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OUT OF TOUCH OR OUT OF REACH?

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Different ages have different expectations of people entrusted with authority. This is the tactile epoch. Decision-makers are required, above all, to be "in touch". To be described as elite is now a severe criticism, unless the description is applied to athletes. It is used as a term of condemnation when applied to the judiciary. Judges are expected to be conspicuously responsive to community values. That involves knowing those values; a task that is not always as easy as it sounds.

How should judges keep in touch? Should they employ experts to undertake regular surveys of public opinion? Should they develop techniques for obtaining feedback from lawyers or litigants? And what kind of opinion should be of concern to them? Any opinion, informed or uninformed? What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making? Who exactly is it that judges ought to be in touch with? We live in a multicultural society

that takes pride in its diversity. That includes diversity of values. Whose values should we know and reflect? If the values to which we respond are known common values, that is one thing. On the other hand, if different judges respond to different values, does that mean that the outcome of a case will depend upon which judge is appointed to hear it?

Judges live in the community. There is no empirical evidence that, as a group, their general experience of life is narrower than that of most other occupational groups. People who administer criminal justice probably see conduct that most members of the community never imagine. A Family Court judge would have a regular view of domestic relations that would throw many people into despair. When you consider the parade of life that passes before a suburban or rural magistrate, it is difficult to understand why the judiciary, as a class, might be regarded as isolated from reality.

"Public opinion" is a deceptively simple concept. It is probably fair to say that, in respect of most of the day-to-day work of most judges, there is no generally shared public opinion. Most people never go to court. For those who do, it is a once-in-a-lifetime experience. In the days when juries participated regularly in the administration of civil justice, some members of the community saw civil courts at work and came away with an impression, perhaps favourable, perhaps unfavourable, about the justice system, or an individual judge. Most people now have very little exposure to the

civil system in that way. People who are unfortunate enough to be involved in litigation see justice as a form of dispute resolution, and their views are probably influenced by outcomes. Winners are likely to have a more benign opinion of the system than losers. Some, but not many, might form a broader judgment about the wisdom and justice of some aspect of the law. There are few who would care to express opinions on the law of contract. Perhaps more people take an occasional interest in the law of tort. By and large, the community leaves constitutional law to the experts.

The principal exception to this pattern is crime and punishment. That is a topic in which there is a high level of public interest. Opinions are widely held, and strongly expressed. There is also more community participation in the administration of criminal justice. Most serious offences are tried, upon indictment, by juries. The charge of being out of touch is most frequently levelled at judges by way of complaint about the sentencing of offenders. Most of us react to the charge, as you would expect, like lawyers. We want particulars. What exactly does the charge mean? How do you test whether it is true or false? We may dismiss it as hopelessly vague. It is often made in circumstances where that is a fair response. There is, however, a wider, political, dimension to this. It is political, not in the party sense, but in a sense that concerns the relationship between the judiciary and the community; a relationship we cannot ignore. We need to try to understand the meaning of the accusation, and do what we can to assess its merits, even though

that may be difficult. At least we should seek to satisfy ourselves the charge is not well based.

Although some judges speak confidently of community values as though they know what they are, they may be attributing their personal values to the public for rhetorical purposes, and without any substantial basis for a belief that those values are generally shared. Judges have no techniques for, or expertise in, assessing public opinion. Judges ordinarily do not seek to influence public opinion. As an institution, the judiciary is passive in these respects. Courts sometimes conduct surveys of litigants and lawyers for limited purposes related to their administration, and seek to inform the public about aspects of their business, or about topics such as judicial independence, but they do not sample community opinion for the purpose of informing their decision-making. And they do not set out to influence wider community values. They are neither followers nor leaders of public sentiment.

What, then, should we make of the assertion, sometimes heard, that sentencing judges are out of touch with community attitudes to crime and punishment? Should we ignore it as meaningless abuse? Of course, the answer depends in part on who makes the claim, and on the reasons, if any, given to support it. In cases where we ought to confront it, how do we go about that?

The first step is to consider what the assertion means. It might be nothing more than a smear, unverifiable and unfalsifiable, with no definable content. If there is more to it than that, it must mean that judges as a class take crime, or some forms of crime, less seriously than the general public. It seems to involve the proposition that sentences reveal a systemic failure to understand, or a determination to ignore, the seriousness with which the community regards deviant behaviour.

