

COMMUNITY PARTICIPATION IN CRIMINAL JUSTICE

OPENING OF LAW TERM DINNER 2012

LAW SOCIETY OF NEW SOUTH WALES

ADDRESS BY THE HONOURABLE T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

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This is my first address at the Law Society's Opening of Law Term Dinner, and I have prepared it with some trepidation. Many people think that as barristers speak for a living, public speaking must come naturally. In my case, nothing could be further from the truth. I managed to go nearly the whole of my 30-year barristerial career without having to deliver a speech or even speak uninterrupted for more than 5 or 10 minutes. Appearing in court was never about delivering a prepared address; it was about trying to squeeze an argument into the precious seconds between interruptions from the bench. That is why, despite all of the totally unjustified flattery that surrounded my appointment, I was never described as a good, or even average, orator. Perhaps one of the reasons for this was that I participated in very few jury trials, a subject about which I wish to say something this evening.

In preparing this address, therefore, it seemed only fitting to review the 13 such opening addresses made to this forum by my predecessor, Jim Spigelman; a man who did much to propagate the perception that lawmen and women are gifted public speakers. I reviewed his speeches seeking inspiration and guidance. However, as I read from one year's to the next (in a published book of his Opening of Law Term Speeches, no less) any hope that I might successfully continue the tradition of outstanding oratory vanished completely. At that point, I briefly contemplated simply reading you one of Jim's speeches from the book, and hoping no one would notice. (After all, judges are nothing if not fastidious plagiarists.)

However, fortunately for me, if not for you, there is a matter that has caused me increasing concern this past year, and so I will use this opportunity to draw attention to it, and leave Jim's copyright well alone.

I have been custodian of the Supreme Court of New South Wales for eight short months. This time has been filled with a wealth of new experiences and challenges. Of particular impression upon me has been my time sitting in the Court of Criminal Appeal. I have come to greatly respect the fundamental role the wider community plays in our criminal justice system.

Members of the lay community participate in criminal justice as a matter of course: as witnesses, complainants, accused and remanded. But in these roles they act as individuals. Their experiences and actions are not reflections of the collective social consciousness. When I speak of the community as a participant in the criminal justice system, therefore, I am referring to two roles in particular. First, to the active role of the jury – to assemble as a tribunal of 12 and pronounce judgment as a unanimous or near unanimous whole, on an individual accused of breaching our legal codes. Second, I refer to the passive role the community plays as an observer of the legal system, whose trust is essential to its legitimacy.

My concern is that the criminal justice system is currently experiencing a crisis of confidence.¹ Community trust in the criminal justice system is eroding. Much of this distrust is fuelled by misinformation that is propagated by sections of the media who prefer to inflame rather than inform, and by politics that encourages fear mongering rather than educated debate.

Instead of complaining about media bias and political propaganda – which, my predecessor reminded me, will achieve about as much as

¹ Indermaur and Roberts, 'Confidence in the Criminal Justice System' (Trends and Issues in Crime and Criminal Justice No 387, Australian Institute of Criminology, November 2009) 1.

complaining about the weather – tonight I want to draw attention to the essential role that the community plays in our criminal justice system, and to the responsibility that we as a legal community have to support it.

In an international survey of public confidence in national criminal justice systems, Australia ranked 27th... of 36 countries.² Only 35 per cent of us have confidence in our criminal justice system. And while nearly three quarters of us trust in the police, less than one third trust in the courts. Our confidence has also steadily declined over the last 15 years.³

We are not alone in these low numbers. The people of Estonia, Croatia, Russia and Slovakia all report a similar lack of confidence in their criminal justice systems. However in the jurisdictions we are used to being compared with, such as the United Kingdom, Canada and Ireland, public confidence is much higher. At least 50 per cent of people in those countries have a high level of trust in their criminal justice systems. It may provide some consolation, if not a great deal, that we at least outrank the United States.⁴

² Roberts, 'Public Confidence in Criminal Justice in Canada: a Comparative and Contextual Analysis' (2007) 49(2) *Canadian journal of Criminology and Criminal Justice* 153, 167.

