

2019 Paul Byrne Memorial Lecture

Judge Dina Yehia SC

Judge of the District Court of New South Wales

2019 Paul Byrne Memorial Lecture

This is the moment I would normally launch into an Acknowledgement of Country.

Before I do, there is something that I need to raise.

There is a view held by some that an Acknowledgement of Country made by a non-Aboriginal person has become tokenistic – an empty gesture.

I understand that view and have some sympathy for it. What is the value of a whitefella acknowledging Country when our First Nations peoples remain disproportionately represented in our criminal justice system? When intergenerational trauma continues to manifest in devastating ways, including high rates of youth suicide? When our Government dismisses the very core of the message contained in the *Uluru Statement from the Heart*, namely, the concept of a First Nations Voice to Parliament enshrined in the Constitution?

But I believe there is something very powerful in remembering at each available opportunity that First Nations peoples were the original inhabitants and custodians of this land – such acknowledgement is not an empty gesture; that they did not cede sovereignty – such recognition is not an empty gesture; that their elders past and present have imparted and continue to impart their wisdom and knowledge, wisdom and knowledge that we can all benefit from if we care to listen – such appreciation is not an empty gesture.

Just one example of that wisdom was demonstrated in the sentiments and ideas expressed in the *Uluru Statement from the Heart* – a simple but profoundly wise Statement. In part, it reads:

... sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of

sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years? ¹

It continues:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness*.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country. We call for the establishment of a First Nations Voice enshrined in the Constitution. We call for the establishment of a First Nations Voice enshrined in the Constitution.²

So, with this in mind, I acknowledge the traditional custodians of the land upon which we gather today, the Gadigal people of the Eora Nation, and pay my respects to their elders past, present and emerging.

I wish to make four further acknowledgements. The first is to express my profound gratitude to the Byrne family for inviting me to speak tonight. I have had the

¹ 'Uluru Statement from the Heart' (Statement, First Nations National Constitutional Convention, 26 May 2017).

² Ibid.

great pleasure of knowing Karen and Jack for some years. Thank you for entrusting me with this great honour.

I also acknowledge Paul's friends and colleagues especially those from Forbes Chambers. Some of you are here tonight. Many of you are leaders at the Bar, demonstrating gold standard advocacy and a commitment to social justice.

Thirdly, I want to thank Sydney University for bestowing on me this profound honour and for hosting this very important event.

Last but not least, I want to thank my former Associate, Jackson, and current Associate, Lauren, for conducting research that assisted in the preparation of this lecture. They have also been busy researching country music lyrics for reasons that will become apparent.

I did not know Paul as well as a number of his friends who are present in the audience, however, I knew him well enough to appreciate his legacy and the way in which he inspired and continues to inspire members of the profession.

When I received Jack's letter inviting me to give this lecture, I was in chambers. My Associate, Jackson, handed the envelope to me and witnessed my emotional reaction as I read the invitation. It occurred to me that I should explain to Jackson why the invitation was so important lest he think that I had completely lost the plot.

I told him something about Paul and his work as a defence lawyer. I told him that Paul represented all that is good, just and honourable about the legal profession. He was not only a highly intelligent, persuasive and greatly skilled defence lawyer. More than that, he was fearless and had an unshakeable commitment to the right of an accused to a fair trial, which includes, of course, fair process. He dealt respectfully with his clients, other practitioners and the Bench.

He, with others, founded Forbes Chambers – but before that, he worked as a Public Defender, which saw him defend those charged with serious criminal offences both in Sydney and in the country.

As with most defence lawyers, many of his clients were unpopular, charged with horrendous allegations. But as his good friend, Phil Boulten, said last year when he presented this lecture, it did not matter to Paul that his clients were unpopular. He cast no personal judgements. He had a deep understanding and appreciation that every individual is entitled to a fair trial and the application of the rule of law. Indeed, the true test of the measure of any criminal justice system is in the way it operates in the most difficult cases involving the most unpopular accused.

Every day, women and men in the legal profession demonstrate their significant intellect and skill. But intellect and skill, do not, by themselves, represent the qualities required to maintain a gold standard criminal justice system. Integrity, a commitment to justice and a capacity for compassion are also qualities that are necessary in fulfilling our various roles. Paul demonstrated all of these qualities in abundance.

He did, however, have some particular personal interests that always intrigued me. Among them were his love of fast cars and a particular soft spot for country music.

