

CONFERENCE

# Confidence in the Courts

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## Magistrates' courts and public confidence

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# MAGISTRATES' COURTS AND PUBLIC CONFIDENCE<sup>1</sup>

## Introduction

The organisers are to be congratulated for choosing a very topical theme. On 21 January 2007, the Premier of NSW announced a proposal to reconstitute the Conduct Division of the Judicial Commission of NSW by adding two non-judicial members, including one from a Victims of Crime organisation.<sup>2</sup> The catalyst for this reform was the investigation of a complaint against a particular magistrate, which was referred to the Judicial Commission's Conduct Division. The complaint was held not to be substantiated. Premier Iemma was reported to have said 'these reforms will see this high-powered body opened up to the wider views of the community...The legal community has nothing to fear from this innovation...it is simply about maintaining confidence in the judiciary'.<sup>3</sup>

A cynic might be forgiven for thinking that the looming State election on 24 March 2007 was not altogether removed from the Premier's thoughts. I do not propose to comment on the merits or otherwise of the proposal although I note with interest that Chief Justice Spigelman of the NSW Supreme Court and Chair of the Judicial Commission of NSW has been critical of the proposal. In essence, as I understand it, the Chief Justice questions the advantage of non-judicial appointees to the Conduct Division given that the nature of the enquiry by that body is a factual one and not an exploration of community values. That enquiry occurs should the Conduct Division consider it appropriate to refer the matter to parliament.<sup>4</sup> For present purposes, the public disagreement highlights the fact that public confidence in the courts (and how best to achieve that outcome) is on the political agenda in NSW and, I suspect, elsewhere in the country.

Amongst lawyers, at least, I would venture to say that the desirability of public confidence in the courts is unarguable because the authority of the courts rests on public confidence and the task of the courts is to resolve disputes between citizens (including corporations)

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<sup>1</sup> The views expressed in this paper are those of the author and do not reflect the views of any other judicial officer. I am grateful to Jack Hourigan, Librarian, Downing Centre Complex Law Library for various references as well as for the comments on an earlier draft by Magistrate Stephanie Tonkin (Queensland) and Professors Kathy Mack and Sharon Roach Anleu. Any errors or omissions are mine. Comments and corrections are welcome.

<sup>2</sup> Tim Dick, 'Citizens to help judge the judges' *The Sydney Morning Herald* 19/1/07.

<sup>3</sup> Footnote 2.

<sup>4</sup> Tim Dick, 'Judge rails against government petulance' *The Sydney Morning Herald*, 30/1/07 p1. See also: Address by the Honourable JJ Spigelman AC, Chief Justice of NSW, to the Annual Opening of Law Term Dinner of the Law Society of NSW, Sydney 29 January 2007 and the edited extract of that address reported under the heading 'A judge's lot to protect independence' *The Sydney Morning Herald*, 30/1/07 p11. For a view supporting the Premier see George Williams 'We should have a say on who judges us' *The Daily Telegraph*, Wednesday, 24/1/2007 p30. The position adopted by Chief Justice Spigelman received strong editorial support in *The Sydney Morning Herald*: Editorial, 'Who will judge the judges?', *The Sydney Morning Herald*. Friday 2 February 2006, p10.

and citizens and the State in accordance with the law. From this standpoint, key questions for this conference would include:

- Is there public confidence in the courts?
- To the extent that there is a problem, how can public confidence in the courts be maintained or improved?

However, I suggest that, framed in those terms, the questions conceal several subtler enquiries. What is meant by the public? What is required for public confidence in the courts? How is confidence (or lack of it) manifested? How are such phenomena measured? Can a global question about public confidence in the courts be asked usefully without reference to the specificity of the courts and their business (considering the vast variations in jurisdiction)? Or, to put it another way, which courts are we talking about?

The purpose of this paper is twofold:

- to consider generic issues about public confidence in the courts;
- to consider whether additional specific issues in relation to public confidence arise in the context of magistrates' courts.

### **PART ONE: Public confidence in courts generally**

Generic issues as to public confidence in the courts will be traversed by other speakers at this conference in great detail. I do not propose to canvass these matters thoroughly. Nevertheless, it is necessary to place my later consideration of magistrates' courts in some context.

#### **What is meant by public?**

Judicial officers are not elected officials. The public cannot be properly characterised as the electorate, nor is it the parliament, the executive, commercial or religious, sporting or social institutions or the media although each of these community sectors is an important element of the community. An answer to the question is provided by Justice Susan Kenny:

The question who are the public must I think fall to be answered by reference to the primary task of the judiciary, which is to administer the law by making binding resolutions of disputes according to law. As trustees of the rule of law, the judiciary administers the law not for its own benefit, but for the benefit of each and every member of the community. The public, then, is the whole community—which at times may not be represented by the majority or the media.<sup>5</sup>

Yet I suggest that a sophisticated understanding of the notion of public confidence is not to be had without an appreciation of the views of various community sectors (or publics to borrow from the terminology of public relations theory)<sup>6</sup> and stakeholders or participants in the court system. Such views are likely to be fragmented, conflicted and affected by the level of involvement with (and/or knowledge about) that system.

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<sup>5</sup> Justice Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (25:2) *Monash University Law Review* (1999) 209.

<sup>6</sup> C Tymson and P Lazaar, *The New Australian and New Zealand Public Relations Manual*, 5<sup>th</sup> edition, 2006.

Perceptions of the courts are in the eye of the beholder. Let us take just one example. In a fascinating recent study by Cashman and Trimboli<sup>7</sup> the authors found that jurors had a high level of confidence in the court process involving trials of defendants accused of child sexual assault. Significantly the majority of jurors felt that both the child complainant and the defendant were treated fairly. It would not be difficult to imagine a different perception of the court process and outcome by different stakeholders (eg the alleged victim and family members, the defendant) and by members of the public who did not have the direct involvement of the jury or participants but whose experience was via media accounts (eg victim support groups, politicians, radio commentators etc).

As Campbell and Lee put it:<sup>8</sup>

... we cannot be certain that judicial views about the conditions that need to be satisfied if the public are to have confidence in the courts will necessarily coincide with the views of ordinary members of the public. Many people will have little understanding of the functions of the courts. Many will have had no direct experience of judicial proceedings, whether as parties to litigation, as witnesses, as jurors or as persons who have observed court proceedings for any length of time. The knowledge of some of them about the activities of the courts may have been derived principally from their views of TV dramas—they often being ones imported from overseas. Such dramatic productions may be most entertaining, but few of them are likely to provide accurate portrayals of proceedings before Australian courts or the roles judges play in them.

### **What is required for public confidence in the courts?**

Lawyers are likely to propose several essential preconditions for public confidence in the courts.<sup>9</sup> The community must be satisfied as to:

- **Competence:** those appointed as judicial officers should have appropriate qualifications and experience
- **Independence:** judicial officers should be free from interference from other branches of government and secure in their tenure (subject to a strict removal process if they are unfit for office or incapable of performing their judicial duties). One aspect of such independence is to apply the law robustly and fearlessly, as appropriate, in relation to the exercise of executive or legislative power, notwithstanding the interests of the government of the day.<sup>10</sup>
- **Impartiality:** judicial officers must be, and be seen to be, impartial. This involves ensuring procedural fairness as well as the opportunity for each litigant to put his or her case to the court. This also involves judicial officers disqualifying themselves from hearing cases in appropriate circumstances.
- **Reasons:** courts should articulate reasons for their decisions so that the litigants, the media, the community, and if appropriate any appellate court, can scrutinise the process

<sup>7</sup> Judy Cashman and Lily Trimboli, 'Child Sexual Assault trials: A survey of jury perceptions' *102 Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, September 2006.

<sup>8</sup> E Campbell and HP Lee, *The Australian Judiciary*, Cambridge University Press, 2001 p278.

