government

measure which encroached upon the right of the accused to remain silent. On the other hand, he opposed the introduction of mandatory custodial sentences. Lord Browne-Wilkinson was strongly critical of a Government measure empowering the police to conduct electronic surveillance without a warrant. When Master of the Rolls, Lord Woolf opposed the provision in the **Criminal Justice Bill 1997** for mandatory sentences.[1]

But the Kilmuir rules had more problems than the element of double standards. In some respects they were against the public interest, not to say the rights of individual judges as citizens. I do not believe that they can or should be supported, for reasons which I shall endeavour to explain. In challenging the Kilmuir rules and the defences erected around them I am not calling for anarchy. But I hope to show that this is an area where demolition followed by reconstruction of a different building on firmer foundations will be more productive than harking back to a bygone era in a jurisdiction whose attitude to the separation of powers was somewhat different to ours.

No one questions the right of a judge expressing opinions in an official capacity. Indeed, a judge has a duty to expose his or her true reasons for decision, no matter how unpalatable. The freedom extends to *obiter dicta* and is occasionally used by some judges to question the wisdom of legislation, or official action; and frequently used to criticise antisocial conduct by litigants or their representatives. Many judges who act this way would strongly endorse the Kilmuir principles and see no incongruity in their own conduct even though it may bear on "*controversies of the day*".

Of course, a judge will be accountable on appeal and in the court of public opinion for anything said, whether by a studied judgment or a loose off the cuff remark. And unrestrained utterances may possibly be used as the basis of an application to have the judge removed from office. These exceptions really prove the rule: which is that in a context where judges will be judged for what they say on or off the bench there is a public interest in freedom of speech even though some may abuse the freedom.

Of course, the Kilmuir rules never applied after a judge retired. The much-speaking former judge is now commonplace. Invariably, he will be introduced by reference to his former judicial office. Yet no one treats him as using the office as a springboard or would regard his former court as affected by what he chooses to say. People can tell when someone is speaking in an official capacity.

Another exception to the Kilmuir principle, now widely recognised, is the right of judges, especially Chief Justices, to speak out on matters affecting the interests of the judiciary. (This has coincided with the lapse into silence of most Attorneys General as protectors of the judiciary.) Sometimes these remarks enter troubled waters of current controversy.

A further exception, one that starts to drive a cart and horse through any absolute principle, is the recognised right of a judge to criticise laws or government policies through participation in a law reform commission, as a textbook writer or as the holder of a royal commission. If a judge has something useful to contribute in these areas, then he or she may publish personal views which can be judged on their merits. Of course, those views cannot qualify the judge's sworn duty to uphold current "laws and usages" if the matter arises in a case. Obedience to the law is essential, but obedience and criticism are never confused in these areas. Why should such confusion step in if the subject matter is one of controversy?

---

[1] For these and other examples, see JUSTICE, **The Judicial Functions of the House of Lords**, 19 May 1999 pp6-7.

I would support the **right** of every judge to contribute to public debate. I am not advocating that we all speak out. Indeed, I would prefer that most of my colleagues would keep their views entirely to themselves, especially those with which I disagree. And if they speak out, I would hope that the arguments would be compelling and appropriately restrained, as befits a judge. But it would not surprise me that I did not approve of everything written or the style in which it is written. That is a small price to pay for an important principle.

Significant contributions to the marketplace of ideas have been made in recent years by serving judges speaking or writing in their private capacities on a range of topics of current political controversy, including an Australian republic, a Bill of Rights, sentencing, drug control and aspects of environmental law. Other judges have done controversial things within broad subsets of society, involving for example churches, environmental matters and the national trust. Some of the judges in each category would subscribe strongly to the Kilmuir Rules, while treating them as inapplicable to what they considered were their own (restrained) political discourse.

Sometimes, for some judges, speaking out may be more than a right, it may be a moral duty, one deserving of praise and encouragement.

In November 1999, Justice James Wood spoke at the Uniting Church, Ashfield on the topic of "Matters of Principle - a Reflection on the Judicial Conscience". He reminded us of brave individual judges who stood out against the majorities and mobs of their day in South Africa and the southern United States. He contrasted those brave spirits with judges who collaborated in Nazi Germany, Eastern Europe and South America by their silent conformity with gross structural injustices. He wrote:

> *Disgracefully, the judges of Nazi Germany took no collective stand against the removal from the Bench of their Jewish colleagues, 643 of them in 1933 alone, the passing of the Nuremburg race laws, or the other horrors of this era. The only known occasion on which they collectively stood up to Hitler was when they wrote a letter to him complaining of a proposed alteration in their pension rights.*

In similar vein, I append a memorandum from my colleague David Ipp which is based upon his experience and observations as counsel in South Africa.

