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## Editorial

# Judging the judges

*Sentencing, sensationalism and somersaults...*

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The media treatment last month of the sentencing remarks of a Supreme Court judge in a 1992 sexual assault matter was extraordinary.

The initial coverage - first in the *Australian*, then leading the Channel 8 News, on ABC TV News, the *7.30 Report* and, the next day, plastered across the front page of the *NT News* and debated on ABC Radio - is best described as 'band wagonism' poorly disguised as the gender bias debate.

The *Australian*, which had the dubious honour of breaking the story, ran it under this head: *Judge cuts penalty for non-ejaculating rapist*.

The lead paragraph said: "A Northern Territory Supreme Court judge has found failure to ejaculate a mitigating factor in favour of a boy, 16, who raped a 12-year-old girl in Darwin in 1991."

The report did not say that failure to ejaculate was listed as point five in a list of seven factors.

It didn't mention that those factors appeared on page 13 of a 17 page judgment and were preceded by the facts, the accused's prior convictions, and his antecedents.

Nor did it mention that the judgment was delivered in September last year; it gave the impression that Justice Mildren had handed down this decision hot on the heels of a comment he made in relation to sentencing in a 36 page paper he presented to the July CLANT conference in Bali.

That comment was picked up by the *Australian's* reporter, David Nason, who wrote: "A transcript of the judgment was provided to the *Australian* following a recent address by Justice Mildren...where in discussing community perception of inconsistent sentencing procedures he likened it to rape - 'an allegation easily made and difficult to refute'."

The story led Channel 8's bulletin:

"Calls tonight for NT Supreme Court judges to undergo immediate education and training for their handling of rape cases. The Territory Opposition is outraged after a 16-year-old boy spent six months in jail for raping a sleeping 12-year-old girl..."

The *7.30 Report* featured an interview with a representative of the Ruby Gaea (rape crisis) Centre who criticised Justice Mildren's comments then said she had not read the judgment in full and was basing her remarks on the 12 paragraph story in the *Australian*.

The second paragraph of the *NT News* story the following morning (14 July) said: "Justice Dean Mildren...in sentencing a 16-year-old youth who had sexually assaulted a 12-year-old girl, said he regarded the offence as less serious because, among other things, the youth had not ejaculated and the victim had known the offender."

The "other things" to which the paragraph alluded were that the victim had no recollection of the assault, that she suffered no physical and apparently no mental injury, that she was not required to give evidence at either the committal or the trial, that the offender was a juvenile, had no priors for sexual offences and showed remorse.

The *NT News* report did make mention of the "other" mitigating factors although they were a long way down the story and spilled onto page two.

The *Australian*, too, listed the other factors in its eighth paragraph.

Until then, the media ignored the bulk of Justice Mildren's sentencing comments.

A somersault occurred the following day when the *NT News* ran a story headed: *Lawyers split on rape row* on page 3. The editorial on the same day was headed *Outrage misplaced*.

It said: "The issue was brought up

by the media and kept going by the media, and it is the media which has chosen to be unthinkingly critical and fashionably outraged.

"The case occurred in September last year. But it has not seen the light of day until now mainly because now so-called 'gender-biased' judges are the current ideological target."

"Finally, is it too much to ask that if the judiciary is being examined then it should be on the basis of fact and not hysteria or media hype?"

John Loizou, in his *Sunday Territorian* column on 18 July pointed out that the case was reported in the *NT News* of 10 September last year and that the outrage at the time was "deafeningly silent".

Mr Loizou also said that Justice Mildren's sentence was "thoroughly reasoned".

Mr Loizou's was the only piece which mentioned the legislation by which Justice Mildren imposed the sentence, a head sentence of four years with a non-parole period of six months.

That legislation was the *Juvenile Justice Act*, the *Criminal Code* and the *Criminal Code (Conditional Release of Offenders) Act*.

It apparently didn't occur to anyone that the absence of an appeal from either side was a reasonable indication that the sentence was consistent with current sentencing principles.

None of the reports quoted these remarks in full:

"The offence of rape is a serious one, and although this offence was at the lower end of the scale, I do not think that the circumstances are so wholly exceptional that a non-custodial sentence is appropriate. Accordingly I do not think that either a wholly suspended sentence or a community service order would adequately reflect the need for general deterrence, the gravity of the offence, the need to

# Mr Moriarty didn't look like a difficult client...



punish you for what you did or promote respect in the community for the justice of the criminal law." [at 15]

"Some people may regard this as a lenient sentence and a sign that the courts are lenient with rape. I want to emphasise that this is not the case. In most cases of rape, offenders can expect condign punishment. In recent times terms of imprisonment of ten years and longer have been imposed. In a proper case, I would have no hesitation in imposing the maximum penalty fixed by law --- imprisonment for life. The circumstances of this case are unusual, and not to be regarded as setting any precedent for penalties for the crime of rape generally." [at 17]

What could be more plain?

What the media did was sensationalise three lines of a 17 page judgment which resulted in the wider community thinking that the accused had his custodial sentence REDUCED to six months BECAUSE he did not ejaculate and BECAUSE he was known to the victim.

That was not even close to objective journalism and certainly did nothing to further any debate about gender bias.

Unfortunately, those who suffered most from the episode were members of the community who rely on the media for their information.

Until the *NT News* editorial and John Loizou's column, the public could be forgiven for being reasonably outraged.

The prize, however, goes to E F Ferrier in a letter to the editor of the *NT News* on 19 July which said: "I can't quite make out whether your editorial of 15/7 is an exercise in self-flagellation or an attempt to shift blame on to other sections of the media..."

"Physician heal thyself."

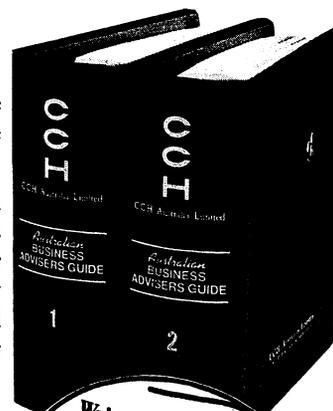
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