"The Role of a Judicial Officer – Sentencing, Victims and the Media"

Magistrates' Court of Victoria Professional Development Conference

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Chief Magistrate, fellow judicial officers, I was delighted to receive the invitation to speak at the Court's Professional Development Conference. It is always a pleasure to have an excuse to come to Melbourne, the most civilised of our cities and one that for me has many happy childhood memories. I was also pleased to have the opportunity to address a gathering of the judicial officers who are responsible for the determination of the vast bulk of criminal cases in Victoria.

The Court's Professional Development Committee suggested that I address the topic "The Role of a Judicial Officer – Sentencing, Victims and the Media". It is a broad canvass.

I have elsewhere discussed the changes that I have witnessed over the course of my professional life that have made the experience of giving evidence less of an ordeal for victims of sexual and other crimes of violence[1]. On that occasion, I was speaking to a lay audience. The changes of which I spoke are matters with which this audience is familiar. However, one of these changes places a new responsibility on judicial officers and, for that reason, I should make mention of it. I am speaking of s 41 of the *Evidence Act* 2008 (Vic), which requires the court to disallow an improper question put to a vulnerable witness.

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1 Jack Goldring Memorial Lecture, delivered at the University of Wollongong on 31 October 2014. Transcript available at <http://www.hcourt.gov.au/publications/speeches/current/speeches-by-justice-bell-ac>.

Any person accused of a crime must have a full and fair opportunity to test the prosecution allegations, but this does not entail a right to subject a vulnerable witness to humiliating or otherwise oppressive questioning. Important to the protection that s 41 affords is that questions put in a manner or tone that is belittling, insulting or otherwise inappropriate must be disallowed. We expect judicial officers to treat witnesses, particularly vulnerable witnesses, with sensitivity and courtesy, and it is now their obligation to ensure within reasonable bounds that counsel do likewise. Generally, for good reason, judicial officers are slow to disallow questions to which no objection is taken. In the case of a vulnerable witness the judicial officer is under a duty to disallow improper questions notwithstanding the absence of objection. The discharge of that duty will sometimes call for a discriminating judgment given that a determination must be made as to whether in all the relevant circumstances it is necessary that the question be put.

The topic "Sentencing, Victims and the Media" is apt to direct attention to the perception fostered by some sections of the media that judges and magistrates impose unduly lenient sentences exhibiting excessive tenderness towards the defendant and an insufficient regard for the effect of the crime on the victim[2]. It is a perception that is not confined to Australian courts. An English judge writing in 2011 described the changing stereotype of the judge in a manner that might equally apply in the Australian jurisdictions[3]:

> "Any judge who started life in the law, as I did, as a barrister in the early 1960s, was appointed in the late 1980s, and has only recently retired, will have seen the stereotype of the … judge transformed in certain organs of the press from that of a port-soaked reactionary, still secretly resentful of the

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[2] Schultz, "Rougher Than Usual Media Treatment: A Discourse Analysis of Media Reporting and Justice on Trial", (2008) 17 *Journal of Judicial Administration* 223.

[3] Potter, "Do the Media Influence the Judiciary?", The Foundation for Law, Justice and Society, (2011) at 2.

> abolition of the birch and hostile to liberal influences of any kind, to that of an unashamedly progressive member of the chattering classes, … out of touch with 'ordinary people' …"

The Parliament of Victoria, in line with the approach taken in other Australian jurisdictions[4], has legislated in recent years to guide the exercise of the sentencing discretion in increasingly prescriptive terms[5]. Some commentators see this trend as a response to perceptions of the kind described by the English judge. As I have sought to explain on another occasion[6], the genesis of the move to the statutory prescription of sentencing principle owes much to the work of the Australian Law Reform Commission in its first sentencing reference[7]. An influential idea that informed the debate at the time was the democratic notion that any interested member of the public wishing to know the basis upon which courts sentence offenders should be able to turn to a statute and find a clear statement of the principles[8]. It is wrong to see this shift as merely a knee-jerk reaction to "law and order" campaigns orchestrated by the popular press.