³ Above n 1.

⁴ Above n 2.

Surveys show that most people in New South Wales trust that the rights of the accused are respected, that the accused are treated fairly, and that we effectively bring wrongdoers to justice.⁵ Why then is there so little confidence in the criminal justice system as a whole? **It is because of a misguided perception that the legal community is soft on crime and out of touch with community expectations.**

I say “misguided” perception for a number of reasons:

First, public perceptions of crime rates are highly skewed. Most people believe that property crime has increased in recent years. In fact, it has decreased. Almost everyone grossly overestimates the amount of crime that involves violence or threats of violence, and equally underestimates the conviction rate for violent crimes.⁶

Second, surveys have demonstrated that sixty-six per cent of people in New South Wales believe sentences are too lenient.⁷ However, most people tend to think of extreme examples of serious crimes, like rape, murder and armed robbery, when questioned about sentencing in

⁵ Jones, Weatherburn and McFarlane, ‘Public confidence in the NSW criminal justice system’ (Crime and Justice Bulletin No 118, NSW Bureau of Crime Statistics and Research, August 2008) 1.

⁶ Ibid 5-6.

⁷ Ibid.

general terms.⁸ When members of the public are given detailed information about a specific crime and the background of the offender, a completely different trend emerges.

A groundbreaking 2010 study used jurors to investigate what informed members of the public really think about sentences.⁹ Before their trials, jurors were asked about sentencing in general terms, and most said they thought sentences were too lenient. However, after sitting through the trial and sentencing submissions, they were asked to give an appropriate sentence for the offender. Most gave more lenient sentences than the judge, and 90 per cent thought the judge's sentence was within a fair range. The study shows that when people are given the facts, most think judges get it right.

A third reason I say public perceptions are misguided, is that it is not at all correct to say that judges are out of touch with the expectations of the wider community. While I do not claim to be on the cutting edge of popular culture (I do not tweet, blog, krump, or LOL. For those of you who do not know what I am referring to by krump, look it up on youtube. It will cause you to LOL. You all know that means laugh out loud.), I can

⁸ Indermaur, 'Public Perceptions of Sentencing in Perth, Western Australia' (1987) 20 *Australian and New Zealand Journal of Criminology*, 163-183.

⁹ Warner et al, 'Public Judgment on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Trends and Issues in Crime and Criminal Justice No 407, Australian Institute of Criminology, February 2011).

say that there are few people as in touch with the realities faced by victims, accused and convicted as are the judges of the criminal courts. They are in the thick of it every single day. And most juries agree when asked at the end of their trial, that the judge presiding over it seemed in touch with community expectations.¹⁰

So public perceptions are wrong. Or at least, they change dramatically when ignorance is replaced with information. But is this really a problem? As long as policy makers are guided by sound research and experience, and judges continue to exercise independent decision making, why does it matter that sections of the media propagate paranoia about crime rates, and make short shrift of the truth to sell a story? It matters because of the fundamental tenet that justice needs not only to be done, but also to be seen to be done. This is not just for the sake of the frail judicial ego, but is necessary to maintaining the rule of law.

The intangible quality that gives the rule of law security in some nations, and none in others, has to do with community trust and expectations. The rule of law is one of six World Governance Indicators used to measure the quality of a country's governance. It is defined as "*the*

¹⁰ Warner et al, 'Jury Sentencing Survey' (Grant Funded Report, Criminology Research Council, April 2010) 68.

*extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence”.*¹¹

Therefore, public confidence in our courts and criminal justice system is not only necessary to the maintenance of the rule of law, but to the quality and perception of our governance structures.

In the popular consciousness, criminal justice often represents the entire legal system. Faith in it is likely to be determinative of faith in the whole. People will not strike bargains or trade if they fear their commercial rights will not be upheld. They will not invest in development and infrastructure if they worry their property rights will be easily violated. Therefore, while the rule of law and sound governance are the foundations of a free and stable society, they are also essential to a prosperous one.

Perception matters. So how can we improve it?