Not every judge wants to exercise the freedom to be a public commentator. Some maintain that their job is to speak only through their judgments. That is their right. (Indeed it is their duty if they get seriously behind in reserved judgments.) But even reticent judges tend to have non-judicial lives and they choose to speak out on matters that interest them in these venues. Thankfully we are a pluralistic society and free to indulge in our several passions. One person's area of acute concern may be an immense bore for others.

For some people in Australia today aboriginal reconciliation in any form is controversial. On my reading of the Kilmuir principles as expounded by their defenders it would be improper judicial conduct even to show support by attending a public meeting relating to that issue.

Judicial officers need no reminding about the capacity of debate to hammer out truth. But even if truth does not prevail, there are significant public benefits in allowing freedom of discourse. Indeed, it is the unpopular or unfashionable view that may be most deserving of being ventilated and tested with a view to rebuttal or adoption. Sometimes judges have useful contributions to make. Furtherance of these free speech values is a small price to pay for wincing at utterances that go over the top.

It is only when a judge says something that is counter-cultural that he or she can expect to receive anything but applause or ennui. The judge who makes a politically correct statement on or off the bench will attract no censure and probably no attention. Of course, attracting attention should never be an end in itself.

Lord Kilmuir's *"controversies of the day"* is more often than not doublespeak for matters which displease the government of the day or the supporters of mainstream political parties, whether in government or opposition. And this really is the rub, because ruling majorities (in politics or public opinion) never like being challenged in their certainties, especially by articulate contenders.

In **Quadrant** (May 2000) the Honourable Athol Moffitt QC wrote defending the Kilmuir principles and strongly criticising one of my colleagues on the New South Wales Court of Appeal for breach of them. It was suggested that a judge is in breach of public duty if he or she expresses a personal view of the merit of any valid law. To describe a law as "unjust" was said to use a judicial term, to confuse the public that the person is speaking as a judge, to breach the separation of powers doctrine, and to mount a direct attack on judicial independence.

With the utmost respect, I strongly disagree. No one has a monopoly to speak about what is "just", nor an absolute duty to refrain from doing so. Listeners and readers are capable of distinguishing between a judge speaking *ex cathedra* and when he or she is expressing personal views unrelated to deciding a case. Mr Moffitt conceded that it was all right for judges to say controversial things **after** retirement, or in secret gatherings where reporters were not present, or in exercise of powers conferred as a royal commissioner. The justification suggested for the lastmentioned privilege was that the royal commission gave the judge "executive authority or justification" to be a critic. The corollary appears to be that the ordinary judge lacks this executive authority to speak his or her mind.

Herein lies the heart of my concern with any variant of the Kilmuir principles and with my distinguished predecessor's views. They are, in my opinion, the very antithesis of judicial and personal independence. In retrospect, it is unfortunate that they were enunciated by a Lord Chancellor and not a Chief Justice. No one's right (or duty) to speak comes by way of permission from the Government or the societal majorities of the day, least of all members of the judiciary. Judicial independence may be a "fragile bastion" that rests upon structures, conventions and practices. Its genuine aspects need constant tending, especially by the judiciary itself.

But judicial independence has nothing to do with quiet subservience to perceived injustice. Independence relies not on a judge's silence out of court but on ensuring that he or she decides cases fairly, according to law, irrespective of political pressure. Surely a person who is a judge is free as a citizen to describe laws as "unjust" without betraying the judicial oath or putting judicial independence at risk.

As with all freedoms, some will speak or write in a manner that others find offensive. Some may succeed in doing so in a manner that all find offensive. But a freedom to speak only as others want you to speak or on topics of their choosing is no freedom at all.
Judges are expected to have calm dispositions. But do we really want them to have no fire in their bellies about anything? Of course any fire in a judge's belly should not colour or give the appearance of colouring decision-making in particular cases.

There are obvious dangers that any judge should take into account before speaking out. The judge may find himself or herself unable to sit in judgment in a matter touching that cause. But it does not

follow that the judge who feels passionately about some cause and keeps his or her opinions to himself will avoid the duty of recusal. A secretly biased judge is still a biased judge, if one defines bias as a mind that is or appears incapable of alteration (***Re JRL; Ex parte CJL*** (1986) 161 CLR 342 at 352).

When Lord Kilmuir said that *"so long as a Judge keeps silent his reputation for wisdom and impartiality remain unassailable"* he was making almost a direct take from the Book of Proverbs (17:28, KJV) where it is written that:

> *Even a fool, if he holdeth his peace, is deemed a man of understanding.*

Is this really a good reason for making every judge a trappist in all things? If it were, why not extend it to judgments as well, and abolish the requirement to give reasons? Judicial silence doesn't always shore up the reputation for impartiality. Sometimes it causes problems in the opposite direction, as Lord Hoffmann discovered when his undisclosed involvement with a party (Amnesty International) only came to light after he gave judgment in the first ***Pinochet Case***.