If all that is meant is that, in some cases, individual judges impose inadequate sentences, then the charge is hardly worth making, or answering. Sometimes judges impose sentences that are too low. Sometimes judges impose sentences that are too high. That is why appeal courts exist. The system recognises the possibility of error, and contains procedures for correcting it. Any judge who has sat on a Court of Criminal Appeal knows that many more sentences are corrected for undue severity than for undue leniency. It is in the nature of news that error, or alleged error is more likely to attract attention than orthodox, unimpeachable decision-making. We try to deal with complaints of this kind by giving and publishing reasons for decisions, and by the appeal process. We can never overcome the problems inherent in the nature of news.

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. *Mirabile dictu*, the sentence was imposed on a politician who had been convicted of an electoral offence. The conviction was quashed on appeal, so the sentence was never the subject of appellate review.

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 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 decisions. How do we know, and how does anyone know, what about the public think? This has been the subject of a good deal of expert research, both in Australia and overseas. It is also, from time to time, the subject of opinion polls which are so

obviously defective in methodology that they belong to the world of infotainment. Our interest should be in research of the former kind.

Dr Weatherburn, the Director of the NSW Bureau of Crime Statistics and Research, has written a new book entitled "Law and Order in Australia: Rhetoric and Reality". It will be published later this year. I have read the manuscript. The September 1987 issue of the Australia and New Zealand Journal of Criminology included a report by David Indermaur of research he conducted in Perth about public perceptions of sentencing. In March 2004, Dr Weatherburn and David Indermaur wrote an article for the Bureau's Crime and Justice Bulletin on "Public Perceptions of Crime Trends in New South Wales and Western Australia". In 2003, Oxford University Press published a study entitled "Penal Populism and Public Opinion: Lessons from Five Countries" (Roberts, Stalans, Indermaur & Hough). All of those works are worth careful attention. The following points, among many others, emerge:

1. Most people, in Australia and elsewhere, greatly over-estimate the risk that they will become victims of crime. Their fear, although exaggerated, cannot be ignored. The fear itself is 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 that 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 the total pattern of 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 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 appeal, there is every chance that, even if the appeal succeeds, the public will never learn of that.

There is one topic on which the Australian public are given practically no information at all, and that is the way in which sentences in Australia compare with sentences imposed in similar places overseas. Consider, for example, terms of imprisonment imposed for murder. Currently, this is a topic of controversy and public debate in the United Kingdom. Over the last two weeks, English newspapers have carried prominent stories about proposed sentencing guidelines for murder, and about public statements by the Lord Chief Justice, the Home Secretary, and others on the matter. None of this has reached the Australian media, or the Australian public. That may not be surprising. What is surprising is that reportage of similar issues in this country seems to ignore an obvious question: how do sentences for murder in Australia compare with those in the United Kingdom, or New Zealand, or Canada? The answer to that question is not difficult to discover. Yet nobody seems to ask. It is surely relevant to an accusation that sentencing judges in this country are "soft" on violent crime. A comparison with what goes on in similar jurisdictions does not bear that out.

In the year 2000, the University of Chicago Press published "Crime and Justice: A Review of Research" (ed Michael Towry). It included a chapter on "Public Opinion about Punishment and Corrections". The authors (Cullen, Fisher and Applegate) reached the following conclusions about the attitudes of the American public:

1. The American public generally endorse a punitive and retributive approach to sentencing. This is a general

propensity, and not merely a mindless response, or the product of distorted questions asked in flawed surveys.

2. However, as in Australia and elsewhere, the more information people are given about the circumstances of particular cases, the more they tend to modify their harshness.

3. People are open to persuasion about the merits of alternative correctional approaches going beyond mere retribution, provided they are given good reasons. They are also open to persuasion about the possibility of rehabilitation, especially for young offenders, but, again, they require good reasons.

4. The primary concern of the public is with violent crime, and people attach great importance to what judges call the incapacitating effect of imprisonment. They want dangerous people locked up, so that the danger they represent is reduced. This, again, is not mindless. However, unless offenders are executed, or sent to prison until they die, there must come a time when they will be released. Incapacitation has its limits.

The authors concluded:

> "When people break the law, most Americans want something sensible done. The public most rejects the idea that anyone can simply flout the law and then be given a meaningless penalty ... Citizens want some signs, some assurances, that an intervention of consequence follows a crime."

