

**LAW INSTITUTE OF VICTORIA JOURNAL**  
**IMPROVING THE DISCOURSE BETWEEN COURTS AND THE**  
**MEDIA<sup>\*</sup>**

**Justice Michael Kirby<sup>\*\*</sup>**

There is a problem between the media and the courts in Australia. It is a source of frustration in both camps. Many in the media think that judges are pompous out of touch gits who have insufficient love for free speech and inadequate respect for the free press. Things are not helped by the strange dress that judges sometimes have to wear, the elevated platform on which they are seen doing their job, the obtuse language they occasionally use and the power they wield - including over the media. Although increasingly relics of the past, wigs are a special target of media comments. Even the High Court judges are usually portrayed in cartoons wearing wigs, although we have not done so since 1986.

When media comes into direct contact with the judiciary, they tend to dislike the fact that judges are less susceptible than other branches of government to media pressure and seduction. In defamation cases,

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<sup>\*</sup> Text of an address given in the Library of the Supreme Court of Victoria on 8 May 2008 on the presentation of the Victorian Legal Reporting Awards.

<sup>\*\*</sup> Justice of the High Court of Australia.

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contempt proceedings, decisions on FOI disputes and cases affecting the big commercial investments of the media, the judiciary of Australia comprise the untouchables. If you have as much power in society as the Australian media tend to have, and you meet an immovable object like the judiciary, the shock to the system can cause frustration and anger. This sometimes spills over into the unworthy thought that this is a group of over-mighty officials who need to be cut down to size. That, after all, is a very Australian reaction.

For their part, the judges are often disillusioned with the media: their bold-as-brass assertions of high motives and their supposed dedication to truth, justice and the Australian way. For judges, observing media coverage of cases in which they participate, there sometimes seems to be a big gap between what the public is told and the actuality at the workplace.

Judges lament the disappearance of many dedicated legal correspondents. They realise the power that the print media still has (despite the falling sales) over the daily agenda of talk-back radio, breakfast television and hence political discourse in the nation. Yet secretly, judges are rather proud that they are the one branch of government, and one of the few places in society, that cannot be overborne by media power.

There is some merit in the perspectives on both sides of this divide. It is the nature of the judicial role that judges must be cut off from

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daily contact with the media and similar sources of influence. Too close an association might lead to the same degree of contamination that can be seen in the political branches of government, occasionally the bureaucracy and sometimes other formerly respected institutions, like the universities and the churches. The lesson of life seems to be that getting too close to the media exposes those who do so to the peril of dancing to the media's tune. That is why most judges realise that it is best to keep a distance.

I suspect that this is the reason that most judges are not in favour of television cameras in courtrooms. For me, this is just a natural development, adapting to the alterations in modern methods of communication. But many judges are afraid that over-close proximity will lead to manipulation. Tiny grabs from complex trials will be extracted to maximise shock, horror and outrage. Distortion of news about the courts will be increased. Some judges might even be tempted to play to the gallery and forget the most important people in the courtroom - the parties to the case.

The Australian judiciary has recently become aware of the research findings of a legal researcher, Dr Pamela Schulz<sup>1</sup>. She has studied newspaper headlines and media stories in her home State,

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<sup>1</sup> Pamela Schulz, *Courts on Trial: Who Appears for the Defence? Courts, Communication and Confidence: A Critical Discourse Analysis of Politics, the Judiciary and Media Reporting Justice*, Uni of South Australia, Doctoral Thesis (2007).

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South Australia, from 2002 to 2006. Her study produced a consistent pattern of reporting which, she believes, amounts to an attempt, especially by headlines, to establish what she calls "discourses of disapproval and disrespect". She thinks that this phenomenon is designed to intensify criticism of the courts, to enlarge disapproval and disrespect for their work and to promote a damaging public attitude of fear and mistrust. Piled on top of distrust of politicians, churches, the monarch and officials, who will be left to protect the public in the dire predicament described in the headlines? You guessed it: only the media and their editorialists - supported perhaps by one or two politicians who dance to their dismal tune.

Dr Schulz collects the many screaming headlines that give rise to this conclusion. A lot of these concern the tried and trusted field of sentencing of offenders. Everyone can have an opinion on this subject. Although Australia's imprisonment rate is now edging to be one of the higher rates in the world - much higher than most European countries - few sentences are adequate for certain commentators. "An outrage", the banner screams. "Call for inquiry grows", "Premier orders DPP to appeal". This is the "fear discourse". But it is backed up by an attack discourse with descriptions of judges as "Holidaying at taxpayer's expense" or "Summer nick-off". More "Outrage". "This is not justice". And so forth.

In interviews recorded by Dr Schulz, Australian judges reacted to these attacks in an generally restrained way. They supported the

principles of a liberal democracy. They expressed acceptance of the media's right to report and also to criticise. But they regretted the lack of real understanding about the courts. They cared about criticism and puzzled about how to counter ignorant and inaccurate reporting. They admitted that being a judge in Australia is not being in "a popularity contest". Judges know that they generally have to "cop it sweet". After all, their oath is to administer justice "without fear and favour"<sup>2</sup>.

Still, there are things that we could do to improve the relationship between courts and the media, without getting so close that judicial, or for that matter media, independence would be endangered.

- Judges need to understand media pressures - especially deadlines and brevity.
- Judicial reasons need to include pithy summaries that can be picked up to give an accurate and authentic idea to the public of what the courts are on about.
- Media liaison officers in the courts need to be more proactive.
- Maybe judges need to reconsider cameras in the courts under strict conditions. Indeed, this is already happening at all levels.

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<sup>2</sup> Pamela D Schulz, "Rougher than usual media treatment: A discourse analysis of media reporting and justice on trial" (2008) 17 *Journal of Judicial Administration* 223 at 227.

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- The appointment of specialist court reporters is an urgent requirement. The amount of specialist court reporting has actually fallen off during my thirty years service in the judiciary.
- The media need to understand better the judicial role and maybe judges need to take more time to explain it.
- In the age of electronic media, sticking to printed handouts, even in email format, is no longer good enough. The judiciary somehow needs to get into the electronic age and to speak directly about the dedication, wisdom and devotion that judges usually display in their often tedious and stressful daily work.

One of the interesting reports in Dr Schulz's study describes how courts in the Netherlands have been prepared to redirect justice reporting by appointing *Persreichters* or "press judges". These are serving members of the judiciary who will go on television and radio to explain justice messages accurately. According to Dr Schulz, these commentators have helped develop a keener sense of the actual work that judges do, of its difficulty, of its importance and of why superficial reports and alarmist headlines are often false and misleading.

It may be time for us in Australia to work towards something similar. Sadly, if we wait for most media outlets to provide quality reports of what really goes on in our courts, we may wait a very long time. Media want it short, sweet and interesting. Judges know, it is often not like that.

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The age of infotainment is upon us. But the judiciary itself needs to help find a workable antidote. I respect the small group of legal journalists who try hard to report the law as it really is, including with justifiable criticism where that is warranted (as it sometimes is). I honour notable journalists in this class who have died in the last year – including the outstanding Roderick Campbell of the *Canberra Times*. I acknowledge a few fine exemplars who have left the media for greener pastures, like Marcus Priest of the *Australian Financial Review*. I congratulate the winners of this year's Legal Reporting Awards. Awarding prizes for good journalism on legal matters is admirable and a step in the right direction. But more is needed. For the good of our society and its institutions of justice, it is time to think of radical solutions. Both the media and the courts are vital to a free, questioning and just society. We all have a stake in raising the standards.

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