Judicial Conference of Australia
Uluru, April 2001

SHOULD JUDGES SPEAK OUT?

Justice Margaret McMurdo

One view of the judiciary during the early part of the 20th century was that judicial appointment brings with it substantial retirement from the world and a degree of public and social isolation so that the judge could not be said to be compromised or the judge's impartiality brought into question.[1]

The Kilmuir Rules

In 1955, the Director-General of the BBC suggested to the Lord Chancellor, Lord Kilmuir, that senior judges might participate in radio programs about great judges of the past. The Lord Chancellor's response has become known as "the Kilmuir Rules" and has provided guidance to English and other common law judges as to when and whether they should speak out. The following extract from Lord Kilmuir's reply sets out what has become known as the Kilmuir Rules:

> "It is, I think, agreed that there are positive advantages to the public when serious and important topics are dealt with through the medium of broadcasting by the highest authorities. We are likely, for example, to get a better assessment of the qualities of some eminent Judge of the past through an existing member of the Judiciary than from anyone else.
>
> But the overriding consideration in the opinion of myself and of my colleagues 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 course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism. It would moreover, be inappropriate for the judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment: and in no circumstances, of course, should a Judge take a fee in connection with a broadcast.
>
> My colleagues and I, therefore, are agreed that as a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or to appear on television. We recognise, however, that there may be occasions, for example charitable appeals, when no exception could be taken to a broadcast by a Judge. We consider that if Judges are approached by the broadcasting authorities with a request to take part in a broadcast on some special occasion, the Judge concerned ought to consult the Lord Chancellor who would always be ready to express his opinion on the particular request.
>
> The expression of views contained in the foregoing paragraph is subject to the important qualification that, as you are already aware, the Lord Chancellor

---

1 Thomas JA, *Judicial Ethics in Australia*, 2nd ed, 1997, 93-94.

> has no sort of disciplinary jurisdiction over Her Majesty's Judges, each of whom, if asked to broadcast, would have to decide for himself whether he considered it compatible with his office to accept.
>
> I am sorry to think that the foregoing expression of my views and those of my senior colleagues will be a disappointment to you. As I said before, I am by no means unsympathetic to the proposal you have made to me which, as I think I have made plain, raises issues of principle of the first importance."[2]

I forgive Lord Kilmuir his exclusive use of the male pronoun for there were no women judges in England or Australia in 1955. That was the year that Anthony Eden replaced the 80 year old Winston Churchill as British Prime Minister; the Cold War hotted up with the USSR organising the Warsaw Pact as a rival to NATO and the USSR and Yugoslavia signing a treaty of friendship; South Vietnam was proclaimed a republic; Annigoni painted his classic portrait of the cloaked, beautiful young Elizabeth II; Vladimir Nabakov wrote Lolita and Lawrence Olivier produced and starred in the classic film adaptation of Shakespeare's "Richard III".

Developments since the Kilmuir Rules

There has been enormous social change since 1955 and this has been reflected in the judiciary.

(a) Australia

By 1984 Lord Kilmuir would have noted with Orwellian horror a divergence of opinion amongst Australian judges as to whether communication with the public through the media was appropriate. Robert Thomson, in his book *The Judges*[3] notes that he wrote to 150 judges that year seeking interviews. Eight heads of jurisdiction and fifty judges agreed to participate. Mr Thomson notes:

> "The judges who did agree to be interviewed self-evidently disagree with the code of silence implicit in the judicial code of ethics. Of those, some came out part of the way, and were happy to be interviewed as long as their oral statements could not be sourced to them … . A proportion were prepared to be interviewed and identified. The view of the interviewed judges was that media contact was not necessarily wrong, but controversy must be avoided."

All seven High Court judges declined to be interviewed.

The views of some High Court judges had changed by April 1995, when the ABC TV's *Four Corners* interviewed the retiring Chief Justice, Sir Anthony Mason. Since then other High Court judges have been interviewed by the ABC about their life and work as High Court judges.

