The law, politics and the media*

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The Attorney General of NSW recently described the relationship between the law, the media and politics as 'the Devil's Triangle'[1] - an allusion to the Bermuda Triangle and the lost souls who are said to have perished there in mysterious circumstances. While spoken in some jest, there are times when we know the media believe the law moves in mysterious ways. Equally there are times when lawyers believe the media moves in ways antipathetic to a lawyer's world vision. And, further, there are times when politicians, no doubt, wish neither lawyers nor the media were there to plague them so they could get on with the business of government without having to reconcile the often conflicting influences of either.

'The media would reject as an unfair constraint on the freedom of the press the modes of regulation which it advocates for members of the legal profession.'

The essential propositions that I wish to examine are:

- Do any or all of the three arms of government have any obligation to ensure the media is well equipped to report their activities accurately and, if so, do they discharge that duty?
- On the assumption that it is accepted that the media's duty is to respect the truth and the public's right to information and that that duty should be discharged in an honest, fair and accurate manner, does the fourth estate discharge that duty?
- If no to any of the above, who is failing in their duty and how should the position be redressed?

What I am concerned to examine, too, is the question of whether, as 'news values become more narrow, more sensational and more trivialised'[2], we increasingly run the risk that the public's perception of government and the law will become distorted and shallow. While this is a problem for all levels of government, it is an acute problem for the rule of law if governments develop a knee-jerk reaction to law making shaped by the level of outcry manifested through the media. Media perspectives of sentencing do not necessarily reflect that of an informed public – yet there are increasing signs of political responses to public outcry rather than calm deliberation and consultation.

It is critical in examining the questions I have posed to keep the following fundamentals firmly in mind:

- Politicians are elected, they conduct much of their business in public through parliamentary debate and they are answerable to the electorate on a regular basis.
- Lawyers are educated in the law. Judges conduct their business in public, they are protected by the principle of judicial independence and prima facie can only be removed by a joint sitting of both houses of parliament for 'proved misbehaviour or incapacity'.[3] Save for the High Court, they are answerable to appellate review. Anyone can read and comment on their judgments.
- Few know the credentials of journalists. While their writings appear in public they can only criticised in the same forum if the editor of the day sees fit and even then the criticism will usually be subject to length restrictions. Further, journalists are answerable primarily to their proprietors. Subject to the laws of defamation and contempt, they revel in a system of self-regulation which, if it applied to any other profession, would provoke a press outcry about self-interest.

Despite controversies about disclosing the source of political funding, politicians, by and large, have to disclose the substantial influences upon them. Judges, too have to refuse to sit in cases where a connection with a party or some other substantial matter might be perceived to influence their ability to deliver an impartial decision. But where is there any requirement that journalists disclose all matters which might be seen to affect their ability to be fair and impartial? Is such a concept possible in a world governed by ratings and subscription rates?

As the Media Entertainment Arts Alliance ('MEAA') has observed:

> A journalist was once defined (by Peter Ustinov) as someone who invents a story and then lures the truth toward it. Anyone who has worked for long in the

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> [journalist] profession, if they are being scrupulously honest, concedes that there is at least a grain of truth in that observation. Journalists exploring a story 'lead' are anxious - indeed, often under pressure – for that 'lead' to bear fruit. They may consciously or unconsciously close their minds to an area of inquiry that could shoot down the story idea. Or, more commonly, they may not make sufficient inquiries to justify the sweep of the stories (especially the intros) they write. Such stories often involve exaggeration or a wrong or misplaced emphasis, rather than blatant errors of fact. The third way of summing up the journalist's ethical failing in such circumstances would be to say: 'they didn't set out to get it wrong, but they didn't do enough to get it right.