There are, no doubt, differences between American and Australian public opinion on sentencing. The general support in America for capital punishment makes that clear. At the same time,

there are common threads running through the research in the two countries, and in other comparable jurisdictions. When people are asked about crime, and sentencing, they think about violent crime. They believe that violent crime is increasing, even when that is not true. They expect crime to attract consequences, and because they think in terms of serious crime, they expect serious consequences. They under-estimate the severity of the sentences that the courts actually impose. They think of crimes in terms of stereotypes. They modify their ideas about appropriate severity when confronted with the circumstances of individual cases.

I do not believe that any of this information would come as a surprise to sentencing judges, or that Australian judges generally are either out of touch or out of sympathy with the concerns of their fellow citizens. But there are lessons for us to learn. 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 their 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 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 individualized, 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 the courts do.

The best way of seeing that the public are informed about the working of the criminal justice system is through the jury system. I referred earlier to the reduction in the use of juries in civil cases. The maintenance of the jury system for the trial of serious crimes, and especially crimes of violence, is a vital means of keeping the public and criminal justice in touch. There is another practical suggestion I would make. Juries do not sentence offenders, but they are interested in the outcome of cases they have tried, and they are well informed about the circumstances of the particular case.

The reaction of jurors to sentences imposed on offenders is likely to influence public opinion. It is also likely to provide a useful source of information to courts about public opinion. If governments were concerned to know what the public think of sentencing practice, a survey of the reactions of jurors to sentences imposed in cases which those jurors had tried could provide interesting information. That could be a useful practical test of whether there is some systemic failure of the process to meet the expectations of well-informed members of the public.

Because, when most people think about crime, they think about violence, they identify with victims, not offenders. That, also, can create a misleading impression of public attitudes. There is at least one area of criminal justice in which the law probably has been ahead of public attitudes in terms of severity of punishment. It is still common to see public education campaigns to convince the public that drink driving is a crime. The offence of culpable driving was introduced because of the notorious reluctance of juries, in earlier times, to convict drivers of manslaughter in cases where drink driving resulted in death. Twenty years ago and more, it was common for Courts of Criminal Appeal to remind sentencing judges, and the public, that in cases where a driver with a high blood alcohol level causes death or serious injury, a custodial sentence should ordinarily follow. Recently, the Court of Criminal Appeal of New South Wales has returned to the topic of penalties for drink driving. Attitudes to the subject have changed significantly during my time in

the law. Even so, perhaps because this is the kind of offence where people can be more inclined to feel some sympathy with the offender, and where ordinary people are quite likely to find a family member in collision with the criminal justice system, public opinion is likely to be less punitive than judicial opinion. Furthermore, the established fact that people who respond to surveys tend to underestimate the severity of punishments that are imposed by courts leads me to wonder how much the public know of the penalties for drug trafficking. I wonder how many people realise that the sentences regularly imposed for the most serious offences of drug trafficking are close to the sentences commonly imposed for murder.

One of the most significant changes in the administration of criminal justice in recent years is the interest now taken in the effects of crime upon victims. Although there are dangers associated with it, on balance this is a healthy development. Error of the kind that gives rise both to public complaint and to appellate intervention is most likely to occur when there has been overemphasis on the personal circumstances of an offender and insufficient attention to the seriousness of the offence. The effect of a crime upon the victim is usually part of that seriousness. In a wider sense, also, it is important for courts to keep in mind the primary aim of criminal justice, which is to protect the community. We do not have the French system, where victims can become parties to the criminal proceedings, but we no longer treat them as strangers to the sentencing process.

Understanding public opinion, and relating it to the work of the courts, is a complex issue. It is sometimes trivialised to the point of absurdity, but it cannot safely be ignored. Maintaining discretionary sentencing, to which the Australian judiciary is firmly committed, has a political as well as a legal dimension. It depends upon a reasonable level of public confidence. Questions of cause and effect arise. It may suit some people to create a lack of confidence in order to appear to respond to it. That does not mean judges can walk away from the issue. No doubt it is a source of frustration to judges, perhaps a majority of them, who never sentence anyone for serious crime, to have public confidence in the judiciary measured by reference to the opinions of people about the way the system deals with violent offenders. I receive correspondence, often in extravagant language, from people who seem to hold me personally accountable for the decisions of every judge and magistrate in Australia. It goes with the job. Even so, we all have an institutional responsibility to take an informed interest in the way the public see the courts. And we can serve our commitment to discretionary sentencing if we pursue that interest. We are developing institutional methods of communicating with the public. We can communicate effectively only if we have a good level of understanding of the people to whom our message is directed.

