

## PRESS CLUB – 5 MAY 2006

Thank you for the invitation to address you today. I regard this as an important opportunity for me to meet and discuss with you areas of mutual concern and tensions that exist between the media and the courts, particularly the criminal courts. I hope to dispel a few misconceptions which are promulgated from time to time and, at the conclusion of my remarks, I invite you to fire questions at me on any topic whatsoever. Whether I will answer remains to be seen.

In reflecting on topics or issues that might be of interest to this gathering I found myself contemplating the times in which we live and the challenges that lie ahead for our courts and our system of justice, particularly criminal justice.

We all know that the criminal law exists for the protection of the community at large, but relatively little attention is given publicly to the role of the criminal law in protecting the rights of individuals within our community. It has always been a difficult task to strike a correct balance between laws which will best achieve the objective of protecting the wider community while avoiding the catastrophe of an innocent person being wrongly convicted and, in addition, while protecting individuals against the unjustified use of the power of the State through various law enforcement authorities, including the police. Through both legislation and rules developed by our courts, in a process that took many years, a precarious balance was struck which was undoubtedly weighted in favour of the individual. That weighting occurred because the community recognised the fundamental importance of fair treatment of all individuals within our community and of ensuring that innocent persons are not wrongly convicted.

I suspect that sometimes we do not truly appreciate from a distance just how disastrous it is when an innocent person is wrongly convicted. When an innocent person is sent to gaol or has been executed before their innocence has been established, our society is greatly diminished.

Today, the advent of DNA has dramatically increased the number of cases discovered in the United States where people have been wrongly convicted of very serious charges such as rape and murder and have spent many years in gaol, some on death row, before DNA has proved their innocence. There have been examples in Australia and the United Kingdom of innocent persons wrongly convicted. These have occurred notwithstanding the weighting of the system in favour of the individual accused.

I mention these matters because it is my perception that there has been a dramatic change in political and community thinking since the wanton destruction of lives in 2001 when the twin towers in New York were destroyed. Prior to September 2001 terrorism had existed for many years throughout many parts of the world, but we in Australia had been relatively isolated from the impact of those acts of terrorism. It took a savage blow on the home soil of the strongest military nation of the world to begin a revolution of thinking in our part of the world about how to deal with terrorism. That revolution gained impetus in the wake of the Bali bombings. Has that revolution altered the precarious balance to which I referred? If so, how and what are the ramifications?

Please understand that in what I am about to say I am raising issues for your consideration and not expressing personal views about particular legislation or political questions. I would appreciate not seeing a headline tomorrow saying “Chief Justice slams terror legislation” or “Chief Justice criticises the government over Hicks”. You will readily appreciate that I am not permitted to enter into debates on political issues, but it is appropriate for me to raise matters for your consideration.

Since September 2001 the momentum to act proactively against terrorism has grown rapidly and we have reached the point of the introduction of what is loosely called the “terror legislation”. In the interim, we have seen two of our citizens imprisoned in Cuba by our ally, the location having been chosen for the purpose of avoiding compliance with United States law governing the treatment of persons taken into custody.

Mr Habib was eventually released after spending two years and nine months in United States custody without a charge being laid.

Whatever one may think about what David Hicks did nor did not do, and we have no idea because evidence has not yet been presented, is it not totally foreign to our understanding of how a civilised community treats persons charged with offences to incarcerate a person for over four years in the conditions to which David Hicks has been subjected? Is it excessive to say that David Hicks has been caged and left to the whims of treatment which we in Australia have always regarded as utterly unacceptable?

If my research is correct, from January to April 2002 Hicks was imprisoned at Camp X-Ray which did not have running water. Beds were on the floor and prisoners were often in the sun. I used the words “imprisoned” and “prisoners” deliberately.

Interesting, isn't it, how the concept of being held in a prison can be sanitised by words such as “camp” and “detained”.

From April 2002 until July 2003 Hicks was imprisoned in Camp Delta. He was kept in a unit made of metal mesh measuring eight feet by six foot eight inches and eight feet high. He was allowed two 15 minute showers a week.