Media reports of sentencing

It is undoubtedly true that the substantial publicity which accompanied media scrutiny of the mandatory sentencing regime operating in the Northern Territory led to some, albeit slight, amelioration of the mandatory sentencing provisions. The provisions had, however, been in force since amendments to the *Sentencing Act 1995* (NT) which had been passed in March 1997. Those provisions had been criticised soon after the amendments by the Full Court of the Supreme Court of the Northern Territory in *Trenerry v Bradley*.[5] Two members of that Court (Angel and Mildren JJ) described the mandatory sentencing provisions as leading to unjust sentences. In the same year, the Australian Law Reform Commission and the Human Rights Equal Opportunity Commission published a report which concluded that the mandatory sentencing provisions breached the United Nations Convention on the Rights of Children. The Northern Territory Bar Association, Australian Women Lawyers and the Law Council of Australia all expressed their concerns about the injustice of the legislation in letters to the Northern Territory and Commonwealth attorneys general as well as in media releases. None of this attracted any significant political response, let alone any media exposure of note. Once the media was activated and the public debate generated, there is little doubt the public furore which was generated produced results. But what does it tell us that it was not until a youth had committed suicide that the whole issue was apparently regarded as interesting enough for substantial media attention and a political reaction?

Or take a more general example. At least once a week a headline in one or more newspapers will report the latest judicial perfidy in what is said to be a grossly disproportionate sentence. Such criticism is not new – but nor is it fair. However distasteful this proposition may be to some members of the media, let alone the public, a true system of justice must be fair to all and that fairness encompasses consideration of the 'rights' of the offender. We have long since departed from a system of law which accorded the offender no rights. Moreover research tells us that a public which is fully informed about the circumstances of a case is likely substantially to support the sentence imposed or to believe it is far less lenient than if asked general questions.[6]

What is the answer to this conundrum? It is certainly not to cease publishing reports of judicial proceedings. Such reports play a very important role in maintaining public confidence in the rule of law. But that public confidence will not be retained by reports which contain no, or no adequate, analysis of the detail which the court has to consider in coming to its decision on sentence.

What have the courts done?

Some may think that the answer lies in the courts providing summaries of the key components of, in particular, their sentencing decisions with the media accepting a correlative burden to include in any report of that judgment the critical components.

The courts have not yet acceded in all cases to a practice of distributing judgment summaries at the time judgments are delivered. That practice has become more frequent – particularly in the case of judgments concerning matters of great controversy. Thus Justice Wilcox's judgment in *Patrick Stevedores* was broadcast on television and radio as, too, more recently, was Justice Finn's decision in the *South Sydney v News Limited*[7] litigation. The Federal Court has decided as a matter of policy to release judgment summaries in matters of public interest. The High Court issued a summary of its orders and the effect of those orders in *Patrick Stevedores Operations Number 2 Pty Limited v. Maritime Union of Australia*.[9] That summary undoubtedly assisted media outlets in reporting the decision.

Regrettably, to date, the preparation and distribution of such a summary has not become the usual approach. Nevertheless, even these, albeit so far small, steps demonstrate the courts' willingness to recognise that it is necessary to make decisions more accessible to the public – there is little indication, however, that the media accepts any correlative responsibility on its part to report decisions accurately. What are the checks and balances which regulate the media in this respect? Are the media conscious of the effect their work may have on larger issues concerning respect for society's institutions or do they care only for the latest by-line and the most sensational headline that can be produced? Do they care whether or not they produce an accurate and unbiased report? For those involved at the coalface of interaction with the media, these questions do not permit of a simple answer.

What has Parliament done?

Venal as much criminal conduct is, it is time journalists recognised that one of the functions of the criminal law is to satisfy the public and the victim's desire for revenge. Once the sentence is served the perpetrator has discharged their debt to society and should be free to go about their business. But public pressure, whipped up increasingly, it seems, by the media, is leading to politicians engaging in what might fairly be described as 'knee jerk' legislation so that they may

be seen to be responding to the perceived public clamour for tougher measures.

