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PUBLIC CONFIDENCE IN THE COURTS

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The Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, declare that, in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Competence, independence and impartiality are the basic qualities required of judges as individuals, and of courts as institutions. Fair and public hearings are the required standard of judicial process. Confidence in the courts is a state of reasonable assurance that these qualities and standards are met.

The values identified in the international instruments to which I have referred are generally accepted, but their practical content is not entirely self-evident. The matter of competence, for example, covers not only possession of formal legal qualifications and knowledge of the law, but also an ability to conduct a hearing, to apply the rules of procedure and evidence, to control counsel and witness, to evaluate evidence and

arguments, to make a sound decision, and to give adequate reasons for that decision. Nowadays, it also covers demeanour, sensitivity towards parties, witnesses and even lawyers, awareness of human rights issues, diligence, and efficiency. The topics of independence and impartiality, which are related to each other, also are complex, and may be the subject of sophisticated analysis. It is a good thing that modern judges are concerned with public perception, but they should not allow that concern to foster an illusion of a public constantly ruminating about such matters as judicial training and development, administrative arrangements between courts and the executive government, or rules of disqualification for bias. These subjects are important, but outside certain professional or specialist groups they are not matters of wide interest.

All institutions of government exist to serve the community, and the judicial branch of government, which has no independent force to back up its authority, depends upon public acceptance of its role. That acceptance requires a certain level of faith. What is it that sustains, or threatens, such faith? That is not an easy question to answer. There are some obvious topics of importance, such as a judiciary's reputation for honesty. There are places where judicial corruption is a serious problem. Happily, this has never been an issue in Australia. Other considerations that might affect the public's view of the courts are less easy to identify.

There is a problem about treating people outside the court system as a class with a consistent set of opinions about courts. Such people include some, such as lawyers, who participate regularly in the work of the courts and have a clear appreciation of the strengths and weaknesses of the system; others who are directly affected by the judicial process, such as litigants, and whose success or failure may colour their views; others, such as witnesses and jurors, whose encounters with courts are brief, but who may take away strong impressions; others whose occupations give them a special interest in or knowledge of aspects of the judicial process, such as politicians, public officials, police officers, medical practitioners or social workers; others, such as reporters and commentators, who observe, describe and appraise, the working of civil or criminal justice, and teachers and students of law. They include many who merely take the same kind of occasional notice of, and interest in, courts as they do of any other public institution. Perhaps the largest group of all are people who think about courts only on the rare occasions when something briefly attracts their attention. Many of those are people whose state of opinion about the justice system may run no deeper than a reaction of approval or disapproval to some recent decision that has come to their notice.

We talk about public confidence in such things as the courts, the democratic process, the institutions of government, or other aspects of public life as though we are referring to an observable state of mind of a sufficiently large group to represent public opinion. We assume that such confidence is as measurable as, say, the approval of a political

leader, or the popularity of a celebrity. Many of the topics for discussion at this Conference assume that we are concerned with an actual, observable, state of mind; and much of what I have to say will accept that assumption. I wonder however, whether, in some judicial discussion, public confidence is really a theoretical construct; something to which we appeal in order to objectify our reasoning, rather as we appeal to the hypothetical fair-minded lay observer when we apply the principles of law about apprehended judicial bias. When judges are doing that, they ought to say so. In certain contexts it is legitimate, but unless it is acknowledged, there is a danger of misunderstanding. It is also worth keeping in mind that one of the problems that courts have with the fair-minded lay observer is knowing how much knowledge or understanding of the judicial process is to be attributed to that disembodied symbol of rationality and wisdom. There may be a difference between what members of the public actually think about the courts, when they think about them at all, and what a judge believes would or should cause a hypothetical, fair-minded, well-informed observer to be concerned about judicial competence, independence or impartiality. Judges are insiders to the process. Some things that might concern them may be matters of indifference to most people outside the system; and some things that may concern people outside the system may be dismissed as insignificant by judges. Any professional group that seeks to assess the esteem in which it is held by outsiders is undertaking a risky exercise. They need to be sure they are listening to voices from outside, and that they are not working in an echo chamber.