Hicks was moved to Camp Echo in July 2003. It appears conditions improved.

The isolation of Hicks from support also requires consideration. He was handed over to the US Military in December 2001. It was not until two years later that he had a military lawyer assigned to him. That occurred in December 2003. It was not until December 2003 that Hicks was first allowed to speak to his father by phone. Two years. No checks and constraints by anyone independent such as a court.

Why? Where has that precarious balance been struck?

And why have our political leaders generally defended this treatment? Is it because David Hicks represents an unpopular cause and political purposes and interests prevail in the minds of our leaders? Where is the strength of leadership that demands and provides fundamental protection for individual members of our community?

Where is the strength of leadership that is prepared to stand up for those rights regardless of any question of popularity?

I stress that these issues have nothing to do with the guilt or innocence of Hicks or any other individual subjected to such treatment. Other issues fundamental to our ordered and relatively comfortable way of life are at stake.

So to Australia today. We face a threat in a form previously almost unknown on Australian soil. No doubt we need measures which will help us deal with the threat and devastating consequences of terrorism, and no doubt there is a strong argument for saying our existing measures were inadequate. Terrorists and other well resourced criminals do not play by some set of Queensbury Rules. As a community we need resources and methods to deal with this threat to our wellbeing.

We have the new legislation. I am not familiar with the details of it and I do not intend to comment on specifics. But what might be considered a cause for concern is not just the terms of the legislation. Does the new legislation herald a change in attitude to the rights of individuals arrested under the new legislation which might be perceived as somewhat alarming? Is the change reflected by the words and conduct of our leaders and in many letters to the editors and talk back shows across the country? Have we as a community come to accept the risk of innocent persons being convicted as a necessary casualty of the need to protect the community from acts of terrorism?

Legal and moral constraints and court oversight of the exercise of powers by the State protect all of us from the consequences of overzealous investigators pressuring individuals because they believe that the ends justify the means. We know it happens. The treatment of prisoners of war in Iraq at the hands of American military personnel provides a graphic example of what can happen when power is unchecked by legal and moral constraints. When leaders of countries convey the impression that those accused of terrorism or who oppose the ideals of the particular country do not deserve fundamental rights available to other citizens, those attitudes filter down and a belief permeates through the rank and file that the ends justify the means.

Why were the media briefed before the initial raids under the new legislation with the consequence that the media were in attendance at the raids? Why were politicians at press conferences announcing the arrests of persons under the new legislation? Why were politicians trumpeting the success of the legislation following a few arrests and without any knowledge of the adequacy or otherwise of the evidence against the individuals arrested?

What of the fundamental right of those individuals arrested to the presumption of innocence? The trumpeting and the media headlines that have followed plainly carried with them the presumption of guilt. All this before any charge or court appearance and, particularly, before the presentation to the court of evidence that might or might not eventually support a conviction.

Of course, the politicians and media have a ready answer. Juries are impervious to such publicity. You only have to look, say the media, to experience in the United

States. The job of the media is to inform the public. A naively simplistic and misleading response.

In this context, I found an editorial in the Australian of 10 November 2005 both disturbing and saddening. The editor wrote:

“The responsibility to afford those who have been charged with terror related crimes a fair trial belongs with the courts, not with the journalists.”

And later in the same editorial:

“What the public needs from the media, more than ever in the age of terror, is fewer ethical gatekeepers and more reporters.”

It is the responsibility of the entire community to ensure that those who have been charged with crimes, be they terror related or otherwise, are afforded their fundamental rights, including the right to a fair trial. The court is the instrument of the community for this purpose. The media and politicians are part of the community and a particularly significant part because they possess the capacity to undermine this fundamental right. It would indeed be unfortunate if media organisations and politicians possessing such power should take the view that they should be unrestrained by community interests or interests of those within the community which are in conflict with their own interests.

Now, before the media go off on the catchcry of duty to inform, let me hasten to add that I do not intend to detract for one moment from the vital role of the media in informing the public and exposing corruption and mismanagement. The value of a proper performance of that duty has been repeatedly demonstrated over the years. Today the performance of that duty is becoming increasingly important in ensuring that persons possessing extraordinary powers do not abuse those powers. The courts and the media both have a common concern in this area.