I have a very fond and clear memory of being in Byron Bay, on a bus with Paul and Karen. We were all being conveyed from a wedding reception back to our respective accommodation. Paul was sitting next to my partner singing ‘El Paso’ at top volume.

For those of you unfamiliar with the song (sung by Marty Robbins), it is a story about the love that the protagonist has for a Mexican girl, Feleena, in the town of El Paso. Our protagonist walks into Rosa’s Cantina to see a dashing young man drinking with Feleena. The lyrics include the following:

So in anger, I challenged his right for the love of this maiden –
Down went his hand for the gun that he wore
My challenge was answered in less than a heartbeat
The handsome young stranger lay dead on the floor

The protagonist was eventually gunned down himself and died in the arms of his love.

I think Paul loved country music because some of the themes mirrored the real life drama involved in the cases in which he appeared: violence, tragedy, human vulnerability, frailty and bad judgement.

Whatever the reason, the image of him singing his heart out on that bus with such enjoyment still warms the heart. I am very honoured and humbled to give this lecture.

I was in Egypt earlier this year during which time I had the opportunity to engage in discussion with family members about Egyptian politics and Egypt's criminal justice system. They acknowledged, almost fatalistically, that the spectacle of mass trials, arbitrary arrest, significant delays and corruption has brought Egypt's criminal justice system into disrepute.

I am not sure whether this was a slow process of decay, an inevitable consequence of years of military dictatorship, or both. The consequence is a system in which no-one has confidence – a system that engenders feelings of helplessness and hopelessness.

You might be thinking that any comparison between Egypt's criminal justice system and our own is a poor one. After all, we are not living under military dictatorship. We live in a healthy democracy. I do not, of course, draw any such comparison. However, following those discussions, I reflected upon the fragility of any

criminal justice system and the importance of being vigilant in protecting the principles which underpin the administration of justice and the rule of law.

Injustices occur even in countries regarded as healthy democracies. We cannot take our criminal justice system for granted simply because we live in a democracy. Indeed, without a proper functioning criminal justice system, our democracy is profoundly undermined.

Moving away from Egypt and towards the United States of America, we continue to see examples of profound injustice, among them the existence of the death penalty in some states and mass incarceration of some of the most marginalised in the community.

Bryan Stevenson (founder and Executive Director of the Equal Justice Initiative, a human rights organisation in Montgomery, Alabama, Professor of Law at New York University, and criminal defence lawyer who has appeared in numerous death row cases) wrote the following in his book, *Just Mercy*:

My work with the poor and the incarcerated has persuaded me that the opposite of poverty is not wealth; the opposite of poverty is justice ... I've come to believe that the true measure of our commitment to justice, the character of our society, our commitment to the rule of law, fairness, and equality cannot be measured by how we treat the rich, the powerful, the privileged, and the respected among us. The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.³

We are fortunate. Our criminal justice system is, generally speaking, a healthy one. The strength of our processes include, but are not limited to, the independence of the judiciary, a robust jury system and the application of principles such as the

³ Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (Scribe, 2014) 18.

presumption of innocence, designed to prevent miscarriages of justice and wrongful convictions.

But that is no reason to become complacent. For all of our achievements and the positive features of our criminal justice system, this is no time to simply walk the line. Indeed, it is complacency that leads to rot setting in and the weakening of the very foundations upon which our system relies to remain strong.

Tonight I will examine a number of areas in which our criminal justice system has either failed or that require ongoing attention. It is incumbent upon all of us to ensure that the fundamental principles and practices that are so necessary to a well-functioning and fair criminal justice system are protected and improved.

The one area in which our criminal justice system has failed, and, I contend, utterly failed, is the overrepresentation of Aboriginal and Torres Strait Islander peoples in our prisons.

Having had the benefit of Phillip Boulten's excellent lecture last year, tonight's lecture is not limited to this very important topic. In examining the operation of our criminal justice system, it is also necessary to identify other issues that we must be alive to. Some of the issues that I want to touch upon tonight are:

- (1) the independence of the judiciary and the importance of guarding against the insidious way in which that independence can be compromised;
- (2) the need to maintain a balance between the protection or suppression of information on the one hand, and the importance of affording an accused a fair trial or hearing on the other;
- (3) ensuring that those who can least afford it are provided with skilled, committed and passionate defence lawyers, a goal that requires appropriate funding for Legal Aid and Aboriginal Legal Services; and, lastly,

- (4) we really have a lot of work to do in achieving diversity on the Bench – not just gender diversity, but other forms of diversity including but not limited to ethnic and cultural diversity.