(b) United Kingdom

When Lord Mackay became Lord Chancellor in 1987, he stated that the Kilmuir Rules should be abolished.[4] Indeed, so far have United Kingdom judges moved from the Kilmuir Rules that they are now issued with a 75 page booklet *The Media. A Guide for Judges* from the Lord Chancellor's Department Press Office which suggests judges who have been invited by the media to give an interview contact the Press Office to discuss relevant issues and information such as a particular program's approach, format, other participants etc. The booklet reminds judges that the Lord Chancellor cannot comment on judicial decisions other than to emphasise the importance of judicial independence and cannot respond publicly on

---

2 Thomas JA, op cit, fn 1, 307-308.

3 Allen & Unwin, 1988, 25-29.

4 Thomas JA, op cit, fn 1, 104.

behalf of judges to general or specific criticism of the judiciary. It encourages judges where appropriate to report false or unfair reporting or harassment to the Press Complaints Commission or the Broadcasting Standards Commission or to demand corrections from the media as appropriate. Serious mis-reporting should be immediately notified to the presiding judge or head of division so that consideration can be given as to whether the Press Office should issue a statement. The booklet gives advice on how to handle "door stepping", the practice where reporters call out questions as you enter or leave a building or car. It gives helpful tips on participating in interviews: look at the interviewer, not at the camera; accept the offer of powder for your face and sit on your jacket tail to prevent unsightly bunching of the jacket at the neck and shoulders. The booklet gives other useful advice including what action to take if you consider you have been seriously libelled by the media.

(c) Internationally

On 4 July 1988, the Basic Principles on Independence of the Judiciary were adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders and include:

> "**Freedom of Expression and Association**
>
> 8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens, entitled to freedom of expression, belief, association and assembly, provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

The role of the Attorney-General

The once rare public criticism of judges has now become commonplace. The once commonplace defence of judges by Attorneys-General has now become rare. This is often cited as reason for judges to speak out. It is useful to look at the history of the role of the Attorney-General.

In the United Kingdom and some other Commonwealth countries, the role of the Attorney-General is restricted to legal advice to the government, representing the government in court, exercising ultimate control, over major prosecutions and discharging special legal functions of the Sovereign, such as granting fiats for relator actions. The Attorney-General does not have ministerial responsibility for a government department. In England, the Attorney-General has not been a member of Cabinet since 1928; ministerial responsibility for the administration of justice vests in the Lord Chancellor and the Home Secretary, both of whom are members of Cabinet.[5]

In Australia, however, the Attorney-General has always been a member of Cabinet and often holds other portfolios. The Attorney-General in Australia, therefore, exercises executive and political power and additionally makes decisions in the exercise of an independent judgment, for example, whether or not to prosecute criminal cases; to institute and prosecute proceedings to vindicate public rights or to enforce the law; or to present *ex officio* indictments.[6] The Attorney-General has ultimate responsibility for such decisions so that were Cabinet to attempt to force the Attorney to prosecute a matter against the Attorney's independent decision, then the Attorney-General must refuse to comply and, if necessary, resign.[7]

---

[5] Hon L J King AC, QC, *The Attorney-General, Politics and the Judiciary*, 74 ALJ 444, 445-446, an edited version of a paper delivered to the 4th Annual Colloquium of the Judicial Conference of Australia, Melbourne, 13 November 1999.

[6] *Barton v The Queen* (1980) 147 CLR 75.

[7] The most famous example in recent times occurred when, in 1977, the then Attorney-General of Australia, Mr Ellicott, resigned from the Fraser Government because of Cabinet's refusal to allow him access to the previous administration's Cabinet papers as to the prior Cabinet's involvement in the controversial overseas loans affair; Mr Ellicott required this information to independently determine whether he should take over and

The Attorney-General has the critically important role in government of the political guardian of the administration of justice. The Hon L J King AC, QC notes that this function includes responsibility for law reform, the funding of the courts and the judicial system.[8]

Sir Anthony Mason, after unprecedented attacks upon members of the judiciary and especially the High Court following the *Wik* decision, said that on occasions the Attorney "should respond to irresponsible criticisms which threaten to undermine public confidence in the judiciary".[9]

The current Federal Attorney-General, Daryl Williams, dissented:

> "… such a view ignores the contemporary role of an Attorney-General and ignores the real risk of a conflict between the interests of the judiciary and the executive interests of the government of which the Attorney-General is a member. Attorneys-General, as members of governments, are politicians. An Attorney-General cannot simply abandon this role and expect to stand as an entirely independent defender of the judiciary. In fact, it has never been clearly articulated or accepted that Australian Attorneys-General do have such a duty. Arguments that an Attorney-General should defend the judiciary and has an obligation to do so is an outmoded notion which derives from a different British tradition. … As I have consistently stated, it would seem to me more in keeping with the independence of the judiciary from the executive arm of government that the judiciary should not ordinarily rely on the Attorney-General to represent or defend it in public debate."