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4 See, eg, *Crimes (Sentencing) Act* 2005 (ACT) ss 10(2), 11(3)(b), 12(3), 33-35, 65; *Crimes Act* 1914 (Cth) ss 16A, 17A, 17B, 19AB, 19AG; *Crimes (Sentencing Procedure) Act* 1999 (NSW) ss 5(1), 21A, 22, 24, 44-46, 49, 54B, 61; *Sentencing Act* 1995 (NT) ss 5, 40(3), 53-55A, 78B, 101, 103; *Penalties and Sentences Act* 1992 (Q) ss 9, 13, 93, 96, 144(2), 160B-160D, 160F; *Criminal Law (Sentencing) Act* 1988 (SA) ss 10, 11, 29A(5), 29D, 32, 32A; *Sentencing Act* 1997 (Tas) s 18; *Sentencing Act* 1995 (WA) ss 6, 35, 39, 76, 81, 86, 89, 90. See also *Criminal Justice Act* 2003 (UK) ss 142-146; *Coroners and Justice Act* 2009 (UK) s 125, which, amongst other things, provides that "every court ... must, in sentencing an offender, follow any sentencing guidelines [issued by the Sentencing Council for England and Wales] ... unless the court is satisfied that it would be contrary to the interests of justice to do so"; Roberts, "Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales", (2011) 51 *British Journal of Criminology* 997.

5 See, eg, *Sentencing Act* 1991 (Vic) ss 5, 5A, 6D, 6E, 6I, 9A–9C, 10, 10AA, 11, 11A.

6 "Sentencing and Judicial Discretion", The Blackburn Lecture, 17 May 2011. Transcript available at <https://www.actlawsociety.asn.au/documents/item/89>.

7 Australian Law Reform Commission, *Sentencing of Federal Offenders: Interim Report*, Report No 15, (1980).

8 Australian Law Reform Commission, *Sentencing of Federal Offenders: Interim Report*, Report No 15, (1980) at 245 [398].

In practice, there may be room for debate about whether highly prescriptive statutory sentencing schemes achieve greater consistency in, or enhance the public's understanding of, sentencing. I do not have experience at the day-to-day level with the sentencing of offenders under the *Sentencing Act* 1991 (Vic) but it is fair to say that the New South Wales sentencing statute has provided fertile ground for appellate lawyers. The statute prescribes a very large number of factors, both aggravating and mitigating, that the court is required to take into account to the extent that they are known to the court[9]. Sentencers find it necessary to explain in increasingly lengthy reasons how each factor has been taken into account. The potential for error is high, particularly in the case of busy courts dealing with a relatively large volume of cases[10].

By way of illustration, s 21A(2)(g) of the New South Wales statute requires the court to take into account as an aggravating factor that the emotional harm caused by the offence was "substantial"[11]. Courts have always taken into account the emotional harm caused by the offence. In the case of sexual offences against children, the courts presume without the need for evidence that psychological and emotional harm will have been occasioned. A judge in the District Court of New South Wales was found to have erred by finding a sexual offence against a child was aggravated under s 21A(2)(g) because there was no evidence that the victim had suffered emotional harm exceeding that which the law presumes any child abused in that way would have suffered[12].

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9 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 21A.

10 Cowdery, "Reforming the Criminal Justice System", speech delivered at the Public Defenders Criminal Law Conference in Sydney on 26 February 2011.

11 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 21A(2)(g).

12 *R v Cunningham* [2006] NSWCCA 176 at [53]-[54] per Bell J (Simpson J agreeing at [6]). See also *R v Youkhana* [2004] NSWCCA 412 at [26] per Hidden J (McColl JA agreeing at [1], Levine J agreeing

Footnote continues

The need to distinguish "substantial" emotional harm from that which the law presumes is the product of the statutory prescription. The articulation of that distinction may not serve to enhance the victim's, the victim's family's or the public's appreciation of the basis of criminal punishment. Whether the administration of criminal justice would be improved by returning to a less complicated and prescriptive approach to the sentencing exercise is ultimately a matter for political judgement.