But I cannot stand here to give this talk without speaking of the crisis that is the disproportionate numbers of Aboriginal and Torres Strait Islander men, women and children in our gaols. The profound disadvantage and deprivation that exists in some communities and in the lives of those who come before the courts is often palpable.

This is not to suggest that all Aboriginal or Torres Strait Islander people live in or come from dysfunctional communities. Nor is it to suggest that there aren't positive, constructive and instructive initiatives being undertaken by many First Nations communities throughout New South Wales and Australia. First Nations peoples continue to have strong ties to the land and strong cultural traditions and practices.

I accept the criticism that is sometimes made that, by focusing on Indigenous disadvantage and deprivation, there is a risk of encouraging a negative stereotype. We must be careful to guard against such stereotyping. There are countless successful businesses, programs and initiatives undertaken by Indigenous people and communities. Let me give you just one example. It comes to mind because Phillip Boulten has been posting updates on social media over the last week or so. The Bábbarra Women's Centre in the Maningrida region, Arnhem Land is a place that brings together women from 12 language groups to design and produce wonderful fabrics. The women exhibited in Paris just last week. That is just one example. There are many, many more.

It is also important to identify and promote some of the very positive steps being taken to deal with the disproportionate rates of Indigenous incarceration. The New South Wales Youth Koori Courts, Just Reinvest NSW, and organisations such as Weave Youth & Community Services are just a few examples.

However, the overrepresentation of Indigenous men, women and children in the criminal justice system and in custody is a real and pressing problem. It does not appear to be getting any better – indeed, the statistics reveal that things are getting worse. To call this out is not to deny the positives. It is to simply state the reality in the context of the criminal justice system. It is to state the failings of the system and to recognise the political, social and economic issues that see Aboriginal and Torres Strait Islander peoples brought into contact with that system.

Profound disadvantage and deprivation, intergenerational trauma and institutionalised racism appear again and again in the cases of those who come before the courts. This crisis is real and must be addressed.

We must ask ourselves whether the outcomes of Indigenous peoples’ interactions with the criminal justice system can be attributed to unequal treatment, whether at the point of policing, arrest, bail hearings and/or sentence proceedings.

Judicial officers, at least the ones I know, are keenly aware of their duty to guard against institutionalised racism and to apply the law equally. But we cannot deny that there are examples of racism within the courts system, and we have to acknowledge that equality before the law means, in truth, that we take into account the unique and systemic disadvantage caused by colonisation and dispossession in the case of Indigenous offenders.

In April 2019, a judge in the Northern Territory sentenced an Aboriginal woman for breaching a domestic violence order by drinking alcohol. He told this Aboriginal mother that she probably got drunk on pension day and ‘abandoned your kids in that

great indigenous fashion'. He openly pondered whether 'anthropologists' would one day explain 'Indigenous *laissez-faire* parenting'.⁴

There is no place for judicial racism. Fortunately, it is very rare, but we must reflect upon our processes, what we take for granted, and the complacency that might develop if we believe that the system always dispenses equal justice.

In August of this year, a disturbing article appeared in *The Guardian*. It referred to research conducted by parliamentarian and economist, Andrew Leigh. He found that between 1985 and 2018 incarceration rates generally in Australia have increased by 130 per cent. Further, while in 2007 the African-American incarceration rate was 75% higher than Indigenous incarceration rates in Australia, in 2017, Indigenous incarceration rates in Australia for the first time exceeded those of African-Americans.⁵

The number of Indigenous women in custody has also risen at an alarming rate. An August 2019 press release by the NSW Bureau of Crime Statistics and Research (BOCSAR) stated that there had been a significant drop in the state's female prison population, including a decrease in the number of Indigenous female prisoners.⁶ This was great news at the time.

⁴ Emilia Terzon and Jacqueline Breen, 'Complaint Lodged against Judge Who Made "Offensive", "Discriminatory" Comments to Aboriginal Defendants', *ABC News* (online, 26 July 2019) <<https://www.abc.net.au/news/2019-07-26/complaint-lodged-nt-judge-discriminatory-offensive-aboriginal/11349360>>.