But Mr Williams nevertheless acknowledged:

> "… that where sustained political attacks occur that are capable of undermining public confidence in the judiciary it would be proper and may be incumbent upon an Attorney-General to intervene."[10]

The Hon L J King AC, QC notes that the difference between the Mason and Williams' view is one of emphasis rather than principle; nevertheless the thrust of Mr Williams' argument is to minimise the role of the Attorney-General in defending the courts and judiciary.[11]

When Sir Gerard Brennan was Chief Justice he accepted the view that: "The judiciary … no longer expects the Attorney-General to defend its reputation and make that position known publicly."[12]

Both Sir Gerard Brennan and the Hon L J King AC, QC believe that the judiciary and the public are entitled to look to the Attorney-General to explain publicly the nature of the judicial process and repel attacks on the reputation of the judiciary based on grounds irrelevant to the application of the rule of law. The Attorney should explain that the courts must apply the law whatever the consequences; the facts of each case, not policy considerations, govern the exercise of judicial discretions, including sentencing, which are dutifully exercised by judges without any political agenda.

---

pursue a private prosecution of members of the Whitlam Cabinet; in the absence of relevant information he was not prepared to follow Cabinet's view that he should do so in order to stop the private prosecution. The Attorney-General's independent role was described in Westminster in 1951 by Sir Hartley Shawcross and is often referred to as "the Shawcross principles". See fn 5.

8 Hon L J King, op cit, fn 5, 454.

9 Mason, *No Place in a Modern Democratic Society for a Supine Judiciary*, (1997) 35 (11) Law Soc J, 51.

10 Williams, *Judicial Independence* (1998) 36 (3) Law Soc J, 50-51.

11 Hon L J King, op cit, fn 5, 457.

12 Brennan, *The State of the Judicature*, (1998) 72 ALJ 33.

This defence from criticism by Attorneys-General is not always forthcoming; when it is, it is appreciated, but it is no longer expected.

Nor can the profession be relied upon to routinely explain and defend the work of the judiciary and the courts; its hands are quite full enough promoting and defending its own position.

Speaking out to explain the role of courts and judges

Most of us now accept that it is for the judiciary to foster public confidence in the courts by ensuring the public understand the role of judges to administer justice according to law. This is necessary to maintain public confidence, understanding and support for the courts, even when they make unpopular decisions, what Chief Justice Gleeson has referred to as judicial legitimacy.[13] Chief Justice Gleeson wisely counsels caution in this area and reminds us that true public confidence must be earned by the regular work of judges in the court room. Judges perform publicly in the hearing of cases and in the publication of reasons. This is our greatest opportunity to communicate courteously and rationally with court users and the public. Justice of Appeal Thomas, in his important work *Judicial Ethics in Australia*[14] also emphasises that the way in which we are entitled to earn respect is in the court room and this is best achieved by fostering fuller and fairer reporting of court decisions. The Court of Appeal of the Supreme Court of Queensland has attempt to do this by publishing reserved judgments and *ex tempore* judgments in matters of public interest on the internet on the day of delivery; providing easy access for the media to judgments and preparing judgment summaries in significant cases.

But is this enough? Should judges do more by speaking out? Sir Daryl Dawson articulately explains the case against judges allowing themselves to be interviewed by the media:

> "It is that the function of a judge is to judge cases. That he does in open court and when he makes his decisions he gives his reasons for them publicly. Everything is there for public scrutiny and there is no real point to be served by any further explication. Indeed, the danger of the judge discussing his function in the news media, even in a general way, is that emphasis would be placed upon the individual personality which is something which the processes of the law are designed to play down. The judicial method, court dress and court procedure are all aimed at fostering an objective rather than a subjective approach to the administration of justice, whereas the inevitable tendency of the media is to personalise issues in a way which is inimical to this aim."[15]

Whilst I am conscious of the dangers of speaking out and I appreciate that judicial legitimacy is best and primarily maintained by judges publicly performing their core function, the delivery of timely justice according to law, we must also make sure the public understands our role. This goal can be achieved in part through extra-judicial speaking and writing.

If you have any doubts about the need for judges to better communicate with the public, let me read to you a few of the judge jokes from the *Penguin Book of Australian Jokes* in the section headed "The Law is an Ass".[16] The section commences with "What do you call a

---

[13] Gleeson, *Judicial Legitimacy*, Australian Bar Association Conference, New York, July 2000.