The administration of criminal justice is the central function of the courts in civil society. Were criminal punishments to be systemically assessed by informed, fair-minded citizens as unjust, it would be a cause for concern. However, it is a different matter when a perception that criminal punishments are insufficiently punitive is based on inaccurate or incomplete reporting, or on a misunderstanding of the incidence of particular crime.

Opinion polls conducted in the Australian jurisdictions and in the United Kingdom have been consistent in reporting that between 70 and 80 per cent of respondents consider the sentences imposed by courts to be too lenient[13]. Research suggests a correlation between the high level of punitiveness in the responses and the respondents' lack of knowledge of the facts of a given offence and of the

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at [1]); *R v Solomon* (2005) 153 A Crim R 32 at 37 [19] per Howie J (Grove J agreeing at [1]; Latham J agreeing at [33]); *Doolan v The Queen* (2006) 160 A Crim R 54 at 60-61 [21]-[24] per Buddin J (McClellan CJ at CL agreeing at [1]; James J agreeing at [2]).

[13] Gelb, *More Myths and Misconceptions*, Sentencing Advisory Council, Victoria, (2008) at 4; Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 1, 11. See also Mackenzie et al, "Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions towards Sentencing", (2012) 45 *Australian & New Zealand Journal of Criminology* 45 at 56; Judge, "The Sentencing Decision", The Atkin Lecture, delivered at the Reform Club, London on 2 November 2005, citing the finding of the British Crime Survey 2004 that 76 per cent of the 20,000 respondents believed that sentences handed down by judges were lenient or much too lenient.

incidents of crime[14]. It is now over a decade since Gleeson CJ proposed jurors as a potential pool of useful information about whether the system of criminal justice is failing to meet the reasonable expectation of the community[15]. That suggestion was taken up by Professor Warner and her colleagues and resulted in the Tasmanian Jury Sentencing Survey. The results of that survey I expect are known to members of this audience. In summary, almost 90 per cent of jurors assessed the sentence imposed by the court for the offence which the juror had tried to be an appropriate sentence[16].

The Victorian Jury Sentencing Survey is presently underway and the results should be published by the end of this year[17]. If the results of the Victorian survey conform to those of the Tasmanian survey, we may find that Victorians hold opinions that are less punitive and more nuanced than the pattern revealed by telephone polling. For the present, there is no reason to conclude that fair-minded Victorians, aware of the factors that the law requires the sentencer to take into account, would conclude that the pattern of sentencing generally is inadequate. Nonetheless, radio and television commentators and the popular press may be counted on to highlight sentencing in individual cases in sensational terms proclaiming the judicial officer responsible for the sentence as manifestly unsuited to the job.

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14 Gelb, *More Myths and Misconceptions*, Sentencing Advisory Council, Victoria, (2008) at 6.

15 Gleeson, "Out of Touch or Out of Reach?", speech delivered to the Judicial Conference of Australia Colloquium in Adelaide on 2 October 2004.

16 Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 49-50.

17 Supreme Court of Victoria, "Public Perceptions of Sentencing: Victorian Jury Study", 13 March 2015, available at <http://www.supremecourt.vic.gov.au/home/contact+us/news/public+perceptions+of+sentencing+victorian+jury+study>.

In the past, when courts were attacked it was seen to be the role of the Attorney-General to defend them. The observance of that convention has ceased to be universal. Former Commonwealth Attorney-General Darryl Williams QC gave reasons why under the Australian system of government, in which the Attorney-General is commonly a senior member of Cabinet, the role of defending the courts was in his view an inappropriate one[18]. He proposed that the judiciary collectively take on the task of defending the courts against attack[19]. From time to time, the Judicial Conference of Australia does fulfil this function[20]. On occasions when inappropriate, highly personal attacks are made on judicial officers, the head of jurisdiction may seek to correct them. The occasions for the head of jurisdiction or the Judicial Conference to enter the arena to "defend" a decision are likely to be rare. The mechanism of appeal provides the opportunity to review the correctness of the decision.

What courts can do is to make their reasons for decision readily available to journalists and members of the public. What courts cannot do is make journalists or members of the public read them. It should not come as a surprise that the commercial appetites of the media are not stimulated by reports of unremarkable sentencing decisions. Nor should it surprise that there is little interest in reporting the work of appellate courts in correcting sentences that are manifestly excessive.