⁵ Katharine Murphy, 'Australia Entering "Second Convict Age" as Imprisonment Rates Soar', *The Guardian* (online, 26 August 2019) <<https://www.theguardian.com/australia-news/2019/aug/26/australia-entering-second-convict-age-as-imprisonment-rates-soar>>.

⁶ NSW Bureau of Crime Statistics and Research, 'Big Fall in the NSW Female Prison Population' (Press Release, 1 August 2019) <http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2019/mr-NSW-Custody-Statistics-Jun-2019.aspx>.

However, Australian Bureau of Statistics data show that Aboriginal and Torres Strait Islander people made up over 28% of persons in full-time imprisonment in September 2019, with Indigenous women making up 34.8% of the female prison population.⁷ This is no cause for celebration.

A report published by the Australian Institute of Health and Welfare in December 2018 found that, on an average night in the June quarter 2018, nearly 60% of young people aged 10–17 in detention were Indigenous, despite Indigenous young people making up only 5% of the general population aged 10–17.⁸ In the Northern Territory, as of June 2019 all children in detention were Indigenous.⁹

Most of us here are very familiar with these statistics. The overrepresentation of Aboriginal and Torres Strait Islander peoples in our criminal justice system and in our prisons is a topic repeatedly referred to by lawyers, academics and politicians. There have been a number of commissions of inquiry, including the Royal Commission into Aboriginal Deaths in Custody, which have, among other things, examined the disproportionate rate of incarceration of Indigenous Australians.

In 1991, the Royal Commission found that the Indigenous population was grossly overrepresented in custody.¹⁰ Nationally, Indigenous Australians constituted about 14% of the prison population at that time. That percentage has doubled. The most

⁷ Australian Bureau of Statistics, *Corrective Services, Australia, September Quarter 2019* (Catalogue No 4512.0, 28 November 2019).

⁸ Australian Institute of Health and Welfare, *Youth Detention Population in Australia* (Bulletin No 145, December 2018) <<https://www.aihw.gov.au/reports/juv/128/youth-detention-population-in-australia-2018/contents/table-of-contents>>.

⁹ Lorena Allam, ‘All Children in Detention in the Northern Territory Are Indigenous’, *The Guardian* (online, 26 June 2019) <<https://www.theguardian.com/australia-news/2018/jun/25/all-children-in-detention-in-the-northern-territory-are-indigenous>>.

¹⁰ Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, [9.4.1].

recent inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples was conducted by the Australian Law Reform Commission ('ALRC') in 2017.¹¹

The ALRC's terms of reference included having regard to the laws and legal frameworks including legal institutions and law enforcement that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples and inform decisions to hold or keep them in custody. The ALRC noted that the over-representation of Indigenous Australians in the criminal justice system and in our prisons was a 'persistent and growing problem'.¹² Of particular concern was the increasing rate of incarceration of Indigenous women.

These inquiries, among many others, have looked at indicators of disadvantage that contributed to this disproportionate representation. Among the relevant factors were colonisation and the dispossession of Indigenous Australians without the benefit of treaty, agreement or compensation.¹³ Other indicators identified were poverty, poor health, lack of housing, access to an economic base including land and employment, poor education results and substance abuse.¹⁴

As far as I am aware, the recommendations made by the ALRC have not been adopted or implemented. That report was published about 18 months ago.

There have been some very good people, both Indigenous people and non-Indigenous people, who have worked long and hard to understand and examine these

¹¹ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, December 2017).

¹² Ibid 1.

¹³ See, eg, Australian Law Reform Commission (n 11) 41–2.

¹⁴ Ibid.

issues and formulate recommendations to ameliorate the problem. We know what the statistics are. We know what the indicators of disadvantage are. Mass incarceration of Indigenous Australians has a real and devastating impact not only on some Indigenous communities, but on Australia as a nation.

The longer this goes on, the more families and communities that will be adversely impacted, the cycle of trauma will continue to be repeated, and there will be continued increases in the numbers of First Nations people in the system and in the gaols.

So, my question to you is: why have we failed in addressing this issue in a meaningful and effective way?

It is not through a lack of understanding of the issues. It is not through a lack of insight into indicators of disadvantage. It is not through a lack of ideas about how we can reduce the number of indigenous Australians in custody.

My question to you is: why do we continue to fail?

My question to you is: how do we proceed?

There have of course been a number of recommendations made by the ALRC and various professional bodies and groups including the New South Wales Bar Association First Nations Committee and the Law Society's Indigenous Law Committee.