[14] 2nd ed, LBC Information Services, 1997, 107.

[15] Dawson, *Judges and the Media*, University of New South Wales Law Journal, 1987, Vol 10 No 1, 17-18.

[16] Adams and Newell, *Penguin Book of Australian Jokes*, Penguin Books Australia, 1994, 273-276.

bigot in a wig? Answer: Your Honour." The penultimate joke is, "What do you call fifty sexist, racist judges stuck at the bottom of the ocean? Answer: A bloody good start." In between are such choice jokes as, "What is black and angry and going nowhere? Answer: An Aboriginal Australian expecting a fair trial." and
"Why is an Australian judge like Halley's Comet? Answer: Because they've both spun out of touch with the real world." or
"Why did the judge stop his wife plugging in the iron? Answer: Because he couldn't cope with a woman being close to power."

Professor Stephen Parker's AIJA Report[17] highlighted the need to not only bring about positive change in the courts but also to communicate with the public.

Many judges take time out of their onerous schedules to address community groups on the role of judges and the courts. Courts, including mine, provide information pamphlets to court users, especially unrepresented litigants, and encourage and facilitate school visits to courts, information days and so on. Most jurisdictions, but regrettably not yet Queensland, use community liaison officers to assist in this function for the demands of a heavy judicial workload do not leave time for public relations work and nor are we appropriately trained. Indeed, our very fear and mistrust of the media tends to exacerbate the tension between it and the judiciary.

In 2001 - a Court Odyssey, few Australian judges would feel obliged to refuse a request from the ABC to participate in a radio or even television program about great judges from the past or a host of other issues, although many might decline the invitation.

Judges should not breach the doctrine of separation of powers
If speaking out or writing extra-judicially, judges must be cautious not to offend the doctrine of the separation of powers. The judiciary must be, and be seen to be, autonomous from the legislature and executive; in Australia the judiciary is not elected and it is for the legislature to enunciate policy and the legislative means to achieve it.

In November 1981, Mr Justice Thomas Berger of the Supreme Court of British Columbia publicly criticised two features of the constitutional accord that had been reached between Prime Minister Trudeau and the Premiers of nine provinces, namely the failure to guarantee native rights and the denial to Quebec of a veto over constitutional change. There was a public outcry over his comments which resulted in a committee of investigation into his conduct. The committee delivered a unanimous report which concluded that although Mr Justice Berger's conduct warranted a recommendation for removal from office, such a severe sanction should not be invoked because the standards of judicial propriety had not previously been enunciated. The committee's report was released to the press and just over a year later Mr Justice Berger resigned.

Some have argued that Mr Justice Berger was treated unfairly; judicial comment on constitutional matters is legitimate because the constitutional structure defines the duties and powers of all branches of government. Judges have a unique perspective on constitutional issues which cannot be represented by the legislature alone.[18]

Surely Mr Justice Berger was entitled as a judge and lawyer to contribute to the debate on constitutional issues, at least whilst it was the subject of community consultation. His error seems to have been in criticising the final form of the accord after its approval by the legislatures.

---

[17] Parker, *Courts and the Public*, AIJA, 1998.

[18] *The Limits to Judges Free speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger*, Jeremy Webber, McGill Law Journal, 1984, Vol 29, No 3, 369, 388.

Speaking out on matters involving the administration of justice

It is also generally agreed that judges have wide licence to speak and write on matters which involve the administration of justice and to advocate measures conducive to its maintenance and improvement and to oppose policies which undermine it. It is on this basis that many judges speak out against issues such as mandatory sentencing. Some think it also permits judges to comment on the criteria for appointment to the judiciary.

Concern for the administration of justice would have permitted brave judges in Nazi Germany to speak out individually or collectively against the removal from the bench of hundreds of their Jewish colleagues, but they did not.

There has been criticism of the silent majority of South African judges under the apartheid system who said nothing when the police force blatantly abused the administration of justice by mistreating and torturing suspects.