<sup>9</sup> See generally, Kenny, footnote 5 and Campbell and Lee, footnote 8.

<sup>10</sup> See Chief Justice Gleeson, 'A core value' 18:11 *Judicial Officers' Bulletin*, December 2006.

- **Open justice:** generally speaking, courts and their deliberations should be open to the public. The principle of open justice has been affirmed on many occasions. It is well put in the following oft-cited passage from the judgment of McHugh JA:<sup>11</sup>

The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament had modified the open justice rule. The open justice rule also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.

There are certain well-established exceptions including proceedings in a Children's Court, the hearing of matters in camera or with non-publication order restrictions to protect certain victims or witnesses in sexual assault proceedings or cases involving security issues. It is suggested that the exceptions referred to, while derogations from the principle of open justice, generally reinforce public confidence in the courts (eg protecting the confidentiality of those involved in sexual assault or care proceedings). More controversial in some quarters are provisions for in camera proceedings relating to so-called anti-terror legislation. The community is more likely to be divided as to the merits of such measures. Potentially, at least, in this area, there is a possible source of distrust in the court process and erosion of public confidence. Generally speaking, courts open to the public do not admit electronic media unless the courts order otherwise. This discretion has rarely been exercised. This normally occurs when there is an unusually heightened public interest in the matter. Examples which spring to mind include: the telecast of the decision in the first coronial inquiry into the death of Azaria Chamberlain; the decision in the so-called 'Tampa case'; the decision in the so-called 'waterfront dispute case'. From time to time, judicial officers have advocated that a more relaxed attitude be taken by the courts in terms of allowing electronic media into the courtroom, subject to appropriate restrictions.<sup>12</sup>

- **Certainty, predictability and finality:** the public is entitled to expect that courts will provide binding decisions by virtue of the application of the appropriate rules and procedures, subject of course to provision for the correction of error by the appellate process. The existence of the appellate process is itself an element of the court system, which should provide comfort and confidence to the community.

### **How is public confidence (or lack of it) manifested?**

There are more brickbats than bouquets for the courts. If things are proceeding smoothly the likely reaction, especially from the media, is lack of interest. However, not all the brickbats are well directed by the bearer of the grievance. Until recent decades the courts were not subject to intense regular criticism. It is fair to say that the landscape has changed. This may be attributable to the information revolution and greater public expectations of

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<sup>11</sup> *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5NSWLR465 at 476-477.

<sup>12</sup> See, for example, Justice Robert French, 'Radio and Electronic Broadcasting in Australian Magistrates Courts—is there a future?', paper delivered to the AAM Conference, 10 June 2006, Fremantle; Justice Ronald Sackville, 'The Judiciary and the Media: A Clash of Cultures', Judicial Conference of Australia, 31 March 2005; D Stepniak, *Electronic Media Coverage for the Courts* (A report Prepared for the Federal Court of Australia, 1998).

accountability and transparency in major public institutions. One manifestation of this is the lively and ongoing debate about the appointment process for judicial officers. (See discussion below.)

**Efficiency and delay:** From time to time suggestions are made that judicial work should be the subject of performance indicators and that this would enhance efficiency and accountability. For example a Dutch judge who recently addressed an AIJA conference in Adelaide claimed that it was possible to devise a quality measuring system to plot how the judicial system functions and thereby to improve every aspect of judicial organisation.<sup>13</sup> Chief Justice Jim Spigelman, of the Supreme Court of NSW, advocated an entirely different viewpoint when addressing the same conference. In an extract from that paper published in the *Lawyers Weekly*, his Honour delivers a stinging riposte to what he characterised as the ‘autistic school of management’ including the following comments:

At the time of my appointment as Chief Justice over eight years ago, I became aware of a range of proposals for performance management of the courts, in accordance with the managerialist ideology that has come to dominate so many aspects of the public sector ... I regarded these developments as a challenge to judicial independence and potentially corrosive to the rule of law... My central proposition is really quite a simple one—not everything that counts can be counted. Some matters can only be judged: that is to say they can only be assessed in a qualitative way. In some spheres of governmental decision making, the things that can be measured are important things. In other spheres, the things that are important are simply not measurable. The law is at the latter end of the spectrum ... Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of government decision making in order to ensure that the government operates with the consent of the governed... A critical reason why a consumer focus is inadequate, and indeed borders on the irrelevant, for the administration of justice is because courts are not merely a publicly funded dispute resolution service. To treat them as if that is all they are is far too narrow. Indeed, in my opinion, it is potentially subversive of the rule of law. It sets at nought the constitutional function of the courts to protect the integrity of institutions, especially the mechanisms of governance. It sets at nought the role of the courts to protect society. It sets at nought the role of the courts to prevent abuse of power ... Courts do resolve disputes. However, they do so as an arm of government that manifests the public interest in the peaceful and fair resolution of private disputes. Court processes are not, and have never been, a facility that the government makes available to serve a private purpose ... Judicial decisions must be determined by objective standards. The satisfaction of the participant is not one of the purposes to be served. It is not an objective of the courts to be popular. Courts must maintain public confidence in their integrity. However, that has nothing to do with ‘satisfying’ persons as consumers of a ‘service’.<sup>14</sup>

But to suggest performance indicators are inappropriate does not entail abandonment of efficiency in the court process consistent with the obligation to administer justice. As Justice Kenny has remarked:

<sup>13</sup> Katherine Towers, ‘Yes, you can measure court quality’, *The Australian*, Friday 22/9/06.

<sup>14</sup> Chief Justice James Spigelman, ‘The autistic school of management’ *Lawyers Weekly*, Friday 6/10/2006; see also Jim Spigelman, ‘It’s a numbers game but not everything that counts can be counted’ *Canberra Times*, Tuesday 3/10/2006.

Few would demur to the proposition that if the judges are to fulfil their primary task so as to retain public confidence, they must render decisions promptly ... (and) should dispose of the cases before them with as much efficiency as the law, including the rules of procedural fairness, will allow.<sup>15</sup>

At a popular level, I suspect, delay in the court system is one of the most frequently perceived injustices and certainly has the potential to erode public confidence in the courts. Egregious examples of delay—for example delays of several years in delivering judgments—are exceptional but are nonetheless rightly seized upon by the media with particular relish. The potential for injustice in convoluted, tortuous and endless litigation has been famously caricatured by Charles Dickens in his account of the case of Jarndyce v Jarndyce in *Bleak House*. We are all familiar with examples of delay in courts at all levels. However, the aphorism that ‘justice delayed is justice denied’ requires qualification.

The notion of delay is elastic and susceptible of subjective interpretation. A litigant initiating proceedings may regard any delay in the remedy sought to be obnoxious. The party responding is likely to take a different view. Circumstances vary considerably. In urgent proceedings delay might be measured in hours or days, rather than weeks, months or years.

In my view it is unacceptable delay which is an anathema to justice. Moreover, unexplained delay is calculated to lead to resentment and perceived injustice. It matters not that a judicial officer may regard the delay as warranted for solid objective reasons, and indeed necessary in the interests of justice. It is essential that reasons be provided to the parties (and therefore to the public) so that the delay is understood. As ever, communication is crucial.

**Perception of bias:** The requirement of impartiality of judicial officers as a prerequisite for public confidence in the courts has already been mentioned. Nevertheless, from time to time, there is disquiet about perceived bias of judicial officers. This can arise in various ways. Campbell and Lee in their monograph on the Australian Judiciary<sup>16</sup> suggest that, notwithstanding the stringent rules as to the duty to disqualify oneself for apprehended bias, lay observers may look askance at the fact that the determination of that question lies in the hands of the judicial officer whose impartiality is in issue.<sup>17</sup> Further they raise the well known, and often controversial, questions as to the extent to which judicial officers should be: critical of laws they are obliged to enforce; involved with the law reform process; or involved in extra-judicial comment in public debate.