We should take comfort in the observation that unfair and biased reporting of our work is not new. The idea that there existed a golden time of respectful

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18 Williams, "Judicial Independence", (1998) 36(3) *Law Society Journal* 50; Williams, "The Role of an Australian Attorney-General: Antipodean Developments from British Foundations", speech delivered to the Anglo-Australasian Lawyers Society in London on 9 May 2002.

19 Williams, "Judicial Independence", (1998) 36(3) *Law Society Journal* 50, at 51.

20 See, eg, Judicial Conference of Australia, "The Prime Minister's Criticism of the High Court", Press Release, September 2011.

reporting of court proceedings cannot survive reading the *Evening News*' description of Windeyer J's summing-up to a jury published on 21 August 1880. According to the *Evening News*, the trial provided another opportunity for Windeyer J to "show his utter want of judicial impartiality"[21]. This was the introduction; thereafter criticism of the judge got personal.

In recent years, the High Court has granted special leave to appeal in a number of sentencing appeals. Professor Warner characterises the Court's jurisprudence in this regard as conservative, favouring individualism over consistency[22]. It is right to say that the Court has laid emphasis on the individualised nature of the sentencing discretion[23]. Justice requires that the judicial officer in whom is vested the sentencing discretion takes into account all of the factors that bear on the determination, fixing an appropriate sentence for *this* offender and *this* offence. In this sense, justice is rightly individual. However, this is not to accept that individual justice produces relevantly inconsistent results.

The value of consistency was explained by Gleeson CJ in *Wong v The Queen* in these terms[24]:

> "All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of

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21 *In the matter of "The Evening News" Newspaper* (1880) 1 LR (NSW) 211 at 211.

22 Warner, "Sentencing Review 2013–2014", (2014) 38 *Criminal Law Journal* 364 at 371.

23 See, eg, *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64; *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25; *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45.

24 (2001) 207 CLR 584 at 591 [6].

> unconnected single instances. It should be systematically fair, and that involves, among other things, reasonable consistency."

Many judicial officers will have views about the effectiveness of different forms of criminal punishment informed by their experience in practice, their legal studies and, perhaps, an interest in criminology. By the time of appointment, some judicial officers may subscribe to the view that the emphasis in criminal punishment should be on rehabilitation, while others may subscribe to the view that the emphasis should be on just deserts. It would be surprising if intelligent people with some background in the practice of criminal law did not hold developed views about such matters. Fidelity to the judicial oath requires that these views be put to one side in the sentencing determination.

The *Sentencing Act* 1991 (Vic) sets out the purposes for which sentences may be imposed[25] and requires the court to have regard, among other things, to the matters set out in s 5(2). These include regard to current sentencing practices[26]. Consideration of sentences imposed in comparable cases and the material produced by the Sentencing Advisory Council serves to promote consistency.

Community Correction Orders are a relatively new sentencing option. Unsurprisingly, much of the focus of today's agenda is on the Court of Appeal's analysis of this form of order in *Boulton v The Queen*[27]. The Court considered that the insertion of s 5(4C) into the *Sentencing Act* with effect from 29 September 2014 requires a reconceptualisation of sentencing options[28]. Section 5(4C) provides that a court must not impose a sentence involving the confinement of the offender unless it

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[25] Section 5(1).

[26] *Sentencing Act* 1991 (Vic), s 5(2)(b).

[27] [2014] VSCA 342.

[28] *Boulton v The Queen* [2014] VSCA 342 at [121].

considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a Community Correction Order to which one or more of specified conditions are attached. I expect that the provision of this new form of non-custodial order will present particular challenges in the Magistrates' Court. The jurisdiction of magistrates extends to the summary disposition of a range of serious criminal offences[29]. Magistrates are likely to be confronted more frequently than judges in the County and Supreme Courts with the need to determine whether no sentence other than imprisonment is appropriate. Particularly is that likely to be the case when dealing with young offenders.