I wonder if those judges invoked the Kilmuir Rules? I acknowledge that it is easy for Australian judges to speak out; we are not at any real risk of personal or financial penalty. I recognise that it is unfair to criticise those judges in less fortunate countries who do not speak out because of the risk to their career or personal safety or that of those close to them. The concept of judicial decision-making within a framework of wickedly unjust laws is a judicial nightmare and hopefully one we Australian judges will never have to face. If we were in such a situation would we be brave enough to speak out, despite the dreadful consequences? Our thoughts have been and are with our Zimbabwean colleagues in their current noble battle with the legislature to maintain judicial independence and the rule of law. But, ultimately, if a judge is not prepared to enforce a statute lawfully passed by the legislature, then, consistent with the judicial oath, the judge must resign, even if very vocally.

A topical and local recent example of a judge speaking out on matters concerning the administration of justice was the Northern Territory's Justice Angel at an admission ceremony on 6 February this year. He spoke against political inter-meddling in the independence of the legal profession when Chief Minister and Attorney-General Burke (he holds both positions) refused to appoint as Queen's Counsel the President of the Northern Territory Law Society, Jon Tippett, despite the positive recommendation of both the Chief Justice and the Northern Territory Bar Association. Justice Angel referred to the history of discord between the Northern Territory government and Mr Tippett, who represented the Aboriginal Legal Service in its case against the Chief Magistrate and has also been an outspoken critic of mandatory sentencing. Angel J commented that there was:

> "… an increasing tension between the present NT government and your profession, or, at least certain, responsible, independently-minded members of your profession … . …
> You may legitimately ask 'when should judges speak out'?
> The circumstances when judges should speak out publicly undoubtedly include circumstances when the rule of law and the independence of the legal profession and of the judiciary are, or may be, put at risk. After all, judges are sworn to uphold the rule of law. So I speak today, not to criticise or to answer or to forestall criticism, but because I deem it in the public interest to do so.
> The rule of law is never at risk in a healthy democracy."[19]

[19] Angel J, Admission Ceremony Transcript of Proceeding, 6 February 2001.

Speaking out must not compromise the duty of impartiality
Judges' involvement in and public statements about extra-judicial activities can sometimes lead to a perception of bias or lack of impartiality and may require judges to withdraw from cases. Whilst the occasional incident is manageable in metropolitan areas where one judge can exchange workloads with another, it can be problematic in country areas where the provision of a substitute magistrate or judge can be costly and inconvenient. Judicial officers in provincial areas need to be especially sensitive to this issue.

The standing in which the judiciary as a whole is held may be demeaned by judges who speak out immoderately being seen as activists, mavericks, publicity or promotion seekers or creatures that feed on the cult of personality.[20]

Speaking at law conferences and writing legal articles
Judges commonly speak on legal matters, questions of law reform or matters dealing with the administration of justice in the presentation of papers to law conferences. They frequently write articles for law journals. Even the cautious approach taken by Thomas JA[21] does not suggest that this is unacceptable; nevertheless it warrants a warning that the role of the judge educator must not cloak partisan agendas or diminish public respect or confidence in the judiciary.[22]

Judges should not speak about pending or completed cases
It is uncontroversial that a judge should not engage in public discussion about a case which the judge is hearing or a judgment which has been delivered. A case is heard and decided upon the material before the judge in open court and is usually subject to an appeal process. Its public discussion risks the appearance of extraneous considerations becoming involved and may obfuscate of the judicial reasoning process. Misrepresented facts can be corrected by the court community liaison officer or the head of jurisdiction.

Controversy may follow judges who speak out
Once judges speak out, controversy often follows and the Kilmuir Rules can look very attractive. Inevitably, there will be grey areas where there is a divergence of judicial and community opinion as to whether it was right for the judge to speak out. Judges who do speak out must be prepared to live with such criticism.

Justice James Wood, in a stirring address in a Uniting Church, which, in my view, did much to brighten the tarnished image of the judiciary and lawyers, expressed his views on aspects of drug policy and laws which were then the subject of vigorous contest between the major political parties in New South Wales; he also urged judges of conscience and faith to take a stand against unjust laws and policies of the secular State.[23]

Former Royal Commissioner and former President of the New South Wales Court of Appeal, Athol Moffitt, criticised Justice Wood as seeking to influence a political decision in breach of his public duty as a judge, amounting to misconduct in office, the more so for using his status as a judge and reputation for independence to influence a political decision.

Senior Judge Jack B Weinstein, US District Court, Eastern District of New York, expressed a different view:[24]

---

20 *Judicial Conduct*, Hon Mr Justice Thomas, Supreme Court Judges Conference, 1988, 12.
21 Thomas JA, op cit, fn 1, 103.
22 See fn 1, 103.
23 Wood, *Matters of Principle – A Reflection on the Judicial Conscience"*, Address at Unity Church, Ashfield, 14 November 1999.
24 Weinstein SJ, *Judicature*, Vol 77, No 6, May-June 1994, 322, 327.