**Public discourse about the judiciary:** A perennial problem which may contribute to an erosion in public confidence in the courts is the lack of understanding of the role of the courts, including the limitations on their powers. Further, it is not well understood that it is generally inappropriate for judicial officers to enter the arena of public debate concerning their decisions which, theoretically, speak for themselves. Traditionally, Attorneys-General would, in appropriate circumstances, publicly explain court decisions and defend the courts. In recent times, that convention is not universally embraced. In any case, it

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<sup>15</sup> Kenny, see above footnote 5, p219-220.

<sup>16</sup> See footnote 8.

<sup>17</sup> See footnote 8, p275.

would not be practical, even for the most active Attorney-General to become so embroiled in the multiplicity of cases which are called into question somehow. While the courts undoubtedly have an obligation to do what they can to present their decisions to the community as clearly and effectively as possible (and much is being done by way of information technology and court media liaison officers in this respect) it largely falls to the media to transmit this information to the public and to interpret it responsibly. Failure by the media to discharge this responsibility can have significant adverse effects in terms of public confidence in courts. As Justice Kenny puts it:

A major problem arises, however, if the media do not seek to gain a full understanding of the judiciary's task but fan community fear, in a self-indulgent way. If the media do not engage in balanced debate, they do a disservice not only to the judiciary but to the community at large. The disservice to the community is of the very worst kind, for it undermines, without adequate cause, the judiciary's trusteeship of the rule of law and it puts nothing comparable in its place.<sup>18</sup>

It should be stressed that this is not a plea for immunity from robust and accurate criticism of judicial decisions. Regrettably, there is no shortage of examples in which the media have abdicated their responsibility to portray court outcomes in a balanced fashion, including their proper context.

**Leniency in sentencing:** One of the most vexed areas in the realm of public confidence is the perception held in some quarters, and regularly reinforced in the media, that courts sentencing offenders treat them with undue leniency and are therefore not doing their job properly. This can lead to a lack of trust and cynicism. It is one of the central concerns said to be held by those whose confidence in the courts is shaken. Questions which arise include:

- Is there a legitimate basis for this perception?
- If not, what can be done to allay the concerns?
- If there is a legitimate basis for the perception, what can be done to improve the situation and to ensure people are aware of the measures taken?

In dealing with these problems we need to consider the complexity of the problem, the sources of information and the selective manner in which it is presented in the media. The public misconceptions about the sentencing process are succinctly summarised by Chief Justice Gleeson in his address to the Judicial Conference of Australia Colloquium in Adelaide in 2004:<sup>19</sup>

Political criticism of sentencing is almost always aimed at suggested inadequacy. Criticising sentencing judges for being soft on crime is popular. I can think of only one case recently in which politicians across the political spectrum criticised a sentence for its severity...What would need to be taken seriously would be a plausible charge that there is a systemic failure of sentencing principles and practice to reflect community attitudes to crime and punishment. No one believes that judges should decide cases by responding to the roar of the crowd. At the same time, if there is any area in which the administration of justice must keep in contact with public morality it is the criminal law. Parliaments, of course, have a

<sup>18</sup> See footnote 5, p222.

<sup>19</sup> Chief Justice Murray Gleeson, 'Out of touch or out of reach?' paper presented to the Judicial Conference of Australia Colloquium, Adelaide, 2 October 2004.

large input into sentencing, not only by the penalties that are prescribed, usually as maximum penalties, but also, nowadays, by detailed legislative prescription of the principles to be applied in sentencing. Even so, the ultimate discretion, and therefore the ultimate responsibility, is usually with the judiciary. The public know what judges think, because, unlike most other decision-makers, judges operate in public and give reasons for their decision. How do we know, and how does anyone know, what the public think? This has been the subject of a good deal of expert research, both in Australia and overseas ... The following points, among many others, emerge (from the expert research):

1. Most people in Australia and elsewhere, greatly over-estimate the risk that they will become the victims of crime. Their fear, although exaggerated, cannot be ignored. The fear is itself a significant reality, and affects the way the criminal justice system is regarded by the public.
2. Most Australians believe that crime is becoming more common. They are right in relation to some kinds of crime, and wrong in relation to others.
3. For example, surveys conducted in Canada and Australia found that 70% of Australians and 80% of Canadians believed the murder rate had increased, when in fact it had declined significantly in Canada, and remained stable in Australia.
4. Public perception of crime and punishment is dominated by crimes of violence, and sentences imposed for such crimes. This is of practical significance. Violent crimes constitute only a small part of total offending, but they are what the public focus on in forming opinions about crime, punishment and the justice system. This inevitably involves a distortion but, once again, the perception itself is a significant reality.
5. When presented with detailed information about particular offences and particular offenders, people who start out with a severely punitive reaction reduce what they think is an appropriate penalty.
6. The public are not well-informed about the level of sentences that the courts in fact impose. This is probably related to a point made earlier. People are far more likely to read or hear about what are regarded as aberrations. Most people never hear about most sentences, because most sentences attract no comment. Indeed when sentences that attract unfavourable publicity are the subject of an appeal, there is every chance that, even if the appeal succeeds, the public will never learn of that.

The more information people are given about what sentencing judges are doing, and why they are doing it, the less likely they are to believe that there is a gulf between their expectations of the criminal justice system and the reality. The more accurate and reliable the information the public get about what judges do, about the detail of the cases they confront, and about the reasons for decisions, the less likely they are to think that judges do not understand or share their concerns. In relation to complaints about decisions in specific cases, the more detail people are given about the facts and circumstances of those cases, the less likely they are to conclude that a sentence is unduly lenient. That makes sense. When people think only of stereotypes of violent offenders, they are more likely to favour harsh retribution than when they think of individuals. That, I suggest, mirrors the everyday working experience of sentencing judges and magistrates ... Institutionally, in dealing with this issue of public confidence, we have some weaknesses and some strengths. We can give reasons for our decisions, and publish them on the Internet, but we cannot compel people to read them. Our appeal system can correct error. But we cannot oblige people to report the correction. At the same time, the system of individualised discretionary sentencing is just, and people accept that. We should take every opportunity to explain the system and how it works in practice. Most courts now have information officers. They are not there merely to put out bushfires. They can develop educational programmes to raise the level of awareness of what courts do.

As Chief Justice Gleeson points out, there is sound research to indicate that people who are properly and fully informed about the circumstances relating to an offence and to an offender are much less likely to be critical of sentencing outcomes on the basis of their perceived inadequacy. It is also important not to be complacent. If perceptions are misinformed it behoves the courts to do what they can to ensure the media and public are better informed. Also, there are other measures which the courts have embraced to improve public confidence in this area. One important innovation is the introduction of

sentencing guidelines. When the first sentencing guideline was introduced in relation to dangerous driving in the case of *Jurisc*<sup>20</sup> Chief Justice Spigelman went to considerable lengths to explain the new system to the public and the media.<sup>21</sup> His Honour remarked:

In my opinion, guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.<sup>22</sup>

Another somewhat controversial suggestion by Chief Justice Spigelman (since referred to the NSW Law Reform Commission for consideration) is the involvement of jurors in the sentencing process, as advisers to the sentencing judge. Arguably, public confidence in the sentencing outcome might be enhanced if such a reform were to be adopted. The proposal has been the subject of some criticism.<sup>23</sup>

**Problems with the legal system not within the control of the courts:** There are problems within the legal system about which the public may be legitimately concerned which are not within the control of the courts.

Where such problems directly affect the operation of the courts and the administration of justice it is not uncommon for people to sheet home responsibility for them to the courts. Examples might include: complexity of the law; cost; legal representation (including legal aid); and unfair laws.