The prime example of this in recent times was the legislation struck down by the High Court in *Kable v. The Director of Public Prosecutions*.[10] The unashamed and transparent purpose of the *Community Protection Act 1994* (NSW) considered in that case was to require 'the Supreme Court [of NSW] to inflict punishment without any anterior finding of criminal guilt by application of the law to past events.'[11] The legislation was passed in an atmosphere of significant community concern about the potential for Mr Kable to commit further acts of violence – yet it was a response which the High Court found to be unconstitutional and, in the words of one justice, 'repugnant to the judicial process.'[12] At the time the legislation was introduced, it was widely supported by the media, and few members of the public appeared to have an understanding of the fundamental threat to all our liberties.

More recently, we heard the NSW Premier speaking of legislation that would 'cement into their cells' nine murderers. Again one might argue that such legislation would appear to be repugnant to fundamental liberties. On this occasion even some members of the media had problems with the proposal – the *Sydney Morning Herald* editorial that dealt with it did not endorse it and legal commentators have pointed out such laws are not just harsh and discriminatory, but unprincipled, ad hominem and bad law. They are inconsistent with the fundamental sentencing principle that all sentences should be imposed in public by a court of law.

Other media proclaimed the merits of the legislation in emphatic terms – it was widely seen as satisfying a public perception that certain offenders never be released. Indeed, it was expressed in terms of applying to offenders of whom those words had been used at the time of sentence – even though, when they were used, those words had no legal effect. Chief Justice Gleeson, when he was chief justice of this State, expressed the view that such remarks should not have been made.

The legislation lottery which can be generated when politicians perceive there to be an increasing call for harsh penalties can be seen by the NSW Opposition's response. Even though the Premier's proposal was in terms very similar to the legislation on the same topic proposed by the Opposition in mid 2000, the Opposition's response, apparently to 'one-up' the Government's proposal, was to say it would introduce legislation which denied prisoners the right to seek parole.

What has the media done?

In the face of increasing accessibility by the media to the judicial process, how does the media respond? The principle that the media should report fairly and with accuracy is seen, by some, to be overshadowed by the media imperative to increase ratings (in the case of the electronic media) and to sell more newspapers (in the case of the print media). The media calls constantly for the judiciary and the legal profession to be accountable. There is no doubt that both are, in most cases these days, through parliamentary convention, statutes in the case of judges or through legislation disciplining lawyers in the case of the legal profession. The media, however, regulates itself. It would reject as an unfair constraint on the freedom of the press the modes of regulation which it advocates for members of the legal profession.

Many journalists take the position that the existing 'regulation' of their work through the laws of defamation and contempt impose sufficient restraints on their conduct to compel them to discharge their duties appropriately. But do they? The litany of correspondence which is published in the 'letters to the editors' pages indicates many complaints about the accuracy of the media's reporting. Often the complaint is, no doubt, satisfied by the publication of the letter, but where wider issues are at stake, for example the failure to present, adequately or at all, one side of a debate, there is no real remedy.

Journalists themselves question their ability to abide by their own code of ethics. The MEAA points out that journalists' ability to observe a responsibility to be ethical and accountable suffers from the fact that most journalists are employees… are subject to direction or 'heavy expectation', or feel themselves so. They do not always control the end product of their work as published or broadcast…managements will be crucial to the development of a 'culture of compliance' with ethical standards.'

Paragraph 8 of the AJA Code of Ethics requires journalists to:

> Use fair, responsible and honest means to obtain material. Identify yourself and your employer before obtaining any interview for publication or broadcast. Never exploit a person's vulnerability or ignorance of media practice.