Much of what we call public confidence consists of taking things for granted. Consider, for example, public confidence in the electoral process. Australians generally appear to assume the integrity of the electoral system, without knowing much about how it works. Outside the political class, professional commentators, and a few amateur enthusiasts, how many people understand how electoral boundaries are fixed, or follow the work of the Electoral Commissioner, or know of the existence of Courts of Disputed Returns? Yet these arrangements are essential to democracy. Occasionally, as with the case of *Bush v Gore* in the United States, outcomes of enormous consequence may turn upon them. Most Australians probably know that there are countries where the electoral process is flawed; where elections routinely are accompanied by intimidation and corruption; and where disputed outcomes are more likely to be decided by the armed forces than by the judiciary. Yet, unless our attention is caught by some widely publicised issue, we are content to accept that our elections are basically clean, and that the results, whether we like them or not, reflect the will of the people. For most citizens, public confidence in the electoral process is based more upon undisturbed assumptions than upon reasoned opinion. Where do those assumptions come from? What kinds of event would shake them? What could be done to reinforce them? There are cultural factors operating here, not necessarily based upon any particular virtue of our people, but rooted in history.

Courts are more often in the news than the electoral system. They exist to resolve conflict, and whenever there is conflict there will be

people who are ready to identify and complain about faults in the conflict resolution system. Yet courts also have the benefit of cultural reinforcement of their authority, and of faith in their integrity. This is a society which accepts the rule of law as the natural order of things. The decisions of courts are obeyed, even when they are unpopular, or offend powerful interests. Governments engage in civil litigation, sometimes against one another. Criminal cases are conducted as contests between a government and a citizen. Governments routinely accept and obey court decisions. Courts make decisions adverse to governments, sometimes in matters of great political importance. They may antagonise large sections of the community. Yet it would be beyond the contemplation of most citizens that those decisions might be not obeyed.

There may be no scientific method of measuring a society's commitment to the rule of law, or predicting what kind or degree of dissatisfaction would destabilise that commitment. Even so, analysis of what needs to be done to give citizens engaged in civil disputes, or in the criminal process, a fair and public hearing by a competent, independent and impartial tribunal enables us to identify some issues that go to the essence of the matter. A number of those issues will be addressed during this Conference. I will mention only a couple that are of special interest to me.

Public participation in the administration of justice is a part of our legal tradition. Trial by jury remains the procedure by which most serious criminal cases are decided, although in recent years, in the

interest of reducing cost and delay, there has been a trend towards making more offences triable summarily. It is important for Parliaments to keep in mind the public interest in involving the community in the administration of justice, especially criminal justice. Through the jury system, members of the public become part of the court itself. This ought to enhance the acceptability of decisions, and contribute to a culture in which the administration of justice is not left to a professional cadre but is understood as a shared community responsibility.

When I entered the legal profession 45 years ago, juries played an extensive part in the administration of civil justice. In most State jurisdictions, that has changed. In some States, civil juries are rarely used. Federal courts, which are of relatively recent origin, have never made significant use of juries. There are now many advocates who have never participated in a jury trial, and there are judges who have never presided at such a trial. Whatever we may think of this reduction in the role of civil juries, we ought to be aware that it involves a cost. If the traditional participation of juries in the common law civil process is to be reduced permanently, as seems inevitable, then we should be conscious of the fact that we are cutting ourselves off from the community in one way, and we need to establish other lines of contact. For example, Australian courts now have Public Information Officers; something that was unheard of 45 years ago. They are not there just to deal with crisis management. They have an educational function that should be used in a conscious effort to replace the information function that once was served by the use of civil juries. Again, before Parliaments

are tempted further to reduce the importance of civil juries they ought to reflect on the way they serve to promote public awareness of the court system. Reduced public participation, through trial by jury, in the administration of civil justice has increased the separation between courts and the community, and we need to find ways to compensate.