There is an exponential growth in the law and increasing specialisation. It is difficult enough for lawyers and judicial officers to keep abreast of developments. The theoretical access which members of the public may have to the justice system is just that, theoretical. Often, despite attempts to develop diversionary strategies such as mediation and referrals to community justice centres, people needing to contend with a complex legal system often require professional assistance. This is inevitably expensive and beyond the reach of many. Legal aid (and community law centres) are an important, indeed fundamental, component of access to justice in this country but budgets are limited and many people who cannot afford a private lawyer do not meet the criteria for legal aid. There is certainly a degree of frustration in the community about these matters and, on occasion, such frustration is directed at the courts. A better understanding of the limits of the courts' powers to deal with these matters might enhance public confidence in the courts and ensure any critique is relevantly directed.

Another matter which is a source of potential public confusion and resentment and which may lead to a perception of an unfair court system is the existence of unfair laws. Although lawyers readily make the distinction between the enactment of legislation and its

<sup>20</sup> *R v Jurisc* (1998) 45 NSWLR 209.

<sup>21</sup> The Chief Justice directed that an explanatory package be disseminated to the legal profession and the media and wrote an article for *The Daily Telegraph*, explaining the notion of sentencing guidelines.

<sup>22</sup> Footnote 20, p216.

<sup>23</sup> The Honourable JJ Spigelman AC, Chief Justice of New South Wales, 'A New Way to Sentence for Serious Crime' 17:1 *Judicial Officers' Bulletin*, February 2005 p1; NSWLRC, *Sentencing and Juries*, NSWLRC IP 27, June 2006.

application by the courts it is not uncommon for these two notions to be conflated by others. A straightforward example is mandatory sentencing laws. There is a virtual consensus in the legal community that such laws may lead to injustice because the courts are deprived of the discretion to consider the particular facts and circumstances of the offence and the offender and are obliged to impose a penalty assigned by parliament.<sup>24</sup> Such laws lead to unjust punishment which, in turn, can undermine public confidence in the court system. It matters not to those affected by injustice that criticism should really be directed at the legislature.

**Lawyers and non-lawyers:** A key issue in understanding the tension between the legal profession's perception of the justice system and that of non-lawyers is the differential status accorded to due process. Lawyers are socialised to appreciate the significance of due process and indeed acknowledge it as a fundamental aspect of natural justice and the rule of law. Yet, at a more popular level, there is often an intuitive reaction against the consequences of due process. Here the focus is on the consequences and the justice calculus has regard to the effects of decisions, not the manner in which they are reached. Recent illustrations include the results of trials involving so-called terrorists. The widespread public reaction against the decision by the Victorian Court of Appeal's decision to overturn a verdict against Jack Thomas because his confession had not been obtained voluntarily was in stark contrast to the virtually unanimous acclaim of the legal profession. Some media commentators fanned the flames of popular dissent. In essence, the popular reaction could not understand, accept or sympathise with a decision which 'flew in the face' of the 'obvious' conclusion that the defendant (appellant) was a terrorist. Other journalists took a more measured approach.<sup>25</sup>

### **How is public confidence measured?**

As Campbell and Lee suggest:<sup>26</sup>

Whether members of the public do in fact have confidence in their judicial institutions will depend in large measure on what they expect of those institutions and whether they are satisfied that their expectations are being fulfilled. In the absence of reliable social surveys, statements about what members of the general public expect of the courts and the judges can be no more than speculative. It is possible that such surveys might reveal that different sections of the public have different expectations and that the levels of confidence in the judiciary also differ according to whether people have had direct experience of the activities of the courts.

I would endorse these remarks but add that, perhaps, other factors which may lead to different expectations and different levels of public confidence may include: access to reliable information, nature of media commentary and the particular court in question (in terms of subject matter of the proceedings, level in the court hierarchy and geographical location—see discussion below 'Does it matter which court we are talking about?').

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<sup>24</sup> For a detailed case study, see D Johnson and G Zdenkowski, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory*, Australian Centre for Independent Journalism, UTS, Sydney, 2000.

<sup>25</sup> See Alan Attwood, 'A triumph for Australia, not a failure', *The Age*, Friday 25/8/06 p17; Richard Ackland, 'Wrong target in hue and cry over terrorist suspect', *The Sydney Morning Herald*, 25/8/2006

<sup>26</sup> Footnote 8, p278.

There are many potential responses to the court system. Leaving aside adverse responses such as anxiety, confusion, anger and resentment, it is not possible, I would argue, to assume that lack of a negative reaction involves a resounding vote of confidence. Absent survey data on public confidence in the courts which I have not researched (and leaving aside issues of methodology which inevitably arise in the conduct of such surveys) I would venture that a significant proportion of people—especially those who have not had a personal encounter with the courts—would be silent or neutral in their response. Such silence or apparent neutrality can mask a range of possibilities including ignorance, apathy, passivity, and lack of interest or acquiescence.<sup>27</sup> These possibilities would not necessarily be revealed in social surveys but may be identified in qualitative interview-based research.

I recall one story (which may be apocryphal) told to me by a researcher who was administering a survey on attitudes of the public to contempt law during an enquiry into that area in the 1980s conducted by the Australian Law Reform Commission. When asked what they thought of the judiciary, respondents frequently assumed the question referred to the disciplinary tribunal which dealt with alleged infringements during rugby league matches. This is perhaps not surprising as that tribunal is affectionately known as ‘the judiciary’.

I have not researched social surveys of public confidence. However, I gather, from the presentations by Dr David Rottman and Her Honour Judge Christine Trenorden that the following conclusions can be drawn: there is a moderate level of confidence in the courts in the USA and SA and that ‘it is not all doom and gloom’; that there is considerable scope for implementing measures to improve public confidence; that there are significant methodological problems in assessing public confidence; and that richer insights are available if social surveys are followed by an extensive consultation process of the kind which was undertaken in South Australia.<sup>28</sup>

### **Does it matter which court we are talking about?**

I would question whether it is very helpful to consider generic notions of public confidence in a court system, absent an upheaval or crisis in the various branches of government. Any survey (even assuming it was methodologically sound), which enquired about the public’s level of confidence in Australian courts, would yield responses likely to be vague platitudes.

What do respondents have in mind? A magistrates’ court in Port Keats, in the Northern Territory (considering a malicious damage charge)? A Family Court in Parramatta, NSW (considering an application for a recovery order)? The Supreme Court of the ACT (considering a civil claim for damages)? The High Court of Australia (considering a special leave application in a criminal appeal or the breadth of the corporations power)? The Supreme Court of NSW in Sydney (considering a Mareva injunction)? The Supreme

<sup>27</sup> Chief Justice Gleeson has remarked that most people are not constantly ruminating about the courts or the justice system: ‘Public confidence in the courts’, Keynote Address, Confidence in the Courts conference, National Museum of Australia, Canberra, 9 February 2007.

<sup>28</sup> David Rottman, ‘Surveys of public confidence and the response of the courts in the USA’, Confidence in the courts conference. National Museum of Australia, Canberra, 9-11 February 2007; Judge Christine Trenorden, ‘Surveys of public confidence and the response of the courts in Australia’, Confidence in the Courts conference, National Museum of Australia, Canberra, 9-11 February 2007.

Court of Tasmania, in Hobart (considering a defamation suit)? The Federal Court (considering an appeal from the Immigration Review Tribunal)? A suburban Children's Court in Brisbane (considering care proceedings)? A Drug Court? A Koori Court? The list could, of course, be much longer.

A better understanding of public confidence in courts would flow from an examination of the specific courts concerned and the specific communities they serve. Such research would need to be sensitive to the different publics involved for the reasons suggested earlier.