I am conscious of the volume of criminal cases that are disposed of in the Magistrates' Court. In my years as a judge of the Supreme Court of New South Wales, I never sentenced an offender without having reserved my decision following the sentence hearing. My only experience as a judge of making decisions affecting individual liberty without the luxury of time for reflection was when I conducted the review of bail decisions. That task gave me some insight into the demands of absorbing information on the run, making a decision and giving ex tempore reasons in each of a number of matters in a list. I am conscious of these practical demands. However, in any case in which a magistrate determines that the right sentence in a given case is one either markedly more or less severe than that revealed by current sentencing practice, it is important to fully set out the reasons for that conclusion.

There was reference in *Boulton* to the claimed lack of reasoning by courts, including those exercising summary jurisdiction, with respect to the purpose or purposes for which a Community Correction Order is made, its length and the conditions attaching to it[30]. The Court of Appeal pointed out the potential for

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29 *Magistrates' Court Act* 1989 (Vic), s 25(1)(b); *Criminal Procedure Act* 2009 (Vic), s 28.

30 [2014] VSCA 342 at [24(b)], fn 10.

inconsistency, given the complexity of the purposes of punishment and the factual considerations bearing on what it describes as a "radically new sentencing option"[31]. Their Honours laid emphasis on the need for a clear statement of the reasons in each of these respects[32].

The clear articulation of reasons is important to appellate review and should serve to reduce unwarranted public criticism of decisions. Courts assist in informing the public about their work by publication of their reasons on the Internet and, increasingly, by notifying interested persons of the fact of publication via Twitter.

The media is undergoing a period of significant change[33]. Fewer people depend upon newspapers or mainstream radio and television for their information about public affairs, including the work of the courts. Specialised legal reporters are a luxury which few media outlets retain. Accounts of court proceedings may appear on blogs or in tweets by individuals who are not subject to the ethical constraints of fair and accurate reporting that bind professional journalists[34]. Recognition of these changes and concern about the stridency of criticism of individual decisions has led some judges and commentators to propose that the courts engage more actively with the public, including through the use of social media[35].

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[31] *Boulton v The Queen* [2014] VSCA 342 at [36].

[32] *Boulton v The Queen* [2014] VSCA 342 at [126].

[33] Warren, "Open Justice in the Technological Age", (2013) 40 *Monash University Law Review* 45 at 47-48; Lord Judge, "The Judiciary and the Media", speech delivered in Jerusalem on 28 March 2011.

[34] Barrett, "Open Justice or Open Season? Developments in Judicial Engagement with New Media", (2011) 11 *Queensland University of Technology Law and Justice Journal* 1, 13.

[35] See, eg, Doyle, "The Courts and the Media: What Reforms Are Needed and Why?", (1999) 1 *University of Technology Sydney Law Review* 25; Kirby, "Law and Media: Adversaries or Allies in Safeguarding Freedom?", (2002) 6 *Southern Cross University Law Review* 1 at 5-7; Sackville, "The Judiciary and the Media: A Clash of Cultures", speech delivered to the Australian Press Council in Sydney on 31 March 2005; Eames, "The Media and the Judiciary", speech delivered to the Melbourne Press Club on 25 August 2006; Schultz, "Rougher Than Usual Media Treatment: A

Footnote continues

The former Chief Justice of South Australia, John Doyle, has been a champion of greater engagement by the courts with the media. His Honour laid emphasis on the democratic obligation of the courts as the third arm of government to inform the public about the performance of their work[36]. This theme was taken up by Chris Merritt, a senior legal journalist, at a conference on "The Courts and the Media" in 1998[37]. Merritt's argument was premised on the view that the judiciary has an "image problem"[38] and that "[t]he task confronting the judiciary is to improve its effectiveness in the market for ideas"[39]. Apart from the suggestion that judges might address the image problem by backgrounding journalists, Merritt proposed the creation of an institution that would "put the point of view of the judiciary"[40].

We should not conclude from temporary strident attacks on individual decisions that public confidence in the administration of justice by the courts is imperilled. Public confidence runs deeper than responses to individual decisions in newsworthy cases[41].

Discourse Analysis of Media Reporting and Justice on Trial", (2008) 17 *Journal of Judicial Administration* 223, 235-236; Lord Judge, "The Judiciary and the Media", speech delivered in Jerusalem on 28 March 2011; Warren, "Open Justice in the Technological Age", (2013) 40 *Monash University Law Review* 45 at 53, 56-58.