Efforts to implement these recommendations are continuing. They include:

- raising the age of criminal responsibility;
- introducing legislation which requires judicial officers to take into account the particular circumstances of indigenous offenders;
- establishing and expanding indigenous sentencing courts;

- properly funding grassroots organisations and other service providers to provide the programs that are sorely needed including, importantly, post-release programs; and
- properly funding *Gladue*-style reports to better inform judicial officers about matters important to the exercise of sentencing discretion.

I believe we also have to pay more attention to how we frame the issue. We have to think about the language we use. Instead of simply restating the appalling statistics, perhaps we should frame the question in this way: why does our country send more Indigenous men to gaol than to University? Why are the resources dedicated to locking up children not re-directed to ensuring they complete their schooling?

Rather than simply stating the issue in language that emphasises the problems that exist in some Aboriginal communities, the emphasis should be on our failings as a nation in failing to engage with First Nations Peoples in a meaningful way to address the underlying issues.

I acknowledge that real change, substantive change, can only be achieved by early intervention, better education programs, more employment, addressing trauma in a meaningful way and, importantly, by affording First Nations peoples a substantive and active role in addressing these issues.

We in the criminal justice system have little control over those socio-economic and political factors. The sentencing court is the very antithesis of early intervention. We are, in effect, the end of the line. But that does not mean that we have no role to play in addressing this crisis.

Arguably, we have a very important role to play because it is judicial officers who actually send people to gaol.

This issue must be a priority.

Judicial Independence

I said earlier that one of the fundamental pillars of our criminal justice system is the independence of the judiciary. We are fortunate to have an independent judiciary. Government does not attempt to influence judicial decisions, as is the case in many other countries. There is no communication outside open court between government and judges concerning the details or the result of any decision a judge may be required to make – at least not that I am aware of.

But we cannot be complacent. Judicial independence can be a fragile thing. Undermining judicial independence is not achieved simply by direct interference from government. There are other ways, more subtle, in which judicial independence may be compromised. Justice Ipp (as he then was) once observed, if judicial independence is to continue to last, it must be buttressed and reinforced.¹⁵

Moves to fetter the exercise of judicial discretion (for example, mandatory sentencing) and public vilification of judges are just two ways in which such independence may be compromised. One of the requirements of justice is that sentencing should operate to provide punishment proportionate to the crime. The imposition of a mandatory minimum penalty may lead to a penalty which is disproportionate to the seriousness of the particular offence, the culpability of the particular offender, or both.

Several traditional justifications for punishment are called in aid of mandatory penalties. These include retribution, deterrence and incapacitation. There is no doubt that mandatory penalties have a retributive effect. However, as has been pointed out on a number of occasions, the inflexible and discriminatory impact of mandatory prison

¹⁵ Justice David Ipp, 'Maintaining the Tradition of Judicial Impartiality' (2008) 12 *Southern Cross University Law Review* 87, 88.

terms sometimes results in disproportionate sentences being imposed. Furthermore, there is a considerable body of evidence that mandatory sentences have no real impact on the rate of crime.

Justice Mildren in the Northern Territory case of *Trennery V Bradley* (1997) observed:

Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.¹⁶

Where the legislature mandates penalties, the courts are stripped of the discretion to impose a lesser sentence to adequately reflect the criminality of a given offender and prevented from considering all mitigating factors.

This was demonstrated in a stark fashion some years ago when judges had to sentence offenders convicted of people-smuggling offences. Overwhelmingly, the offenders were young, uneducated, poor Indonesian fisherman. Judges had to impose the mandatory minimum sentence mandated by the legislation. In doing so a number of them expressed their frustration in their judgments.

In the NSW decision of *R v Karim* (NSW District Court, Conlon J, 27 July 2011), the sentencing judge commented: ‘In my view the present case provides a glaring example of how mandatory penalties can sometimes prohibit a court in delivering a fair and just result and a sentence, “that is of severity appropriate in all the circumstances of the case”.’

¹⁶ *Trennery v Bradley* (1997) 6 NTLR 175, 25–6.

In imposing a sentence in the Northern Territory in the case of *R v Nafi* (NT Supreme Court, Kelly J, 19 May 2011), Justice Kelly observed that he was compelled by legislation to hand down a sentence which was ‘harsher than a just sentence arrived at on the application of longstanding sentencing principles applied by the Courts’. In doing so, his Honour stated: ‘I have no choice’.