### **What can be done to maintain and improve public confidence?**

**Communication:** It is essential that judicial officers communicate effectively with the community. This entails effective communication with litigants (represented or otherwise), legal representatives, court staff, court user forums (where appropriate) and the media (via media liaison officers). Judgments and in particular reasons for decision (not only in judgments but in interlocutory or administrative processes) should be in clear and accessible language, to the extent practicable.<sup>29</sup> In addition, a legitimate and important role can be undertaken by judicial officers in extra-curial writing in professional journals and through contributions to professional conferences. More controversial is the extent to which judicial officers should participate in a wider range of extra-curial activities such as debate about matters of general public interest.

**Education:** The role of education, at secondary as well as tertiary level, should not be ignored. While not a complete antidote to confusion and resentment about the justice system—notorious elements in cynicism and lack of public confidence—education can, I would argue, significantly reduce these problems. For example, an elementary understanding of the separation of powers and the respective roles of the executive, legislative and judicial branches of government might go some distance towards deflecting unwarranted criticism from the courts. Such basic information could be covered in a civics course in appropriate areas of secondary curricula. At tertiary level, leaving aside the obvious candidate of law degrees, there would appear to be ample scope for the incorporation of such elements (at a more sophisticated level) in courses dealing with history, political science, jurisprudence to name but a few. An illustration of the type of information which might be used is the booklet *Judge for yourself: A Guide to Sentencing in Australia* published recently by the Judicial Conference of Australia. This is in accurate accessible form (also available in a more detailed version and in an electronic version). It is very suitable for high school students and would be an excellent resource for court users and for professionals in the media.

But education of another sort is also important. Ongoing judicial education—a term which raised eyebrows as recently as 20 years ago—is now an established phenomenon. As Chief Justice Murray Gleeson remarked recently:<sup>30</sup>

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<sup>29</sup> In recent times, various judicial education programs have incorporated judgment writing skills with considerable effect.

<sup>30</sup> The Honourable Murray Gleeson AC, Chief Justice of Australia, 'Judicial Selection and training: Two sides of one coin' 15:7 *Judicial Officers' Bulletin* August 2003, p53; The Honourable Chief Justice Underwood, AO, 'Educating Judges—What Do We Need?' 7:4 *The Judicial Review*, March 2006; Chief

Courts in all Australian jurisdictions have now developed their own programs of judicial development ... But there is a great deal of scope for further development ... although the Australian judiciary has embraced the idea of continuing professional development, the range of topics that can usefully be addressed could be expanded well beyond those that are now covered.

The community is entitled to expect competent judicial officers who keep abreast of changes in law and procedure, as well as social developments that have an influence on the legal system.

**Media:** Another crucial issue is the role of the media. Courts may strive valiantly to communicate effectively with the public via their decisions but it falls to the media to disseminate reliable information about these decisions. Justice Kenny makes the point admirably:

... if public confidence in the judiciary is to be promoted then, the media, in all its forms, ought to be encouraged to present a balanced account of the work of the judiciary; to act as the informed translator of judicial decisions for the community at large; to raise for careful public consideration the question whether the public purse should be spent upon the administration of law, and to enquire as to the means by which participation in the administration of the law can be more broadly based.<sup>31</sup>

One way of reducing the risk of misleading information via the media is for the courts to provide accurate reliable information in convenient and accessible form. Complex, turgid, impenetrable information is counterproductive. On the other hand, oversimplification can lead to error. The task is to achieve a compromise which involves ensuring the integrity of the information yet to present it in a manner which is not daunting. I have already mentioned the JCA booklet *Judge for Yourself A Guide to Sentencing in Australia* which attempts to achieve this compromise.

**Judicial codes of conduct:** Recently the Australian Institute of Judicial Administration (AIJA) published a Guide to Judicial Conduct.<sup>32</sup> This booklet, prepared by the AIJA at the request of the Council of Chief Justices is intended to provide Australian members of the judiciary with practical guidance as to what conduct is expected of them as holders of judicial office. It provides appropriate benchmarks and advice particularly in relation to areas as to which there may be uncertainty. It is clearly of interest to the media and the community in understanding the judicial role.

**Appointment of judicial officers:** The traditional mode of appointing judicial officers, that is a decision by the Executive in Council following such consultation as she or he sees fit by the relevant Attorney-General, has been the subject of criticism including by eminent judicial officers or former judicial officers including former Queensland Court of Appeal judge, Geoffrey Davies, Justice Ronald Sackville of the Federal Court (immediate past Chairman of the Judicial Conference of Australia), former High Court Chief Justices Gerard Brennan and Anthony Mason, Justice Ruth McColl of the NSW Court of Appeal

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Justice John Doyle AC, 'Investing in the Judiciary', Sir Richard Blackburn Lecture, ANU, Canberra, 11 May 2004.

<sup>31</sup> See footnote 5, p221.

<sup>32</sup> AIJA, *A Guide to Judicial Conduct*, Melbourne, 2002

and former Federal Court judges, Ronald Merkel and Murray Wilcox.<sup>33</sup> The key objections are that the existing process is not transparent, may encourage political bias and may not draw on the most appropriate pool of suitable candidates. Various remedies have been suggested. The Judicial Conference of Australia recently commissioned a paper on a judicial appointments commission by its secretary Professor John Williams and Dr Simon Evans. The plan, which is not official JCA policy, was presented to the JCA conference held in Canberra last October. Such advocacy has won support in some quarters but has not met with the universal approval of judicial officers. As far as I am aware, Chief Justice Gleeson has not expressed a view<sup>34</sup>. One academic commentator rejects the judicial appointments commission model on the basis that it effectively removes democratic accountability from the appointment process.<sup>35</sup> Justice Minister Chris Ellison has apparently also rejected the idea.<sup>36</sup> Her Honour Chief Justice Marilyn Warren has provided an interesting review of the options.<sup>37</sup> The debate is unlikely to go away.

It will be apparent that some of the measures referred to are within the control of the courts. Others (for example, the conduct of the media, the introduction and teaching of relevant courses and the establishment of a body to mediate the judicial appointments process) are clearly not.

## **PART TWO: Public confidence in magistrates' courts**

In this section of the paper I will use magistrates' courts as a generic description. It is the most commonly used term for first instance courts throughout the country (leaving aside esoteric examples of original jurisdiction in higher courts).<sup>38</sup>

Obviously the matters discussed in the first part of the paper are pertinent to all courts, including magistrates' courts. The purpose of this second section is to focus on those matters relating to public confidence in the courts peculiar to, or at least of especial relevance to, magistrates' courts.

Magistrates' courts are at the forefront of the justice system, the court which most people are likely to encounter.<sup>39</sup> In many cases it will be the only time a person has been to court. Accordingly, that court experience (which may be long-lasting) may be very influential in shaping a person's perception not only of the magistrates' courts but also of the court

<sup>33</sup> Chris Merritt, 'Reform the system to stop cronies becoming judges', *The Australian* 25/8/06 p25; Marcus Priest and Matthew Drummond, 'Brennan backs new route to bench' *Australian Financial Review*, 13/10/06 p53.

<sup>34</sup> This has not prevented media speculation: Marcus Priest(ed) 'Hearsay: inside the world of legal affairs', *Australian Financial Review*, Friday 15/9/06 p60.

<sup>35</sup> Professor James Allan, 'Politicians should pick our top judges' *The Australian*, 24/11/2006 p32.

<sup>36</sup> AAP Newswire, 'Fed: No need for judicial appointments commission', *AAP Newswire*, Wednesday 11/10/06. Attorney-General Phillip Ruddock has also rejected the proposal: Speech to Confidence in the Courts conference, National Museum of Australia, 10 February 2007.

<sup>37</sup> Chief Justice Marilyn Warren, 'Judicial appointments, judicial behaviour and complaint mechanisms', Confidence in the Courts conference, National Museum of Australia, Canberra, 9-11 February 2007.

<sup>38</sup> In NSW, of course, these courts are known as the Local Courts of NSW: see Local Courts Act 1982 (NSW).