Despite this paragraph, time and again we have seen the Australian media using hidden cameras to obtain 'stories' which the media thinks worthy of publication. Just recently, a camera was taken into Ray Williams' house concealed in a briefcase. The justification for this was said to be the public's right to see how the Williams family was living in contrast to those who had fallen into economic misfortune as a result of the collapse of HIH. The unstated premise in all of this was a good illustration of the flawed reasoning which frequently seems to underline such exposes. The process appears to proceed somewhat along the following lines:

- There is a victim.
- The person responsible for the 'victim's condition' can be identified.
- Because there is a 'victim', the 'responsible' person must have done something wrong.
- It is appropriate for the media, especially the electronic media, to use means, including subterfuge, to expose the [media] identified wrongdoing.

An external system of regulation?

Such frank criticism from the journalists' own organisation calls for a response. If journalists cannot regulate themselves, is the answer an external system of regulation? The response of various media bodies to this suggestion raises the spectre that too close a system of external regulation threatens the fundamental freedom of the press.

At present, the principal body which plays an extra-curial role in regulating the press is the Australian Press Council. This, it might be noted, is a self-regulatory body established and funded by the print media. Its power in relation to the receipt and determination of complaints is that which is given to it by the media which established it.

The Press Council has argued that the establishment of a statutory body to play a role in the regulation of the media would:

> bring the status of the print media in this country closer to that in countries where there is no freedom of the press. In particular, it would place Australia at risk of being classed amongst those countries where the expression of critical opinion by the press may attract political or economic sanctions.[14]

The MEAA points out that journalists oppose licensing, and for good reason, because the history of the struggle for freedom of the press is in large part the struggle against licensing. Journalists, it is said, claim no 'exclusive right to perform particular functions' in the way that lawyers and doctors do.[15] This begs the question.

As we are all aware, journalists' daily writings have an extraordinary ability in the global village to influence events and individuals. Their publications can lead to vigilantism. Witness the recent events in England when a newspaper decided to publish the lists of convicted paedophiles and innocent people mistakenly identified as the guilty were subjected to gross physical abuse and harassment. The newspaper's conduct was widely condemned. And would it have been any less worthy of condemnation if those abused had been properly identified?

Is there an answer?

I would argue that at the very least the media's reporting of legal issues could be much improved if that reporting was assigned to journalists with some legal qualifications. Time and again journalists' reporting of court proceedings bears little resemblance to what happened – a point remarked upon by jurors surveyed recently by Professor Chesterman.

Secondly, journalists should be required to include in sentencing reports a summary of the key factors influencing the sentence as indicated by the judge delivering the sentence.

Thirdly, in this media age, rather than limiting responses to what appears in the printed page, articles about substantial legal issues should give hyper-links to source materials exploring the issue as well as to electronic accounts of responses which space did not permit to be reproduced in the print version.

Finally, all journalists should have to subscribe to a minimum code of journalists' ethics. Regulation of this code should, at least for the time being, remain with journalists themselves - a position which should be kept under review.

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1 Speech at the NSW Bench and Bar Dinner, 18 May 2001, reproduced in this issue at p.32.

2 Curran and Seaton, *Power without responsibility: The press and broadcasting in Britain*, 5th ed, (London, Routledge, 1997), p.1.

3 In New South Wales, they are also subject to the *Judicial Officers Act* 1986 – see esp. ss29, 41; see also s53 of the *Constitution Act 1902*.

4 MEAA, *Ethics Review Committee final report*, November 1996.

5 (1997) 15 NTR 1.

6 'What works with South Australian newspapers?' Current issues in Criminal Justice, Volume 12, Number 2 at 228.

7 Ibid., at 230.

8 (2000) 177 ALR 611.

9 Address by Black CJ reprinted in 1998 *UTS Law Review*, p.9.

10 (1998) 195 CLR 1.

11 (1996) 189 CLR 51.

12 Ibid, per Gummow J at 134.

13 Ibid.

14 MEAA, Ethics Review Committee Final Report, November 1996 – Introduction.

15 Australian Press Council, Second supplementary submission to the Senate Select Committee on Information Technologies on its inquiry into self regulation in the information and communication industries, at para 2.

16 MEAA, op. cit., chapter 1.