However, in the context of exercising a degree of restraint in the interests of fairness to persons arrested or charged, and particularly with respect to suppression orders made to ensure that accused persons receive fair trials, please do not continually endeavour to take the high morale ground and beat your chest about the importance of the freedom of the press and informing the public. You readily criticise judges who constantly – I emphasise constantly – resort to reliance on the need for and importance of the independence of the judiciary, yet fail to acknowledge even a hint of self serving interest when you oppose, and vehemently oppose, any restraint on your freedom to publish material that might prejudice a fair trial. Vigilance is required in both areas, but so is more than a touch of realism.

Having spoken of self serving interests, permit me also to take issue with News Limited Chairman and Chief Executive John Hartigan who was reported to have said in his remarks to the Inaugural News Awards in Adelaide on November 15 last year that “the judiciary are increasingly secretive and self-serving in their attempts to gag the media and rule in and out of bounds, on their terms, what’s fit to print.”

While the media have a legitimate point that some judicial officers are too cautious and grant suppression orders too readily, the courts are not secretive. Almost everything is done in open court, including the giving of evidence that is suppressed. Rarely is a court closed to the public.

Self-serving is a term that, other than on rare occasions, cannot reasonably be applied to the courts. Self-serving is defined by the Oxford English Dictionary as “placing one’s own interests before others”. When the court places restraints upon the media through suppression orders it is not for the self interest of the court. It is for the interests of the community at large and the individuals before the court. The interests favouring publication and those favouring suppression are frequently in conflict and the court must engage in a balancing exercise in order to reach a view as to the appropriate course. But it is utterly inappropriate to accuse the court in these situations of being self serving.

So to the criminal courts. Our legislators have given us new laws to interpret and to apply in the context of a system of justice that has now, in certain areas, seen a perceptible shift in that precarious balance.

Well, regardless of personal views, Judges and Magistrates must apply the law given to them in an objective manner. This represents a challenge for those in the judicial ranks who hold strong personal views adverse to the new laws. Sentencing, the most contentious area that arouses high emotions and, at times, a lack of clear thinking amongst commentators, also involves significant challenges for Judges and Magistrates.

Sentencing is not some idiosyncratic exercise personal to the whims of an individual Judge or Magistrate. There are laws in place, both statutory and common law developed by Judges, which govern the exercise of the sentencing discretion. Each offence carries a maximum penalty which the law says is reserved for those cases which fall within the worst category. Sentences must be adjusted according to where the offending is placed on the scale of seriousness. It is rare that a crime is properly classified as falling within the worst category and to highlight, as was done interstate recently, the absence of the imposition of a maximum penalty over a period as demonstrating a soft approach to crime is to distort the true situation.

The Sentencing Act passed by the Northern Territory Parliament in 1995 sets out the purposes for which sentences may be imposed and identifies the factors by which Judges and Magistrates must be guided when imposing sentence. The purposes of sentence are wide ranging and, despite emphasis given publicly to questions such as punishment, retribution and deterrence, rehabilitation is an important purpose of sentencing, particularly for young offenders. Factors to be taken into account are not limited to aggravating factors such as the seriousness of the offence or the harm done to the victim. They include an offender's character, age and intellectual capacity together with other mitigating factors relating to the offender.

It must not be overlooked that subject to very limited exceptions, prisoners are eventually released back into the community. The protection of the community is best achieved by releasing offenders who have been rehabilitated. A sentencing court cannot cure or address the underlying problems that lead to the commission of crimes.

As has often been said, the criminal law is a blunt social instrument. Not infrequently the imposition of long sentences would be counterproductive to rehabilitation and not in the best interests of the community. This is a message that fails to reach the public.

In addition to statutory and common law restrictions, a sentencing court is required to sentence within identified ranges of penalties applicable for particular types of offences. Obviously there needs to be a range because offences vary greatly in their seriousness and the culpability of offenders also varies greatly.