It is unsurprising that those who have the least amount confidence in our system, also have the least information about it. They are the most likely to overestimate crime rates and underestimate conviction rates. They

¹¹ Kaufmann, Kraay and Mastruzzi 'Governance Matters VI: Governance Indicators for 1996-2006' (Policy Research Working Paper No 4280, World Bank, July 2007), 4.

are also the most likely to draw their information from sources like talkback radio. Those who have more accurate knowledge, on the other hand, have the most confidence in the criminal justice system, and tend to draw their information from broadsheet newspapers, government publications, and educational institutions.¹² It turns out that the only group whose confidence in the system doesn't increase with knowledge, is the elderly. Apparently a certain amount of crotchiness just comes with age.

For the majority, at least, increased confidence will come from better information. There is little we can do about talkback radio and tabloid journalists trading on the demand for shock and scandal, but there are things we can do as members of the legal community to improve the public's knowledge.

First, we can participate in the debates about crime and sentencing reform that occur at all levels of society. The Law Reform Commission is currently reviewing the *Crimes (Sentencing and Procedure) Act*. Many in this room have participated in the reform process, and this is to be commended. However, we should not forget that the discussions occurring in classrooms, on editorials and blogs, and even over talkback

¹² Above n 5, 12.

radio, are just as important in shaping public opinion and confidence in our justice system. Reasonable minds will differ as to the reforms we need, but we will remain true to our profession by participating in these debates and insuring they are kept informed and accurate.

Second, those working in government and policy should continue the open and transparent dissemination of information, making it as accessible and relevant to the broader community as possible. We have outstanding information services in New South Wales. The Bureau of Crime and Sentencing Statistics and the Judicial Information Research System are but two. Service like the Department of Attorney General & Justice's Lawlink and LawAccess are also invaluable. We should support and advance these services in every way.

Third, judges and those who work in criminal court administration should strive to use plain and accessible language, particularly in judgments and remarks on sentence.

Finally, a very great deal may also be done through the jury.

Juries are an essential part of our participatory democracy and of the trust the wider community places not only in the criminal justice system,

but also in the ability of the legal system generally to protect each individual's rights, family and property. Just as the judge and court in a jury trial act as ambassadors for the whole of the justice system, so each juror becomes an ambassador for the courts within the community.

Approximately two hundred thousand people had some interaction with the NSW jury system last year, by being placed on the jury roll, summoned for service, or empanelled.¹³ Studies show that confidence levels are higher in people who have had recent contact with the courts or justice departments, and highest in those who have actually participated in court processes or hearings as jury members. The experience of sitting on a jury has been shown to improve an individual's confidence in the criminal justice system significantly, and almost universally.¹⁴

The jury is so ancient a form of tribunal that even Blackstone, writing in 1769, referred to its use as originating in "*time out of mind.*" He said that although its use was "*greatly impaired and shaken by the introduction of the Norman trial by battle... [it was] always so highly esteemed and valued by the people, that no conquest, no change of government, could*

¹³ Source: Office of the Sheriff of New South Wales.

¹⁴ O'Brien et al, 'Factors Affecting Juror Satisfaction and Confidence in New South Wales, Victoria and South Australia' (Trends and Issues in Crime and Criminal Justice No 354, Australian Institute of Criminology, April 2008) 1, 4-5.

*ever prevail to abolish it.*¹⁵ Yet today, New South Wales has no grand jury, very few civil juries, no trial by jury for summary offences, and a criminal offender may opt-out of trial by jury in favour of a judge alone trial. The sky has not fallen.

But we are at a precipice. Over centuries of debate and reform, of “*inroads and trifles*,” some are now proposing what was for Blackstone the final, unthinkable machination. In his words: “*the utter disuse of juries in questions of the most momentous concern.*” The jury, so long taken for granted in the public imagination of “the law”, is entirely foreign to the majority of legal practitioners, and some find it of such little relevance to modern jurisprudence that they call for its abolition all together.