One aspect of competence is the capacity of the system to identify and correct error. All human systems are fallible, and any justice system can miscarry. The ability of the courts, through the appeal process, to correct error is important to the acceptability of the process. This is an area in which the diminishing role of the jury has mixed effects. Jury verdicts are given without reasons. The acceptability of the outcome is based on trust in the combined wisdom of a group of citizens, chosen at random, directed by a judge as to their legal obligations, and applying common sense and community standards to the resolution of issues of fact. It is hard to appeal against a jury verdict. The system has the advantage of finality, and the related disadvantage of inscrutability. In the case of a trial by judge alone, the judge must give reasons. The acceptability of the decision is based on the cogency of the reasons of a professional decision-maker. It is easier to appeal against a reasoned decision. It is easier to identify error. Miscarriages of justice have the capacity to shake confidence in the system, but the capacity of the system to correct itself might be expected to reinforce confidence. It may be that the spirit of our times attaches less importance to finality and more importance to the need to know, and be able to challenge, reasons. It would be interesting to know what the public think of the

comparative merits of trial by jury and trial by judge alone. I wonder what percentage of people have a view on that question. Perhaps we judges overestimate the importance that people attach to our reasons. How many outside the legal profession have ever read reasons for judgment? The fact that juries do not give reasons for their decisions, and that judges give what would be regarded by many people as elaborate, sometimes over-elaborate, reasons is often completely overlooked in commentary about the role of juries. Does that suggest that something we regard as fundamental in the judicial process is something that people outside the process regard as insignificant? That is a sobering thought.

Another aspect of competence is the professionalism of judges, and the related question of their appointment. Some interested citizens have opinions on these topics, but I am not aware of any reliable studies of general opinion about them. This also may be an area in which people are tempted to identify their own opinions with public opinion, or to concern themselves more with what public opinion ought to be than with what it is. I have some views about what is needed for a competent judiciary. I believe that most of those views would be shared by most other judges. Yet, from time to time, different views are expressed by other people. Some of those people may be wiser than I am, although on this topic I can probably claim to be comparatively well informed. How would I know how widely my opinions are shared in the general community? We all want courts to enjoy public confidence; so we ask

ourselves what would affect our personal state of confidence. That is a reasonable approach, as far as it goes, but it does not go very far.

An assurance that courts decide cases free from external influence in the form of pressure from governments or other powerful interests or favouritism of some litigants is basic. The ultimate test of such assurance is whether people believe that, in a legal contest between a citizen and a government, the judge will hold the scale of justice evenly. It is also important that people believe that judges are committed to deciding cases of all kinds, regardless of the identity of the parties, fairly and according to law. There are some who say that impartiality is a myth; that, whether they realise it or not, judges are controlled by personal impulses and inclinations, perhaps formed unconsciously; and that the best judges are those who break free of the myth of impartiality and exercise judicial power in order to promote social ends. If this were ever to become a general opinion of the way judges behave, then there could be no public confidence. Manipulating the law in pursuit of a judge's personal agenda might seem clever to an enthusiast for a cause, but it would be destructive of the authority of courts and therefore, ultimately self-defeating. If the idea of judicial impartiality is consigned to the intellectual scrap heap, judicial authority will soon follow it.

There is a useful practical indicator of the judiciary's general reputation for impartiality. The readiness with which politicians, the media, and interest groups demand a judicial enquiry as the procedure

for investigating controversial and sensitive issues surely reflects the fact that judicial process enjoys a certain reputation for integrity. The demands are rarely made because a judge, or former judge, has some special professional expertise that sets him or her apart from all others. Rather, the assumption is that the outcome of an enquiry will be accepted more readily by the public if it can be described as judicial. It is obvious that one of the attractions to government of former judges to conduct enquiries is the aura of impartiality that is brought by their former status. We ought to find this encouraging.

Australians largely take for granted the political independence of judges. Some judges have well-known political backgrounds. Once appointed, however, they are expected to avoid political activity. If a judge were to indicate a preference for one side or the other of a political issue, that would attract applause from some partisans on the side favoured by the judge. But thoughtful people would recognise the inappropriateness of such conduct, and even those on the side of politics preferred by the judge would feel uneasy. Abuse of public office by engaging in inappropriate political activism is easily recognised, especially by politicians, who are quick to notice when a political point is being made, and quick to complain when it is being made by someone who should keep out of politics, even if it happens to be a point in their favour. Politicians understand that if latitude is extended to their friends today, then tomorrow it will be the turn of their opponents. Politicians both reflect and influence the way the community views public institutions and office-holders, including courts and judges. They are

keen observers of conduct that reflects on judicial independence and impartiality. They are too shrewd to approve a particular instance of such conduct just because it happens to support their side of politics.