In *R v Mahendra* (NT Supreme Court, Blokland J, 1 September 2011), Justice Blokland acknowledged the need for general deterrence. Her Honour, however, observed that deterring of poor, uneducated fishermen in Indonesia has not been achieved by mandatory sentences, and at the same time had removed judicial discretion to pass proportionate sentences. Justice Blokland referred to Article 9.1 of the *International Covenant on Civil and Political Rights*, which in part states that no-one shall be subjected to arbitrary arrest or detention. Her Honour said:

Assigning a five year sentence of imprisonment, without judicial consideration of the gravity of the offence, in terms of the circumstances of the offending and the offender may, in my view, amount to arbitrary detention. In the usual sense it is understood, it must be arbitrary because it is not a sentence that is a proportional sentence.

NSW Law Reform Commission *Discussion Paper 33* looked at issues related to sentencing in 1996. In considering mandatory and prescribed minimum sentences, the Commission stated that ‘The potential rigidity of such sentences interferes with the discretion of the sentencing judge which must be preserved if justice is to be done in individual cases.’¹⁷

Of course, it is not for judges to advocate for legislative change. That is a role better left to others – to you, as members of the legal profession. My point is that we

¹⁷ NSW Law Reform Commission, *Discussion Paper 33 – Sentencing* (1996) 62 [4.76].

cannot take these things for granted. We should not be complacent simply because, when compared to the criminal justice systems that operate in other countries, ours is considered superior.

The second way in which judicial independence may be compromised is in the type of vitriolic, inaccurate and at times misleading reporting about judges and their decisions that we sometimes see in the media, and the unfounded criticisms that have been made, on occasion, by politicians.

Public confidence is necessary for the effective performance of the judicial function. The general acceptance of judicial decisions by the public and by government is essential for the peace, welfare and good government of the community. Conformity to its decisions on the part of the community and branches of government only exists because the public have a certain attitude towards judicial power and those who exercise it, an attitude described as confidence.

Let me be clear: I am not suggesting that there should be no criticism of judges and/or their decisions. It is of fundamental importance in a democracy that there be robust debate about, and criticism of, decisions made by judges. Judges have to expect harsh criticism. Media criticism is an important and valuable aspect of judicial accountability.

But the question has to be asked: does ill-informed media and political criticism of judges damage judicial independence? There are different views on this topic. Dyson Heydon, former Justice of the High Court, in an article published in February 2018 appeared to be critical of an approach that attempts to deal with such criticism by way

of contempt proceedings.¹⁸ He observed that it is in the public interest that judicial failings be exposed with a view to their eradication. He referred to rude and bullying conduct by judges, inefficiency, laziness and indecisiveness. He also referred to widespread delays.

Informed, accurate and measured criticism is both legitimate and necessary to ensure judicial accountability. Bullying behaviour should be called out. Laziness or inefficiency has no place on the Bench.

But, there does come a point when poisonous misinformation about judges and their decisions challenges the administration of justice and the rule of law. It runs the risk of undermining confidence in the judiciary and thereby compromising the independence of the judiciary.

Justice Basten, in a conference paper delivered in 2005 titled ‘Court and Media Relationships’, observed that in all countries, to degrees which vary from time to time, there is tension between the courts and the media:

Generally speaking, a level of tension is healthy and acceptable as part of a lively relationship between two active institutions in a modern society. However, the tension can be unhealthy if either party forgets that any exercise of public power must be constrained by a sense of responsibility, so as to avoid abuse of power.¹⁹

Often, judges are accused of being elitist and out-of-touch. It is not my intention to defend those accusations today, although I am happy to do so if asked.

¹⁸ Dyson Heydon AC QC, ‘Does Political Criticism Of Judges Damage Judicial Independence?’ (Policy Exchange Judicial Power Project Paper, February 2018).

¹⁹ Justice John Basten, ‘Court and Media Relationships’ (Conference Paper, National Judicial College Conference, Beijing, 30 October 2005) 1.

Rather, my intention is to identify that fine line between robust criticism on the one hand, and the type of vitriolic and misleading criticism (often directed personally at a particular judge) that can have a corrosive long-term effect on the public's view of the judiciary and the exercise of its functions.

Headlines such as 'Soft Justice is Failing Us All', 'Courts Going Soft on Child Rapists', 'Hard Drugs: Soft Judges', and 'Yet Another Thug Set Free to Kill' frequently appear in the tabloids. Sometimes, both the headlines and the articles that appear below them are misleading and detrimental to the interests of justice.