36 Doyle, "The Courts and the Media: What Reforms Are Needed and Why?", (1999) 1 *University of Technology Sydney Law Review* 25 at 26-27.

37 Merritt, "The Courts and the Media: What Reforms Are Needed and Why?", (1999) *University of Technology Sydney Law Review* 42.

38 Merritt, "The Courts and the Media: What Reforms Are Needed and Why?", (1999) *University of Technology Sydney Law Review* 42 at 42.

39 Merritt, "The Courts and the Media: What Reforms Are Needed and Why?", (1999) *University of Technology Sydney Law Review* 42 at 46.

40 Merritt, "The Courts and the Media: What Reforms Are Needed and Why?", (1999) *University of Technology Sydney Law Review* 42 at 46.

41 Gleeson, "Public Confidence in the Judiciary", speech delivered to Judicial Conference of Australia in Launceston on 27 April 2002.

A nice statement of the foundation of judicial legitimacy in a constitutional setting broadly corresponding to our own is found in the opinion of the Supreme Court of the United States in the *Planned Parenthood* case[42]:

> "The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands".

Public confidence in the courts rests upon an understanding that judges and magistrates are impartial, independent of the executive and conscientious in the performance of their functions. Unlike various government agencies, courts are not service providers. As the recipients of public funds, courts have an obligation to carry out their work as efficiently as the due administration of justice allows and, in the case of courts which administer their own budget, to account for their expenditure in an annual report. However, Courts are not participants in the "market for ideas". Courts are essentially reactive; they settle such controversies as are presented to them within the limits imposed by the way the parties conduct the litigation. Accountability in the quality of the work of the courts lies in the mechanism of appeal.

In a civil dispute, whether between private parties or between government and a private party, one side will suffer disappointment. In sentencing an offender, the court must reconcile competing and often contradictory considerations and commonly the defendant or the victim of the crime, or both, will suffer

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42 *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992) at 865.

disappointment. The integrity of the administration of justice is not measured by popularity.

Several Australian courts now have social media accounts[43]. To the extent that these accounts are used to inform practitioners and interested members of the public of the publication of reasons, new practice directions and the like, social media is an efficient mechanism. However, the immediacy, informality and limited ability to control the material that is posted in response are considerations which may favour a cautious approach to wider use.

Marilyn Krawitz surveyed court staff in Australia, Canada, the United Kingdom and the United States with a view to finding out whether their court had created social media accounts to "engage the public". The results of the survey were published last year[44]. Krawitz distinguishes the "output only" approach, by which court officials use social media to inform the public of matters, from the "input output approach", which permits the public to post comments or replies to information posted by court staff[45]. She favours the latter, arguing that the ability to post a comment on the court's page may make people feel that they are being listened to and thereby increase their confidence in the courts[46]. The possibility of useful feedback, she suggests, outweighs the downside, which is the anonymous

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[43] See Krawitz, "Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts", (2014) 23 *Journal of Judicial Administration* 182 at 189-190. For an overview of the position in the United States, see *2014 CCPIO New Media Survey*, Report of the Conference of Court Public Information Officers, (2014) available at <http://ccpio.org/wp-content/uploads/2014/08/CCPIO-New-Media-survey-report_2014.pdf>.

[44] Krawitz, "Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts", (2014) 23 *Journal of Judicial Administration* 182.

[45] Krawitz, "Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts", (2014) 23 *Journal of Judicial Administration* 182 at 184-185.

[46] Krawitz, "Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts", (2014) 23 *Journal of Judicial Administration* 182 at 185-187.

posting of negative comments[47]. Krawitz points out that an "output only" format means a court's social media account may offer little more than its website[48].

Judicial officers are expected to behave with a degree of formality and reserve. It is an expectation that reflects the solemn nature of judicial work and is conducive to the maintenance of the appearance of impartiality. The essential informality of social media as a means of communication may not be conducive to either of these expectations.