Speaking in 2010, Lord Justice Moses of the Court of Appeal of England and Wales bemoaned that discussions about juries are often conducted on so high a plane of principle that they inevitably degenerate into cliché.¹⁶ If you are against juries, he says, you quote Professor Glanville Williams’ “*exposure of the superstitious reverence attached to trial by jury*”, while “*if you are in favour [of them] you recite Lord Devlin... or*

¹⁵ Blackstone, *Commentaries on the Laws of England* (1st ed, 1765-1969) Vol 3, 350.

¹⁶ Lord Justice Moses, ‘Annual Law Reform Lecture: Summing Down the Summing-Up’ (Speech delivered at The Hall, Inner Temple, 23 November 2010).

Blackstone [on] the glory of the English Law.” Clearly I am not one to break with that particular tradition.

Nevertheless, Lord Justice Moses’ address made the valid point that “*there is little to add to the debate as to the desirability of juries*” when conducted on such higher plains of principle, because most of what can be said, has been said already.

We know why juries are good: they represent a check on state prosecutorial powers and maintain public trust and confidence in the administration of justice. We know why they are bad: they can be costly, are highly secretive and sometimes produce what appear to be unreasonable verdicts. However, just as the good is no reason to remain uncritical or to not strive for improvement, so the bad is no reason to throw the proverbial baby out with the bathwater.

Jury trials represent only 3 per cent of all criminal trials in New South Wales. This is largely because they are not available in Local Courts, which hear 96 per cent of all criminal trials.¹⁷ However, they remain the primary method of trial in the Supreme and District Courts, where the most serious offences are tried. Of all defended criminal hearings in the

¹⁷ Source: NSW Bureau of Crime Statistics & Research.

Supreme and District Courts in 2009 and 2010, at least ninety-two per cent were by jury.¹⁸ More importantly, the jury both represents the collective social consciousness, and is alive within it.

It is the only mechanism by which non-members of the legal profession actively participate in the administration of justice. The importance of that participation cannot be overstated. Whatever faults the system may have, it provides reassurance to the victims of crime, the accused and to the community generally that factual issues surrounding the guilt or innocence of an accused will be judged by a panel of people randomly selected, and not perceived to be isolated from the types of factual issues commonly involved in a jury trial. The abolition of jury trials would have at least the potential to further isolate and thus alienate the community from the operation of the legal system and further erode community trust in the system.

Thus, and in keeping with Lord Justice Moses' plea for level-headed, earth-bound debate, let us make the conversation about ways and means of *helping* the jury system to achieve its purpose; to enhance democratic participation and community trust in the criminal justice system.

¹⁸ Ibid. In 2009-10, there were 1,283 defended hearings in the Supreme and District Courts. Over the same period, 1185 charges proceeded to trial by jury.

It is important in considering this issue to have regard to what are commonly perceived to be the flaws in the system. As I said earlier, jury trials are seen to be costly. To this it might be added that jury trials are time-consuming compared to trials by judge alone, at least if the time it takes the judge to write their judgment is not taken into account.

However, what this should tell us is that it is necessary to put in place procedures which ensure that jury trials, along with other forms of litigation, focus on the real issues in dispute. An accused is entitled to have the case against him or her proved beyond reasonable doubt, and to put the prosecution to proof on any matter that is likely to be in dispute. This does not mean, however, that representatives of the accused acting responsibly should not assist, by admission or otherwise, in ensuring time is not spent over matters which will plainly not end up in issue. The legislature, the courts and the profession I know are seeking to devise mechanisms to ensure that this does not occur.

The second complaint commonly made is the secretive nature of the process. This is an integral part of the system. As best as I can perceive there does not seem to be a perception, at least in the community, that the relatively secret nature of the process is such a disadvantage to warrant its abolition. The important issue for the profession is to do what it can to ensure that juries are supplied with as much assistance as

possible to reach the right result. If the profession is transparently seeking to achieve this end, concern held by the public as to the secretive nature of the process will be allayed.

The third concern is that the increasing complexity of jury trials makes it impossible or extremely difficult for the jury system to function effectively. This is not a criticism of the capacity of jurors but rather a consequence of the difficulty of explaining to a jury and having a jury understand in a limited period of time complex factual issues including those involving technical, financial and scientific matters. It is suggested that judges who have greater exposure to these issues and a greater ability to ask questions to clarify matters of evidence and perhaps more time to contemplate the evidence, are more likely to achieve the correct result.