<sup>39</sup> For an interesting account from a magistrate's perspective, see Hugh Dillon, 'The Law and Social Change—A Magistrate's Perspective', 7:3 *The Judicial Review* 345.

system, legal system and justice in Australia. There is a distinct opportunity for magistrates' courts to provide a positive court experience or at least to minimise a negative one.

It should be borne in mind that such people do not come as neutral observers but with particular agendas and are often fearful, emotional and vulnerable. They are certainly not objective and dispassionate. Yet this is the context in which the judges are judged—at least by those people. The challenge is to regard each case as an opportunity to deal as fairly, efficiently and effectively with the matter as is humanly possible. The hoped-for outcome is that each participant in the proceedings, whether the beneficiary of a favourable decision or not, is able to say that the process was fair and that his or her voice was properly heard. Indeed for a disappointed litigant to say that he or she was treated fairly and respectfully, and understood the reasons for the decision, is not a bad litmus test for a court system that is doing its job and in which the public can have confidence. In this respect, the research outcome identified by Rottman, that fair process is a pre-eminent factor in public confidence in the US, is heartening.<sup>40</sup>

One of the features of magistrates' courts is their enormous caseload.<sup>41</sup> It is not uncommon to find in the literature observations about 'pressure cooker', 'conveyor belt' or 'assembly line' justice in lower courts.<sup>42</sup>

There is also anecdotal evidence from court reports by law students<sup>43</sup> over many years corroborating some of these perceptions. The remarks are, I suspect, for the most part directed at list days and would not surprise magistrates who have the sometimes daunting task of presiding over them. Nevertheless there are also considerable pressures in the context of interlocutory hearings (for example applications for interim apprehended violence orders, ex parte family law recovery orders or emergency care and protection orders) as well as fully defended matters. Ex tempore judgments are commonplace.

Until recently there had not been any detailed and comprehensive survey of the activities of magistrates' courts in Australia.<sup>44</sup> The landscape has now changed as a result of the pioneering work of Mack and Roach Anleu.<sup>45</sup> Their extensive research project has been

<sup>40</sup> David Rottmann, 'Surveys of public confidence and the response of the courts in the USA', Confidence in the Courts conference, National Museum of Australia, Canberra, 9-11 February 2007.

<sup>41</sup> For a detailed breakdown, see Australian Government Productivity Commission, *Review of Government Services, Part C Justice (Court Administration)*, 2007: <http://www.pc.gov.au/gsp/reports/rogs/2007/justice/index.html>.

<sup>42</sup> For example, see Pat Carlen, *Magistrates' Justice* (1976) and Doreen McBarnet, *Conviction* (1981), noting that these accounts deal with English and Scottish lower courts involving Justices of the Peace, which are materially different from modern magistrates' courts in Australia. For a critique of their approach see N Hutton 'The Sociological Analysis of Courtroom Interaction: A Review Essay' (1987) 20 *ANZJ of Criminology* 110.

<sup>43</sup> These are observational reports submitted as part of their course requirements by students at various Faculties of Law.

<sup>44</sup> Some interesting research about peer observation of courts by magistrates in South Australia and Victoria has been undertaken by SA magistrate Garry Hiskey over a number of years.

<sup>45</sup> Magistrates' courts in Australia are the focus of a national, multi-year, empirical research project entitled: 'The Changing Role of the Magistrates Court'. Professor Kathy Mack and Professor Sharon Roach Anleu of Flinders University are conducting the project, in collaboration with all Australian magistrates courts (other than the Federal Magistrates' Court) and the Association of Australian Magistrates.

under way for several years and is continuing. It has resulted in numerous publications so far.<sup>46</sup> A detailed portrait of magistrates' courts in this country is emerging. I look forward to the next session when Kathy Mack and Sharon Roach Anleu will share some of these insights with us.

Whatever metaphor is used to describe the activities in magistrates' courts the unifying image is the perceived imperative to manage a very large caseload as efficiently as possible consistently with the dictates of justice. Magistrates' courts have adopted detailed practice notes and guidelines to facilitate this objective. It has been increasingly recognised that the courts, as with any branch of government, must be accountable for the expenditure of public resources. Heads of jurisdiction have acknowledged this obligation. It is notable that such accountability can coexist with the important principle of judicial independence. Of course, there are tensions from time to time, as to the potential for overreach by the executive arm of government under the guise of financial control in a manner which could compromise judicial independence. I have already mentioned the concern expressed by Chief Justice Spigelman about any proposal to introduce performance indicators for the courts. An additional, and important, reason to manage the court's caseload efficiently is the potential evil of significant unacceptable delay, captured in the oft-quoted aphorism 'justice delayed is justice denied', discussed earlier.

However, when there is a clash between case management and the attainment of justice, it is clear that the latter objective must prevail. Justices Dawson, Gaudron and McHugh succinctly expressed the principle in *Queensland v J L Holdings Pty Ltd*<sup>47</sup> as follows:

Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

In exceptional circumstances, appellate courts have overturned a primary court's refusal of an application for an adjournment by a prosecutor. In the recent decision of *DPP v Ozakca*<sup>48</sup> the magistrate had declined an application by the DPP for an adjournment because of the unavailability of a key witness and the case had been dismissed. On appeal Rothman J held that in the exceptional circumstances, and notwithstanding the double jeopardy principle applicable, natural justice had not been afforded to the DPP and the decision to refuse the adjournment should be quashed and the matter remitted.

### **Unrepresented litigants**

Although it is not unknown for litigants to represent themselves in superior courts<sup>49</sup>, the majority of unrepresented litigants appear in magistrates' courts. One possible measure of

<sup>46</sup> See, for example, K Mack and S Roach Anleu, *National Court Observation Study: Overview of Findings*, Report No.5/06 June 2006, Flinders University, Adelaide, South Australia.

<sup>47</sup> (1997) 189 CLR 146 at 154.

<sup>48</sup> Unreported judgment of NSW Supreme Court, Rothman J, 21/12/06).

<sup>49</sup> According to Justice Murray Wilcox, in a paper 'Litigants in Person' presented to the Travelling Judicial Education Program of the National Judicial College of Australia, Hobart, 5 March 2004, 41.4 % of cases in the Federal Court had at least one litigant in person and 38% of contested cases in the Family Court had litigants in person, in each case the figures being for 2001-2002.

public confidence in such courts is the level of satisfaction experienced by such persons in relation to such appearances.

This cohort of persons is, of course, not homogeneous. There will be age, class, and gender differences. Sexual orientation and ethnic origin may be relevant, as may Indigenous affiliation. Mental health issues may affect some of them. Some unrepresented litigants will be very savvy about the court system. Others will feel intimidated and bewildered. Civil cases will throw up different issues from those that arise in criminal cases.

Nevertheless, there is a common thread for this group: their court experience is direct and unmediated. There is no lawyer to reassure them, explain the law and process, to make a realistic assessment of the outcome or to aid in achieving a negotiated solution. Potentially, perhaps ironically, they may sometimes have (leaving aside problems of anxiety, disability or inarticulateness) a greater prospect of participating in the process and having their voice heard than their represented counterparts.<sup>50</sup> There is no buffer zone of lawyers. I say potentially because their lack of a buffer zone is a double-edged sword. It exposes them to at least the risk of perfunctory, dismissive or discourteous treatment. This risk is exacerbated when such litigants misconceive legal claims, defences, court procedures and, especially, the rules of evidence. Such difficulties should hardly be a matter of surprise to judicial officers, given the nature of such rules. Moreover, the problems are regularly compounded by an inability for such litigants to be dispassionate about their cause and by emotional and sometimes psychological or psychiatric issues which inhibit them from adequately articulating it.