> "On matters of more general interest, in a neutral setting such as a law school, bar association, or house of worship, any view on any subject no matter how controversial – abortion, family or community values, drug abuse or welfare reform – is acceptable."

This debate raises many issues. Mr Moffitt has no objection to relevant comments made in the course of cases being decided, to draw the attention of parliament to the unsatisfactory aspect of a particular law so that it can be amended. Is it then wrong to do the same thing in a public lecture at a law conference or in an article in a law journal? Judges are often in a position to offer useful insight into law reform, for example, sentencing options. Are such judicial comments legitimate if the reform suggested is not opposed by a major political party? Is the position different if a State judge makes a comment criticising a federal or another State law or policy which is not presently an issue in the judge's State? What if no major political parties oppose the suggestion, but a minor political party puts forward a populist but flawed policy, such as temporary judicial appointments to ensure that sentencing is sufficiently severe? Illegal drug abuse is a major factor in the criminal justice system; is not the drug issue relevant to the administration of justice?

In a response to Mr Moffitt's article, Mason P,[25] Voltaire-like, supported the right of every judge to contribute to public debate although he conceded he would sometimes prefer that his colleagues kept their views entirely to themselves, especially those with which he disagreed! This observation is very astute: if we agree with the speaking-out judge, he or she was right to speak out, but not otherwise!

Chief Justice Gleeson has also contributed to the debate and again reminds us to exercise caution:

> "Like other members of the community, individual judges will, on occasion, disapprove of some of the laws enacted by Parliament. Provided their capacity to administer the law impartially is not compromised, they are free to criticise the law, and to propose change. In fact, judges regularly point out defects in the law, and make proposals for law reform. … Impartiality is a condition upon which judges are invested with authority. Judges are accorded a measure of respect, and weight is given to what they have to say, upon the faith of an understanding by the community that to be judicial is to be impartial. Judges, as citizens, have a right of free speech, and there may be circumstances in which they have a duty to speak out against what they regard as injustice. But to deploy judicial authority in support of a cause risks undermining the foundation upon which such authority rests."[26]

It is difficult to find consensus amongst judges who speak out about speaking out! Dare I suggest that we would all agree with Mason P that a judge should not publicly endorse a politician standing for election. Mason P also suggests we should not publicly criticise the fitness of a colleague appointed to our bench;[27] but Davies JA[28] questions, without answering, if, in the view of those capable of making an informed objective judgment, a government appoints a judge who is not appropriately qualified by intellect and training, should judges who know that and who are pre-eminently those capable of making that informed, objective judgment, then speak out?

---

25 Mason, *Judges, Royal Commissioners and the Separation of Powers (A Reply to Athol Moffitt)*, NSW Bench and Bar Dinner, 2000.

26 Gleeson, *Judicial Legitimacy*, Australian Bar Association Conference, New York, 2 July 2000, 3.

27 Mason P, op cit, fn 25, 12-13.

28 *Judicial Reticence*, 1998, 8 JJA, 88.

Suggestions for discussion

There is room for tolerance of difference in the approach taken by judges to speaking out, but it would be useful if the members of the Judicial Conference could agree on some areas where judicial comment is acceptable and other areas where it is unwise. I raise the following issues for discussion.

- The Kilmuir Rules no longer apply to the Australian judiciary.
- We should adopt the following statement in the United Nations' Basic Principles on Independence of the Judiciary:

  > "… members of the judiciary are like other citizens, entitled to freedom of expression, belief, association and assembly, provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

- Judges' best opportunity to communicate with the public is through courteous and efficient performance in the court room and the timely dispensing of justice according to law. Every effort should be made to assist and encourage fuller and fairer reporting of court decisions.
- Institutional Communication to explain the workings of judges and the courts is desirable.
- Judges should not speak about pending or completed cases but a head of jurisdiction or court community liaison officer may correct misreported facts.
- In speaking or writing extra-judicially, judges should take care to preserve the principles of the Separation of Powers and the duty of impartiality.
- If a judge is concerned about the propriety of speaking or writing extra-judicially, the judge should consult with the head of jurisdiction and would consider doing so before taking part in a media interview.