These constraints upon all judicial officers are not well understood by the community at large. The situation is exacerbated by the tendency of the media to concentrate on the aggravating circumstances of crimes coupled with interviews with victims who almost invariably complain about the adequacy of the penalty. A good story, no doubt, but hardly conducive to informing the public in a manner and with such detail as will enable the public to be properly informed and to make a balanced judgment. It is this emphasis and the lack of balanced communication of necessary information which fosters the growth of attitudes like, “the courts are out of touch” and “penalties are too lenient”.

Are the courts out of touch with reality or the wishes of the community? Judges and Magistrates all live in the community and many have children. We are not oblivious or immune to crime. Many of us are victims of crime. We read the papers. Is this view of Judges and Magistrates a myth being perpetuated in the interests of good stories?

I suggest that most Judges and Magistrates know more about the criminal side of our community than the majority of the members of our community who rarely, if ever, come across that darker side. We are well aware of the impacts of crime at various levels because we regularly see and hear victims. Unfortunately, for those of us who have practised in the criminal law or sit in the criminal court, too often we hear evidence of activities that most of our community will only read about occasionally in the media.

In assessing the overall performance of the judiciary, it must be recognised that in recent years penalties have increased significantly. Judges and Magistrates impose many hundreds of sentences every year. Of the many hundreds, only a very few are reported in the media. Of those reported, not all are the subject of attack for being too light. Unfortunately, when that attack occurs, it is frequently accompanied by the general allegation that the courts are too lenient and out of touch.

In making these observations I do not overlook the fact that Judges and Magistrates make mistakes from time to time and impose excessively lenient penalties.

Sometimes excessively heavy penalties are imposed. In a system that gives the sentencing Judge or Magistrate a discretion within an overall range of penalties it is inevitable that these errors will occur. Hence both offenders and the DPP have rights of appeal to the Court of Criminal Appeal which can determine whether Judges or Magistrates have erred.

When mistakes are made, we accept that public scrutiny will often lead, legitimately, to criticism. No one likes to be criticised, but Judges and Magistrates accept that we

operate in the public arena and we are properly subjected to public scrutiny. Such scrutiny and criticism are inevitable. They are healthy aspects of our democratic society. But what Judges and Magistrates find difficult to accept is the ill informed criticism which is fostered by media reports that are inadequate, inaccurate and frequently biased in a particular direction. Unless the reasons are read on the website, very limited information is given to the public by which to assess the gravity of the mistake.

I need to add this. Journalists face a difficult job. Most are not trained in the reporting of court proceedings. They have time limits and often are confronted with very little opportunity to read and understand transcripts of sentencing remarks. We endeavour to assist by publishing our judgments and sentencing remarks on the court website soon after delivery, but if we can do more to assist please tell me.

On this issue of properly informing the public, I must compliment the media generally for their co-operation and balanced coverage during the trial of Mr Murdoch. I also wish to compliment the NT News/Sunday Territorian for having published my entire sentencing remarks last year at a time when considerable public debate was occurring about a sentence I had imposed. I appreciate the time and space constraints that exist within all sections of the media, but I hope that in the future when particular sentences become the subject of significant public controversy that there will be more occasions when the full sentencing remarks are published in order that the public can reach properly informed views.

Is the problem of public perception truly one of concern? Attacks on courts and individual sentences have been occurring for many years and the courts have survived. But in my view the nature and persistence of the attacks across Australia, many of which are ill informed, have created cause for concern. In some States the sources of those attacks add to that concern. We are witnessing an ongoing and insidious process of undermining public confidence in both our system of justice and the judicial officers who administer it.

This process has gained momentum in some parts of Australia notwithstanding that Supreme Courts across Australia post sentencing remarks and judgments on their websites soon after delivery. These reasons and judgments fulfil two purposes. First, they explain the reasons of the Judge in detail thereby informing the public of the facts and the basis of the sentence or judgment. Secondly, they fulfil the requirement that Judges be accountable for their actions by exposing the reasons and thinking of the Judge to public scrutiny. Very few in our community are subjected to such scrutiny in their day to day work.

Yet by reason of what the community is told repeatedly by politicians, the media and other commentators, the community rarely receives a full and unbiased picture.