It raises for the court the familiar dilemma of how far the court should go in assisting such litigants to formulate their case in the interests of justice, bearing in mind the interests of the opposing party. Views of judicial officers as to 'how far they should descend into the ring' differ. One well known example is the decision to reject a guilty plea when the court is confronted with material which clearly contradicts such a plea coupled with the defendant's insistence that he or she is definitely innocent but wishes to plead guilty 'just to get it over with'.

Yet in my experience (and I rely here on anecdotal evidence and have no scientific basis for this claim) judicial colleagues in magistrates' courts bend over backwards to assist unrepresented litigants within the constraints I have mentioned and also, notably the constraints of a busy list situation.

It is germane to the issue of public confidence in magistrates' courts to know what this group thinks. But building a reliable picture is fraught with difficulties because of the fragmented nature of the group and, as far as I am aware, the lack of data on the subject. (It may be that the South Australian survey to be considered elsewhere at this conference by Justice Christine Trenorden may shed some light on the subject. The work of Mack and Roach Anleu mentioned earlier may also be helpful).

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<sup>50</sup> For an interesting (and in some respects provocative) argument about the potential advantages of self-representation see Duncan Webb, 'The Right not to have a lawyer', paper presented to Confidence in the Courts conference, NJCA and ANU, National Museum of Australia, Canberra, 9-11 February 2007.

Such difficulties should not, however, present obstacles to thoughtful speculation as to what the perceptions and concerns might be and the implementation of policies calculated to address them. The key issues, it is suggested, are effective communication and case management.

Explanation of what is happening, when it will happen and why are essential. Reasons in accessible language should be given for all decisions. Courts and registry staff should form an integral part of this process. A great deal of confusion and frustration can be alleviated if people are kept abreast of what is happening so that they are 'in the loop'. If the court communicates with such litigants clearly, effectively and compassionately the prospect of a positive court experience is enhanced. The alternative is alienation, cynicism and sometimes injustice and waste of time and money. The latter can be illustrated when, for example, litigants originally at court waiting for their case to be called (especially at a multi-court complex) wander off the set because of lack of communication about some changed circumstance, have their matter dealt with in their absence and then bring annulment applications (or worse, are arrested on a warrant issued in default of appearance).

Representation, although often desirable for obvious reasons, does not amount to a panacea as far as confidence in the courts is concerned. A represented litigant may, on occasion, feel resentful and misunderstood because his or her case has not been put in a satisfactory way. Often there is a straightforward explanation readily appreciable by lawyers (for example by reference to the rules of evidence or courtroom tactics) for the adoption of a particular approach. But the resentment felt by such a litigant can extend beyond the legal representation to the court process itself, as well as the court. This is a potential source of erosion of public confidence in the courts which cannot be dealt with by the courts. The solution lies elsewhere, in terms of effective lawyer-client communication.

### **Vexatious or querulous litigants**

One particular category of unrepresented litigant which deserves particular attention in this context is the so-called vexatious litigant. Dr Grant Lester, who has conducted extensive research in this area, describes such litigants as querulous.<sup>51</sup> Lester identifies certain features which characterise such litigants (in comparison with a control group), namely:

- that they were demonstrably more persistent than the control group
- that they pursued their complaints for much longer
- that they supplied a greater volume of written material
- that they telephoned more frequently, and for longer
- that they intruded more frequently without an appointment
- that they had not attained a settlement when the case was closed or transferred

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<sup>51</sup> Grant Lester, 'A Study of Unusually Persistent Complainants', paper presented to the Travelling Judicial Education Program, National Judicial College of Australia, Hobart, 5-5 March 2004; Grant Lester, 'The Vexatious Litigant' 17:3 *Judicial Officers' Bulletin*, April 2005 p17.

- they were motivated at least in part by a desire for vindication and retribution
- they pursued their claims with threatening behaviour
- they were prepared to pay a high personal price for the pursuit of their claim.<sup>52</sup>

Needless to say such people pose problems for all courts but especially for magistrates' courts. In terms of public confidence there is, I would suggest, a twofold issue: the court response to the querulous litigant; and the perception of the court response to such a person by third parties present in the courtroom as well as members of the public who learn about the response via the community grapevine or the media.

As to the first matter, there is probably little the court can do to deflect the underlying obsession involved. However it is important that the inevitable frustration and irritation that accompany such encounters (especially on a repeated basis) do not adversely influence the normal fair treatment to which all litigants are entitled. Also the issue of case management looms large because such matters can absorb a disproportionate amount of time. The embrace of techniques advocated by Dr Lester<sup>53</sup> can be helpful but ultimately individual matters vary enormously and difficult judgments must be made about the temperament, personality, and emotional level and so on of the person involved. This is not the place to discuss such issues in detail.<sup>54</sup>

In terms of the second aspect—the effect of the court's response to querulous litigants on third parties—two things should be mentioned. First, a court's treatment of a difficult situation in a fair, respectful way is likely to enhance public confidence in the court process amongst both actual observers in court as well as in those who learn about it second hand, assuming they receive accurate reports. This flows in part from the fact that they are likely to conclude that if such difficult people are properly treated in court they (who are not such difficult people) will be. I am sure that many judicial colleagues have had the experience on a busy list day of dealing with a sentencing matter or an application for an apprehended violence order only to be told by one or more parties in court who observed the court's handling of the original matter 'I'll have one of those'. The point is that the investment of appropriate time in, and effective communication with, the person involved (and hence at least those in the courtroom who are listening) is not only the proper thing to do but can also have pragmatic benefits in terms of consent orders and the like.

On the other hand, observers of the court's response to querulous litigants may also conclude that an inordinate and disproportionate amount of court time (which could have been better spent on them) is being wasted on a difficult person with resulting frustration and irritation with the court process. An awareness of this prospect coupled with a natural human impulse to dispense with the querulous litigant, pose particular problems for judicial officers in general and magistrates in particular.

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<sup>52</sup> See footnote 46.

<sup>53</sup> See Grant Lester, 'The Vexatious Litigant' 17:3 *Judicial Officers' Bulletin* April 2005 p19.

<sup>54</sup> For a detailed discussion see footnote 48.

One qualification is necessary. It is possible, indeed easy, to conflate querulous litigants with litigants who are simply affected by mental health issues or other disabilities. The issues discussed earlier as to the court's response (in terms of fair treatment) are pertinent here as well. However, additionally, there may be a need to access appropriate resources and support services sometimes necessitating an adjournment. The courts (who are sometimes but not always assisted by professionals such as mental health nurse clinicians) must be alert to such potential issues. The behaviour of people with such difficulties can often superficially resemble that of so-called querulous litigants.

### **Leniency in magistrates' courts**

Reference was made earlier to the perennial public concern about leniency in sentencing. I will not repeat what I said before. Suffice to say that magistrates' courts are not immune from such criticism. Such critical comment appears to reach a crescendo during election campaigns as the respective political parties vie to be seen as the toughest on law and order.<sup>55</sup> The comments made earlier apply equally in the context of magistrates' courts.

The position was well put recently by His Honour Chief Magistrate Graeme Henson, Chief Magistrate of the Local Courts of NSW. He pointed out that:

- magistrates typically had more exposure to the realities of life than many politicians
- political attacks on lenient sentences were usually undeserved
- those on his bench were not soft and were far from out of touch
- the only measure of inadequate sentences was the number of crown appeals against them
- there were 42 crown appeals in 2005 of which half were dismissed and 5 were only partly upheld
- these crown appeals represented 0.02% of more than 204,000 criminal matters decided by the Local Courts in the relevant period
- there were far more appeals by offenders against severity—about 5,000 per year. (About two-thirds of those appeals were upheld).<sup>56</sup>

It is apparent, when one examines the data available, that Local Courts in NSW are not becoming more lenient and that crown appeals represent a minuscule percentage of the caseload.