The limited number of characters allowed by Twitter imposes its own limitations on the style of communication. The District Court of New South Wales recently posted a tweet in these terms: "judgment – tendency evidence – joint concoction – is *Hoch v The Queen* a zombie?" It was helpful to alert practitioners and interested members of the public to publication of a judgment containing a discussion of tendency evidence. However, to my mind, it is not the function of the courts to "market" their judgments with racy teasers.

Australian courts are at the beginning of their engagement with social media and it may take some time to develop protocols about its use. I would suggest that courts resist the temptation to encourage others to "like" them, to personalise their judicial officers, or to engage in discussion with members of the public.

There can be no objection to communicating details of the delivery of judgment via Twitter. It may be in this regard that it is reasonable for the court to

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47 Krawitz, "Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts", (2014) 23 *Journal of Judicial Administration* 182 at 186.

48 Krawitz, "Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts", (2014) 23 *Journal of Judicial Administration* 182 at 187.

distinguish the delivery of reasons in cases of no apparent interest to persons other than the parties from those that are likely to attract a wider audience. However, courts should not appear to be drawing public attention to selected decisions to make some wider point. The impersonal administration of justice is not served by making judicial officers "personalities". Rather than inviting the public to "listen to Justice Mary Smith's remarks sentencing a mum for the manslaughter of her child to 3 years' imprisonment", it may be desirable to adopt a more neutral style.

Victorian Courts have been at the forefront of the adoption of social media. The Supreme Court of Victoria has adopted the "input output" approach to its Facebook page. The Court has an informative and user-friendly website, and the adoption of the "input output" format may reflect a view that, if the Court is to have a Facebook account, it should serve a function that is additional to that served by its website. Some of the challenges that the "input output" model poses are evident in the vituperative and extraneous comments posted by members of the public with respect to the sentencing of an individual for a fraud offence[49].

I cannot leave the subject of social media without noting the body of literature addressing the subject of whether judicial officers should be free in their private capacity to operate Facebook and Twitter accounts[50]. We do not lose our civil rights upon appointment. Judicial officers are free to engage in social media communications. However, as judicial officers, we accept that appointment carries with it restrictions on private behaviour of a kind that do not apply generally to members of the public. Some of these are restrictions with very clear boundaries: a

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[49] Posted 16–17 April 2015 and still available for viewing as at 22 July 2015.

[50] Krawitz, "Can Australian Judges Keep Their 'Friends' Close and Their Ethical Obligations Closer? An Analysis of the Issues Regarding Australian Judges' Use of Social Media", (2013) 23 *Journal of Judicial Administration* 14; *Guide to Judicial Conduct*, Judiciary of England and Wales, March 2013 at [8.11]; *The Use of Social Media by Canadian Judicial Officers*, Discussion Paper, Canadian Centre for Court Technology, May 2015 at 17-21.

judicial officer should not engage publicly in debate about matters of political controversy.

Facebook provides a convenient means to keep in contact with family and friends. Subject to care in the type of personal information that is posted and in the selection of the privacy settings, there is no reason to think that judicial officers should not take advantage of its functionality. Perhaps different considerations are raised by Twitter. The prime function of this service is to enable people to participate in a public conversation. Judicial officers need to be careful about the public conversations in which they choose to take part. It would be naïve to think that the fact of their judicial office may not come to be known.

The *Guide to Judicial Conduct* for the Judiciary of England and Wales counsels judicial officers not to identify themselves as members of the judiciary on blogs. It also cautions against expressing any opinion which, should it become known is that of a judicial office-holder, might damage public confidence in the individual's impartiality or in the judiciary in general. The guidance is expressly stated to apply to blogs that purport to be anonymous. The good sense of the guideline is evident.

In the *Planned Parenthood* case, the Supreme Court, in affirming *Roe v Wade*[51], said that it must "take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, and not as compromises with social and political pressures"[52]. The Court was speaking of its role as the ultimate court within the hierarchy and in a different context. Nonetheless, that courts should take care to speak and act in ways that are

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[51] 410 US 113 (1973).

[52] *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992) at 865.

conducive to acceptance of their decisions is no bad precept. We should keep it in mind in our engagement with new means of communicating with the public.