Some claims that judges are out of touch are based on the flimsiest of evidence, and some are based on no evidence at all.

Sometimes the real grievance being expressed is not that judges are out of touch, but that they are out of reach. Those who, in different ways, and in different circumstances, seek to influence opinions, and decision-making, often find the judiciary frustratingly unresponsive. That frustration reveals itself in a search for ways to make judges more accountable. Judges regard judicial independence, not as a personal benefit, but as a constitutional principle that exists for the good of the community. It would be naive to think that everybody sees it in that light. Those who want to influence judicial decision-making, and regret their lack of capacity to do so, may regard the independence of judges as evidence of inappropriate isolation from the rest of the community. But judges are meant to be hard to get at. The reason for that should be obvious. If the idea that judges are easy to influence were to gain currency, there would be plenty of people exerting influence.

In the September 2004 issue of the Australian Law Journal, there is reference to a survey of public opinion which was said to show that 38% of respondents thought that judges should be popularly elected, and that only 15% thought that they should be appointed as they are now. The methodology of the survey attracted criticism, but that is not my present concern. The association of a belief that judges are out of touch, and a belief that judges should be elected, is not coincidental. The two ideas are closely related, even if they are ill-considered, and their currency is exaggerated.

This, again, gives rise to a problem of informed, as against uninformed, opinion. It is quite likely that, if people chosen at random were to be asked whether the Federal Commissioner of Taxation should be popularly elected, at least 38% would answer yes. The same would probably apply to most public officials. The idea of popular election sounds democratic. It has immediate appeal, especially to people who have never really thought about it, and have never considered the implications.

There was a form of democracy, long since vanished, in which all public officials, including those who resolved legal disputes, were elected. In the Greek city states, various kind of democracy flourished. In Athens, all citizens voted in the Assembly. In the law courts, the decision-makers, the jurors, were selected by lot for a period of a year. Military leaders and some financial officers were elected by vote. Most public officials were chosen by lot. (Generally, see Aristotle, *The Athenian Constitution* at 9, 24, 51-60, 63). But this system of amateur government was possible only because the population was small (about 250,000) and most of them were not enfranchised (about 30,000 were entitled to vote - women, foreigners, males under 18 and slaves were excluded).

Our system of representative democracy is far more complex. Built into it are checks and balances. Power is separated and divided. Legislative power is exercised by people who are popularly

elected. It is parliamentarians who are chosen to represent the will of electors, who hold the power and the legitimacy that comes from popular election, and who engage in the political process. Executive power is exercised by Ministers who are members of, and responsible to, Parliament. The Ministers preside over Departments of State. The officers of those Departments are appointed, not elected. The Minister bears political responsibility for their actions. Judicial power is exercised by judges who are appointed by the Executive, and who can be removed from office by reason of misconduct only upon a vote of the legislature. Judges are constitutionally independent of the legislature and the executive. Unelected public officials are meant to be outside the political process. They are not meant to compete with politicians for popular support, or to seek, or claim, political legitimacy.

The constitutional security of tenure given to judges is in aid of their independence, both of the other two branches of government, and of other potentially powerful influences. Judges are regularly called upon to decide disputes, not only between citizens, but also between citizens and governments and, in the federal structure, between different governments. Criminal cases are conducted as contest between the government and a citizen. International instruments declare the creation and maintenance of an independent judiciary to be a fundamental human right of all citizens. The ability to resort to an independent court to assert rights, including rights

against the government, is a necessity if those rights are to be a practical reality.

The appropriateness of electing any public official depends upon the nature of the responsibilities of that official. If the official concerned is meant to be impartial, and independent, and to stand apart from the political contest, then the problems are obvious. If a public official were to stand for election, the candidate, or his or her supporters, would have to explain to voters why they should prefer him or her to other candidates. That explanation would involve some representation about how the candidate would act if elected - a policy. The process of persuading electors of the merits of one candidate against others involves organized activity - political action. Such action requires resources - political funding.