### **Diversionsary programs**

There are many innovative programs associated with magistrates' courts or children's courts which are not particularly well known or understood in the general community. They include programs such as Youth Justice Conferencing, Young Adult Conferencing, Circle Sentencing and the Youth Drug Court.<sup>57</sup> Again I use NSW examples but there are variations on this theme throughout the country. It is my contention that public confidence

<sup>55</sup> Russell Hogg and David Brown, *Rethinking Law and Order*, Pluto Press, Sydney, 1998.

<sup>56</sup> Tim Dick, 'Law chief hits back at pollies' criticisms' *The Sydney Morning Herald*, 21/9/06. It is worth noting that reliance on the rate of crown appeals as an index must be approached with some caution given the different criteria that apply, including the double jeopardy principle.

<sup>57</sup> The adult Drug Court is part of the District Court in NSW.

in magistrates' and children's courts would be improved if these programs and their processes and outcomes were better recognised, understood and embraced.

### **The media and magistrates' courts'**

The role of the media was discussed earlier. In magistrates' courts the media are usually absent. This means that the vast majority of cases heard by Australian courts are not subject to media scrutiny. Routine cases are not usually reported. The exception occurs if one of the participants has a high profile as a personality in business, sport, politics or the entertainment industry. However there is often media interest in committal proceedings for serious offences, some coronial inquiries and cases dealing with a subject of current political interest (eg terrorism or dangerous driving by young people). Current affairs programs on commercial television sometimes focus on court proceedings with a quirky or voyeuristic theme (eg apprehended violence orders against 'Australia's worst neighbours' or the like).

The result is that the portrait of magistrates' courts presented to the public is skewed, refracted and fragmented. One interesting experiment which may go some distance towards redressing the situation is *The Code: Crime and Justice*, a ten part documentary television series in which television cameras are being permitted to film the Victorian magistrates' court.<sup>58</sup> This series (which started this week) was filmed with the approval of His Honour Chief Magistrate Ian Gray who appears in the program. He has insisted on the right to veto material which is inaccurate, unfair or embarrassing to an individual. His Honour shares the frustration of many judicial officers about the depiction of courts in television dramas and hopes that the program will balance the perception in some political and media quarters that courts are soft on crime.<sup>59</sup> In NSW, ABC Television has presented a very interesting, informative and well-researched series on the State Coroner.<sup>60</sup> From time to time print journalists have made an effort to spend considerable time observing the magistrates' courts from close quarters. One recent example involved Sydney Morning Herald journalist Malcolm Knox who spent a month in the NSW Local Courts and published a long feature based on his observations.<sup>61</sup>

### **Communication in magistrates' courts**

It will be apparent from a good deal of what I have said in various contexts—the media, unrepresented and querulous litigants, the fair treatment of parties before the court, efficiency and delay and so on—that I regard effective communication as a central plank in the maintenance and enhancement of public confidence in the courts. Given the nature of the jurisdiction and the persons attending, it is a crucial requirement in magistrates' courts. This entails communication at all levels, including

- interactions in court with litigants/legal representatives, witnesses

<sup>58</sup> Kenneth Nguyen, 'All rise for the reality of justice' *The Age*, Thursday 25/1/07 p8. There have been previous documentaries on magistrates' courts, which have not explored the court in such depth, the best-known being Jenny Brockie's 'So Help Me God' filmed for the ABC in 1993. This was based on 6 weeks filming at Campbelltown Local Court in South West Sydney.

<sup>59</sup> Kenneth Nguyen, 'On the case', *The Guide, The Sydney Morning Herald*, February 5-11 2007, p6.

<sup>60</sup> ABC Television, *A Case for the Coroner* (series), 2003.

<sup>61</sup> Malcolm Knox, 'Crime and Punishment', *The Sydney Morning Herald*, Thursday 14/12/06 p34.

- providing clear reasons for decisions ranging from adjournments, bail, interlocutory and ex parte matters to detailed judgments in civil and criminal cases
- communication with court staff, sheriff's officers, correctional staff and support staff (domestic violence, mental health), court volunteers (eg Salvation Army personnel)
- regular court users' meetings
- communication with colleagues
- participation in ongoing judicial education
- communication with the media (through court media liaison officers).

### **Dealing with witnesses**

Apart from the desirability of effective communication which flows from the dictates of fairness, impartiality and natural justice (not to mention courtesy and common sense) there are statutory obligations in some jurisdictions as to questioning of witnesses. Without undertaking a comprehensive review of this issue, I note, for example s275A and s275B Criminal Procedure Act 1986 (NSW) dealing with improper questions and the provision of communication aids to witnesses with communication difficulties, respectively.

### **Concluding remarks**

It will be evident that much of what I have said has been by way of conjecture and surmise rather than a set of neatly packaged solutions. If I have succeeded in stimulating some discussion I will be content.

I have sought to review generic issues concerning public confidence in the courts. In doing so contentious issues have inevitably arisen as to what is meant by 'public'. It has been suggested that this must refer to the whole community but that a sophisticated understanding of public perception of the courts cannot be had without looking at divergent views of different stakeholders and observers. Lawyers would doubtless argue that courts should be competent, impartial, independent, give reasons, deliberate in public and make predictable binding decisions. Many non-lawyers would agree on these virtues, but also have different expectations.

Several matters have a vital impact on public confidence in the courts including efficiency and delay, the perception of bias, public discourse about the judiciary, perceived leniency in sentencing as well as problems within the legal system that the courts cannot control (but which the public believe they can) such as complexity of the law, cost of justice, legal representation and unfair laws.

A substantial issue arises as to how public confidence in the courts can be measured effectively. This thorny but doubtless fascinating problem has been omitted from consideration in this paper.

It is suggested that a good deal can be learned about public confidence in the courts if the focus is on specific courts in specific jurisdictions. Such fine-grained information may yield richer insights than the sweeping responses likely to be received to general survey questions.

Tentative suggestions are put forward as to means by which public confidence might be maintained or improved. These include:

- effective communication—in all its aspects
- education (referring to (i) formal secondary and tertiary courses as well as information for the community and the media in accurate and accessible form and (ii) ongoing judicial education)
- encouraging the media to present a balanced account of the work of the judiciary
- Judicial Codes of Conduct
- Review of the appointment process for judicial officers

In the second part of the paper, the focus shifted to specific issues relating to magistrates' courts, the so-called coalface of justice. These courts are the busiest in the country, have an extremely wide jurisdiction and may represent the only encounter with the court system for many people. Particular problems arise in relation to delay, efficiency and case management and unrepresented litigants (including so-called querulous litigants). The problem of so-called sentencing leniency looms large. It is suggested that these problems can be tackled through balancing efficiency and justice, adoption of effective communication within the courts and improving the accuracy and reliability of information about sentencing provided to the media and thus the community. It is suggested that more should be known about innovative diversionary programs. One of the difficulties is the lack of interest by the media, generally speaking, in magistrates' courts.

A central theme in relation to magistrates' courts, indeed all courts, is the need for effective communication with persons at all levels inside and outside the court system.

All of these matters represent formidable challenges for Australian courts. In recently reviewing the qualities that a modern judicial officer should possess to do their job—that is, 'to render just decisions in a timely manner and maintain public confidence in the rule of law', Chief Justice Beverley McLachlin, Chief Justice of Canada, suggested that judicial officers must possess conscience, courage and absolute integrity and must be: knowledgeable; independent; impartial; connected to society; more diverse, reflecting society; more efficient; better at communicating with the public and better educated.<sup>62</sup>

Some might quibble as to aspects of these virtues. Few would demur to the general tenor of the qualities outlined by Chief Justice McLachlin. And public confidence in all courts would, I suggest, be enhanced if judicial officers rose to these challenges.

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<sup>62</sup> The Rt Honourable Beverley McLachlin, PC Chief Justice of Canada, 'The 21<sup>st</sup> Century Courts: Old Challenges and New', Fourteenth AIJA Oration in Judicial Administration, Melbourne, 28 April 2006.