Commentators, political and otherwise, seldom give a balanced commentary. Almost invariably the commentary is adverse to the Judge or particular decision. Why? I do not accept that Judges invariably get it wrong. There is no complaint, or legitimate complaint, about the vast majority of decisions. So why is attention always given, and given prominently, to complaints and views which are frequently ill founded?

The Australian community needs a strong, independent and competent judiciary which is fully accountable and in which the public has confidence. More than ever the courts are endeavouring to inform the community of the work of the courts through the internet, media liaison and education programs. But more is needed. Politicians and the media should recognise this need and, when appropriate, be willing to promote public confidence in the judiciary and the system.

In making that observation, I do not mean to imply that individual decisions or Judges or our system of justice generally should be immune from criticism. Nor am I suggesting that criticism should be withheld or tempered where such criticism is justified. As I have said, the operation of the courts in public, the giving of reasons and informed criticism are all healthy aspects of our judicial system and the wider democratic processes.

However, criticism should be informed. Criticism of individual sentences should not be elevated to an attack upon the system generally. Nor should criticism in an individual case descend into a personal attack upon the judicial officer concerned.

In raising these issues, I am reflecting upon approaches Australia wide. It must be said, and emphasised, that in the Northern Territory in recent times both the politicians and the media have, generally speaking, taken a moderate and sensible approach to sentencing controversies. In particular, both the Attorney-General and the Chief Minister have publicly expressed their support for the judiciary as a whole while reserving their right to criticise individual sentences. The importance of this positive support from leaders of our community should not be underestimated. It is

this positive support for the judiciary and system as a whole which will play an increasingly important role in maintaining public confidence in the criminal justice system and the judicial officers who administer it.

There are two further matters relating particularly to the Northern Territory upon which I wish to comment briefly. First, my sitting in Yarralin in 2005. In mentioning this issue I am not making any comment about the sentence imposed. As you will appreciate the Court of Criminal Appeal allowed the Director's appeal against the sentence I imposed and the decision of the Court of Criminal Appeal is the subject of an application for special leave to appeal to the High Court. I have no problem answering questions about the role of customary law generally, but it is inappropriate for me to discuss that specific decision.

The purpose of mentioning that sitting today is to highlight what I regard as the important issue of the Supreme Court sitting in Aboriginal communities. I have a personal view that we should make an effort to sit in communities across the Territory in order to demonstrate that we are interested in the welfare and problems of people within those communities and to send messages directly to the communities about the type of conduct which so frequently brings members of those communities into our criminal court. Sitting in the communities also provides the opportunity for residents to observe first hand how the court operates and I was delighted to see in Yarralin that children of the local school were brought along to observe part of the proceedings.

It must be emphasised, however, that there is no point in the court sitting in a community unless it is the wish of the community, or at least the Council and Elders

of the community, that the court do so. In addition, there is the potential for conflict between the fundamental policy that the sittings of the court are conducted in public and are open to view by any member of the public who wishes to be present and the permit system which has the potential to detract from that fundamental policy. This is an issue that needs to be addressed.

The second matter concerns the visit in 2005 of Judges, Magistrates and others directly and indirectly involved in the legal profession to Elcho Island for the conclusion of the Ngarra, that is, the Chamber of Law, of the clans involved. This was a particularly significant occasion. In the most practical way possible, the clans of the Yolngu people involved demonstrated a desire to inform us of some of their traditions and laws and to work with us in bringing about a proper reconciliation of Territory and their traditional laws. A two hour presentation by Richard Trudgeon provided an excellent introduction to the structure of the society and the operation of its laws while demonstrating vividly that we were only just scratching the surface. Male members of the visiting group were privileged to witness ceremonies which we are not permitted to discuss. Subsequently the whole community gathered to witness the awakening of the spirits, the reading in two languages of laws, which had been transcribed in both languages, and the presentation of the transcription of those laws to me and Richard Coates on behalf of the Attorney-General. The goodwill towards the entire visiting group was palpable.

This was the first time traditional laws had been transcribed and published. It was a remarkable piece of initiative upon which the government and the legal community should build without delay.