There is force in these concerns but it seems to me that our focus should be on ways to improve the jury process. Recent Australian studies suggest a number of ways of doing this. They are intended to both enhance juror experience and increase the reliability of jury verdicts.

First, the nature and role of witness examination should be explained at the outset of the trial. Jurors report not treating lay witness examination

as evidence on which they can base their decision. This is because the “CSI” effect has left many jurors with the impression that only sources like DNA and expert reports count as real “evidence”. The result is that they place too much emphasis on what they see as “hard evidence”, and too little on witness examination.¹⁹

Second, jurors in complex trials could be asked in the final minutes of the sitting day whether they require clarification or explanation of any expert evidence or other evidence of a technical, financial or scientific nature. Generally speaking this should not be necessary but in exceptional cases it may be a useful tool to ensure juries understand the evidence led.²⁰ It is no different to what judges commonly do in non-jury trials.

Third, another area that has received considerable scrutiny is whether judges should assist jurors with the meaning of “beyond a reasonable doubt.” Australia is one of the few jurisdictions in which judges almost never define this expression, yet it is one of the most common sources of juror confusion and complaint. English, Canadian and New Zealand courts all allow trial judges to assist juror understanding of “beyond

¹⁹ Warner et al, ‘The Jury Experience: Insights from the Tasmanian Jury Study’ (2010) 10(3) *Judicial Review* Vol 334, 347.

²⁰ *Ibid* 342.

reasonable doubt”.²¹ Law Reform Commissions in other Australian states have recommended adopting a similar approach, and the New South Wales Law Reform Commission consultation paper on jury directions raises the issue squarely. This is a conversation worth having.

Fourth, greater assistance may be given with jury deliberations. Written jury directions are already encouraged in New South Wales, and about seventy per cent of trial judges make use of them.²² However, step-directions, issue tables and decision trees are now used in overseas jurisdictions, where they have been received favourably.²³ Studies with mock trials in Australia show that such aids significantly improve juror comprehension of legal directions.²⁴ Great care must be taken to ensure that such aids do not unduly influence juror decision-making, but any processes that increase juror comprehension should be encouraged.

The manner of jury trial in force at the time of Blackstone, or even, for that matter, Professor Glanville Williams or Lord Devlin, is not necessarily appropriate today. Jurors should have the benefit, to the extent possible, of technological or other materials which would assist

²¹ Martin, ‘Beyond Reasonable Doubt’ (2010) 10(1) *Judicial Review* 83, 107-112.

²² New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper No 4 (2008) 228.

²³ *Ibid.*

²⁴ C Semmler and N Brewer, ‘Using a Flow-chart to Improve Comprehension of Jury Instructions’ (2002) 9 *Psychiatry, Psychology and Law*, 262.

them in their determination. We should not underestimate the ability of jurors to use these aids, or be unduly fearful that they will be misused.

Finally, returning to the issue of sentencing, the simple gesture of inviting jurors to stay and watch sentencing proceedings has been shown to significantly improve jurors' experience and trust in the criminal justice system.²⁵ Many jurors report that it validates their experience, and the "justness" of the verdict they reached. This will often be impossible when sentencing occurs at a later time, but to the extent it can be achieved, it is desirable.

Many other suggestions of ways to improve the jury process and confidence in the criminal justice system have been made, and should be investigated. I suggest that the proposals most likely to succeed are those that trust in *people* - in the members of the community and the jury - to be intelligent, diligent and fair. It is our responsibility to improve their chances by enlivening debate, and insuring that the information we distribute is accurate, relevant and accessible. Otherwise, we have little right to expect trust in a system that excludes the voice of the community it is meant to represent and protect.

²⁵ Above n 19, 334-336.

It has been an honour to address you tonight. The Law Society of New South Wales has always been dedicated to reform, education and community engagement. I am sure you will continue to be a credit to our state and profession in the 2012 Law Term.