Nevertheless, the people whose opinions are most influential in affecting the way the public see the courts are lawyers, especially those whose work regularly takes them into the courts. As a class, they are knowledgeable and critical observers of judicial behaviour. And, as a class, they have plenty to say, both to one another and to the public, about judicial performance. They are not notably charitable; and not notably reticent. The standards of competence, independence and impartiality that they apply in their observation of the work of the courts are, in most cases, demanding. It is essential that the courts enjoy their confidence. Without the confidence of the legal profession, it would be impossible for courts to enjoy the confidence of the public. Their good opinion of the courts is not sufficient; but it is necessary. A litigant's perception of the judicial process is likely to be strongly influenced by the lawyer's perception. Lawyers tell litigants what to expect. They predict outcomes. They express opinions about decisions, and prospects of appeal. The lawyer's perception of the judge, or the court system, or the legal process will be communicated to the client and, through the client, to the public. The judicial branch of government should keep itself well informed about what the legal profession thinks of its performance; not because it can expect comfort from professional solidarity, but because the views of lawyers influence their clients, and many members of the wider public.

How do courts know what people think of them? Some classes, such as politicians, or lawyers, or media commentators, are communicative. What of the silent majority? Surveys of public opinion are sometimes undertaken on particular questions, such as sentencing. (I am referring to serious surveys; not to the kind of polling done for entertainment.) These can provide useful insights. Occasional clamour over controversial decisions, such as unpopular sentencing decisions, may create concern, but it needs to be kept in perspective. We are often told that modern Australians are sceptical of all authority. I do not doubt that. But they are also sceptical of information, and commentary. The fact that people allow a tide of information and commentary to wash over them does not mean that they form serious opinions without making any attempt to evaluate what they read or hear. Their opinions about the reliability of information and commentary are themselves the subject of surveys, and those surveys do not indicate uncritical faith.

The nature of news affects what is published about courts. The things that sustain confidence in an institution are not likely to be newsworthy. Things that shake confidence are more likely to be newsworthy. Inevitably, therefore, the public hear more about the latter than the former. But people understand that. There is nothing new about this. All people in public life, and all institutions, have to cope with it. Bad behaviour attracts attention. Commitment to the service of the public does not. Consumers of information have an appetite for bad news; naturally, commercial providers of information bear that in mind. If

a bridge collapses, that is news. Why would anyone publish a story about a bridge that remains standing? If a victim of crime says that a sentence is outrageously lenient, that is newsworthy. If a victim says that a sentence is fair and reasonable, that is not newsworthy. Naturally, the public will hear more from people who criticise the system than from people who think it is working well. To complain about that is like complaining about the weather.

There is another side of this topic that should be mentioned. We are devoting two days to the question of public confidence in the judiciary. It might be worth giving a thought to the matter of judicial confidence in the public. Some of the alarm that is expressed about the effect of bad news stories, vindictive commentary, and ill-informed or malicious criticism, gives the public little credit for discernment. Judges ought to have enough confidence in the public to accept that the best way to sustain confidence in the courts is to do a good job. They should not be indifferent to public opinion; on the contrary, it should be a matter in which they take an informed interest. At the same time, there is every reason to believe that people generally value the courts. If it were otherwise, how could their commitment to the rule of law be explained? There are, of course, degrees of confidence, but without a substantial level of assurance of the competence and integrity of the courts people could not transact business, arrange their personal affairs, and order their lives with reasonable security. I said earlier that confidence in any public institution most often takes the form of assumptions that people make. Law-abiding citizens, whether they are conscious of it or not,

assume, in many different ways, the competence and integrity of the judicial branch of government. Those assumptions run deep. They are a form of cultural inheritance from our predecessors. They provide a reason, not for complacency, but for optimism. And they remind us that we are only temporary custodians of the collective reputation of the judiciary, and that we ought to take care to pass it on intact.

It is important not to confuse confidence with popularity. It is not the business of judges to try to please when they make their decisions. Doing justice without fear or favour requires, from time to time, making decisions that will displease some, perhaps many people. The public understand that. Confidence in the courts includes trusting them to pursue justice, not applause.