How would this apply in the case of the election of an Australian judge? First, what kind of policy might a candidate for judicial office adopt? What reasons would a candidate, or the candidate's supporters, advance as to why electors should vote for the candidate? (A useful practical exercise to test the merits of a proposal that any public official should be popularly elected would be to draft a policy speech for a candidate). Second, in our society political action normally involves the party system because, for practical purposes, that system provides the necessary organizational structure and attracts the necessary voter support. Third, election campaigns are expensive. If a serious contest were

to develop between opposing candidates, electoral funding would become an issue.

We know from the experience of the United States, where some State judges are elected, that each of these practical considerations is capable of applying to the election of judges. In some cases, policies of judicial action are formulated; organized political action may be undertaken for or against candidates; supporters and opponents are mobilized, and substantial campaign expenses may be incurred. Does anyone seriously believe that a substantial number of Australians, or at least a substantial number of Australians who have thought about the matter, want that? In the United States, of course, Federal judges are appointed, not elected. They are appointed for life, as Federal judges in Australia used to be.

There is one group of influential Australians who, I am certain, would not have a bar of the idea of electing judges, and that is parliamentarians. If anyone seriously contemplates the idea of electing judges, a useful reality check would be to ask politicians what they think of it. Politicians are already extremely sensitive to any sign of political activism by judges. What would they think of judges who actively solicited popular support and who claimed an electoral mandate? How would a Prime Minister or a State Premier take to the idea of an elected Chief Justice? In the Australian system, a Chief Justice with an electoral support base would be a constitutional monstrosity.

There is another reason why the election of judges is repugnant to our legal culture. Judges are not meant to cultivate popularity. It is part of their professional duty, where necessary, to make unpopular decisions. Judges may be called upon to protect the rights of citizens who are in conflict with government and who are despised by most members of the community. The law exists to restrain power, and to protect the weak against the strong. Judicial decisions, including decisions of the High Court, sometimes arouse intense public resentment. So be it. I know many judges who would agonise over claims that their decisions were unjust. I hope no judge who would lose any sleep over a claim that a decision was unpopular.

While it is true that usually people identify with the victims of crime rather than with those accused of offending, most members of the community would understand the implications of being charged with culpable driving before a judge who had campaigned for election on a promise to "crack down" on drink driving. No doubt, promising to crack down on various things would be a popular form of judicial campaigning, but there is no reason to believe that Australians who are given an opportunity to think about the subject want their judges chosen in that way.

It is one thing for individual judges, and the judiciary as an institution, to show a proper respect for community values and to be

conscious of the importance of public confidence. It is another thing for judicial decisions to bend before the changing winds of popular opinion. Nothing is more likely to undermine public confidence in judicial independence and impartiality than the idea that judges seek popularity or fear unpopularity. And nothing is more likely to expose judges to improper pressure and interference than a belief that they can be intimidated by popular disapproval.

In the Australian constitutional and social context, the idea of electing judges to office is deeply flawed in principle, and has no significant political support. Other, less radical, changes to the system of appointment are floated from time to time, and can be considered on their merits. It is not my present purpose to discuss them. However, the very fact that election could be advanced as an option to be taken seriously suggests that basic principles about judicial independence and impartiality are not well understood. This is a concern. A lot of preaching on this topic is addressed to the converted. We should be looking for better ways to popularise the message. Perhaps our public information officers should be given the task of reaching further into the community. It is not difficult to find simple and attractive ways of telling school children, for example, that courts ought to be fair and impartial, or that judges in our system are expected to keep out of politics. There ought to be a concerted effort to do that.

We take too much for granted. It is easy to overlook the fact that most people never have an opportunity to think about issues like this. When I was President of the Judicial Commission of New South Wales, we used to receive complaints that some magistrates who were asked to make apprehended violence orders did not appear to be sufficiently sympathetic to applicants. The complainants were well-intentioned and sincere. They did not understand that, in adversarial litigation, a magistrate is not supposed to be conspicuously sympathetic to one of the parties. Until the evidence has been heard, and the competing arguments have been put, he or she is supposed to be, and to look, impartial. That is a simple point, but it is extraordinary how often it is overlooked.

We do an effective job of persuading sophisticated opinion about the importance of judicial independence and impartiality. Perhaps we are not doing so well at the grassroots level. We ought to give more attention to communicating with people who are not well informed about basic constitutional principles. We need to take up the challenge of broader public education. Explaining to ordinary lay people the reason why the idea of electing judges is foolish and dangerous would be a good place to begin.