There is always danger that a person who makes a controversial public utterance will say something foolish or say something wise in a foolish manner. Judges are not immune from this - on or off the bench. A deserved or undeserved reputation for wisdom may suffer and there may be a slight trickle-down effect that makes life uncomfortable for colleagues. But judicial independence produces broad shoulders and we should be able to carry each others burdens in this matter. We may wince when Justice X is reported to have said something outrageous, but more often than not it is because we disagree with the particular sentiment. It is only if we can honestly say that we wince even when something acceptable is said publicly by a serving judge that we can genuinely defend the Kilmuir Rules.

A last resort for those who would silence judges minded to say anything politically controversial is to tell them: *"If you want to speak on these matters you should come down from the Bench and stand for election"*. This is a cheap shot because the right of freedom of speech is not the monopoly of the elected or those seeking election. If it were otherwise, then our politicians had a simple method of silencing any criticism from women who dared to speak out before the 20th century, aboriginal people who dared to speak out before 1967 and children who still dare to speak out on any political topic. The simple fact is that many people are too busy doing other useful things to wish to stand for (or in the United States, to run for) political office.

My remarks are themselves controversial. An opposing view is forcefully stated by Mr Justice Thomas in his book, **Judicial Ethics in Australia**. However, I draw comfort from the announcement of Lord Mackay of Clashfern (yet another Scot) in 1987 that the Kilmuir Rules should be abolished in the United Kingdom. His Lordship said:

> *…. I believe that [judges] should be allowed to decide for themselves what they should do …. Judges should be free to speak to the press, or television, subject to being able to do so without in any way prejudicing their performing of their judicial work. …It is not the business of the Government to tell the judges what to do.*

I would not want it to be thought that I am encouraging any judge to seek publicity or to see his or her office as a springboard for causes (however worthy). Nor am I suggesting that serving judges have the right to talk about any and every topic. For example, it would be unthinkable that a judge would offer public endorsement to a politician standing for election, or public criticism of the fitness of a colleague appointed to the Bench. There are obvious "no go areas" and it behoves the judiciary to formulate them. My concern is with the suggestion that judges must never engage in controversy and with the reasons offered for enforced silence.

Controversy causes pain, and the judge who speaks out on anything should weigh anxiously the cost to colleagues and the institution of justice. Sir Anthony Mason reminds us that:

> *Judicial reticence has much to commend it; it preserves the neutrality of the judge, it shields him or her from controversy, and it deters the more loquacious members of the judiciary from exposing their colleagues to controversy. Judges are not renowned for their sense of public relations.*

We all have a number of callings. One of them is to be a humane and moral citizen. For all of us there is *"a time to keep silence, and a time to speak"* (Ecclesiastes 3:7) and each one of us will enter these times in different ways and on different issues. Our right to do so and the public interest in doing so should be recognised.

I have tended to speak in terms of individual rights and duties. These lie in a state of constructive tension with our individual and collective duties to the institution of the judiciary. While we hold public office our primary obligation is to serve the administration of justice and any private rights (as distinct from duties) that we possess must yield to that overriding obligation. Doyle CJ's paper, which I have read in draft, lays proper emphasis on this institutional duty. In seeking to stimulate debate I have tried to focus upon the public interest in ridding ourselves of the Kilmuir rules. There is a strong public interest in erecting and enforcing an alternative structure of principles regulating when judges may and may not speak out.

21 March 2001

MEMORANDUM

TO: Mason P

FROM: Ipp AJA

RE: **Judges speaking out**

The following comments about my memory of what occurred in South Africa may be helpful.

1. It is to be remembered that the erosion of civil liberties occurred very gradually in South Africa. In 1948, before the Nationalist government took power, there was little difference in the laws and the attitudes of the people to those which you would find in most western countries. Changes in attitudes were gradually effected by propaganda (involving largely appeals to patriotism) and changes in the law. The fundamental proposition was that any person who did not agree with the changes to the laws was not a true patriot and an enemy of the people. Gradually, it became difficult to speak out without being faced with government and community opprobrium.

2. Of course, it is now accepted that in the period from 1948 to about 1990 the laws that were passed in South Africa involved a fundamental negation of human rights. In hindsight, there is now very strong criticism of the judges who failed to speak out at each stage of this gradual process. There are few who disagree with this criticism, although there are some South African judges who defend themselves on the basis that it was not their duty to speak out, it was their duty to apply the law.

3. I shall mention a few examples of the particular changes to the law that might be thought to have played an important role in the gradual evolution from a largely democratic society to one which in many ways was totalitarian.

4. Firstly, there were changes to the law relating to qualification for votes. The coloured people (that is, those of mixed blood ancestry and Malay) were removed from the Common Voters' Roll. They were allocated (from memory) two or three (white) members who would represent them in Parliament. They no longer had the right to vote for a particular candidate in a particular constituency as the white citizens did. They were thereby substantially disenfranchised. The black citizens were also allocated white members of Parliament to represent their interest. There were only a few of these. The blacks were thereby given no practical vote.

6. The next category of laws that were critical to the establishment of the racist and totalitarian society were those that defined ownership of property and access to particular places and things by reference to colour. A hierarchy of colour was created. From white to Chinese to Indian to Malay to mixed blood to black. The lower one was in the hierarchy the fewer

rights one had. The means of determining whether a particular individual fell within one racial group or another were humiliating and degrading.

7. Then there were those laws that concerned the abolition of habeas corpus. Like all the other laws this occurred gradually and was an evolving process. They started off with something called the 90 day detention law. By this law a person arrested on particular offences could be detained without trial for 90 days. The rules applicable to this detention gradually became more oppressive. The persons detained would be kept in solitary confinement without access to other prisoners. Then they were deprived of access to lawyers. Then the whereabouts of their prisons were concealed. Then they were deprived of reading and writing material, soap, clean clothes and the other accoutrements of ordinary life. This was all done by legislative fiat. Then the 90 day period was extended and the police were allowed to re-arrest a prisoner immediately upon expiry of the 90 day period. The result was that the 90 day period became indefinite and prisoners could be kept indefinitely without anyone being able to communicate with them. The courts did nothing and judges said nothing. Everything was done by Act of Parliament.

8. The onus of proof in criminal cases having any political content was changed. This, also, happened very gradually. Firstly, there were only a small category of cases where this was the law. Secondly, the onus was reversed only in regard to particular issues. Gradually this developed so that the reversal of the onus became generally accepted in all categories of cases involving the maintenance of the existing regime and its system. Also, it applied in a most broad ranging way to virtually every issue in each case. The effect was that it became extraordinarily difficult to obtain an acquittal. Severe mandatory sentences were required to be imposed.

9. Finally, another category of laws prevented the courts or anyone else having access to government documents, prevented appeals on fact, and which generally protected executive action from court interference.

10. It is to be emphasised, again, that everyone of these laws came from an act of Parliament. Sections of the press constantly criticised them. This resulted in censorship. Again by Act of Parliament. But everything was lawful (now, some say, the laws should have been disobeyed, as in Nazi Germany).

11. Throughout this period there were certain law faculties, individual academic lawyers, Bars and individual barristers who publicly criticised the laws. Some judges did their best to ameliorate the harshness of the legislation by enlightened judgments. As time went by the public opposition to criticism of the system increased. One academic, Barend Van Niekerk, who was particularly outspoken in his criticism of judges who applied the laws in a mechanical way, was found guilty of contempt of court and sent to prison for a significant period. This had a profound effect on his life.

12. Many lawyers publicly and privately implored judges to speak out extra-judicially. They did not. Most declined to speak out in the course of their judgments. They thought they were duty bound to remain silent. The judges had many opportunities in the course of their judgments to alleviate the laws by way of processes of construction. Some did but most did not.

13. With the recent transformation of South Africa there has been a great deal of criticism of the judges who failed to speak out. This criticism has been accepted, not only by lay people and lawyers but by many of the judges themselves.

14. I went to a conference in Durban in 1993 or 1994 when Sidney Kentridge QC praised the individual barristers and two or three Bars who had continually done their best to oppose the injustices and alleviate the situation. Some judges present who had been amongst those who had vigorously and with enthusiasm applied the laws in question cheered Kentridge's remarks and shouted "Hear Hear".

15. Certainly, at a later stage, from the late 1980's, some judges actively did speak out. They made an enormous difference. They are spoken of with great respect in the country. They include judges such as Didcott J, Goldstone J, Kriegler J and Friedman J. Didcott J spoke out vociferously both extra-judicially and in court. The others were very critical in the course of their judgments. The general consensus of opinion is that they were very important in effecting change, and bringing about a less rigid climate of opinion.

17. Questions have now been asked - What would have happened had judges earlier done what these judges did? At the height of the apartheid regime, that would have been particularly difficult, although possible. It would have been easy, early on, when the gradual evolution began at that stage, less courage would have been required. It was then that the judges were restrained and inhibited only by the view that they were there solely to apply the law. This led, in the end, to an abuse of the law, to an overriding set of unjust laws and to an unjust society.

18. The informed view in South Africa today is that experience has taught that judges are the guardians and custodians of the administration of justice and of human rights generally. They are duty bound to protect and warn society against laws which are fundamentally inimical to a democratic society. In this task, mild inroads into those laws are as important as frontal assaults. It is usually through the mild inroads that an executive conditions the people and gains sufficient strength to make the frontal assaults.