One of the most concerning headlines that I have seen appeared in the United Kingdom's *Daily Mail* newspaper on 4 November 2016. The article related to a decision of the three High Court judges who ruled that the UK Government would require the consent of Parliament to give notice of 'Brexit'. The headline, in bold capital letters, read 'ENEMIES OF THE PEOPLE'. Directly above the headline was printed a photograph of the three judges in their wigs and robes.

That headline is particularly disturbing because of the way in which that label has been used historically. The term implies that, by opposing the ruling subgroup, the 'enemies' in question are acting against society as a whole. It was extensively used by Stalin to describe anybody critical of him and is routinely used by authoritarian rulers to demonise those critical of them.

Just a couple of weeks ago, Justices of the Supreme Court in the UK were accused by some politicians of mounting a 'constitutional coup' following that court's ruling that the decision to suspend Parliament by the Prime Minister was unlawful. An accusation that these 11 justices are revolutionaries is absurd.

There was at the same time, however, an article in *The New York Times* that was quite amusing and that I must share with you. It related to the brooch worn by Lady

Hale as she read out the judgment in question. It was described as a ‘brooding fantastical diamanté spider brooch’.²⁰ There was speculation as to whether Lady Hale was referring to ‘Boris the Spider’, a 1966 song by the Who, the lyrics of which include: ‘creepy, creepy, crawly, creepy, creepy, crawly, he’s come to a sticky end’. I am sure she intended no such reference.

In Australia, we have seen examples of politicians accusing judges of being left-wing ideologues, lily-livered civil libertarians, and hard-left activist judges divorced from reality. One Australian politician referred to judges as ‘dear, little daffodils’.²¹

These labels do nothing to inform the public about the legal issues, the substantive ruling or reasons for judgment. They do nothing to call out judicial bullying or to address inefficiency or laziness.

Rather, the risk is that such vitriolic and misleading criticism undermines our justice system which is based upon values of independence, impartiality, integrity and professionalism.

Indeed, as the former Lord Chief Justice, Lord Woolf, observed, such misleading criticism can be counter-productive.²² It can be an ‘own goal’, undermining public confidence in one of our most important institutions.

²⁰ Lou Stoppard, ‘Big Spider Love: The Brooch That Ate Brexit’, *The New York Times* (online), 24 September 2019 <<https://www.nytimes.com/2019/09/24/style/brenda-hale-brexit-brooch.html>>.

²¹ Mike Secombe, ‘The Government’s War on the Law’, *The Saturday Paper* (online), 24 June 2017 <<https://www.thesaturdaypaper.com.au/news/politics/2017/06/24/the-governments-war-the-law/14982264004832>>.

²² Frances Gibb, ‘Criticism of Judges Is “an Own Goal for Government”’, *The Times (UK)*, 31 May 2006.

How do we deal with that risk? These voices should not, of course, be gagged. A democracy such as ours requires free speech, albeit not always responsible or well-informed speech. Judges should not be expected to defend themselves publicly by giving interviews or justifying their decisions.

The courts, institutionally, have gone some way to addressing this issue by setting up public information officers to provide appropriate information to journalists. Perhaps it is incumbent upon us, as judges, to think about the way we write judgments so that they are more accessible to the public.

Public statements by the New South Wales Bar Association over the past few years have been extremely important in setting the record straight.

As a community, we should also consider the importance of early education in our schools emphasising the importance of the separation of powers and the role and independence of the judiciary.

Protection and Suppression of Information vs Procedural Fairness and the Right to a Fair Trial

Emphasising the importance of the separation of powers and the role and independence of the judiciary is particularly important when judges are called upon to make decisions adverse to the interests of government (we have seen an example of that play out in the UK).

This can occur in cases involving alleged terrorist acts, the making of control orders, and the making of declarations that an organisation is a criminal organisation.

The right to a fair trial has been described variously as ‘a central pillar of our criminal justice system’, ‘fundamental and absolute’, and ‘a cardinal requirement of the rule of law’. Procedural fairness is an integral part of a fair trial or fair hearing and is a fundamental tenet of our criminal justice system.

There are, however, cases where information is sought to be suppressed: applications for non-disclosure of criminal intelligence relied upon to make a declaration that an organisation is a criminal organisation; confidential affidavits; various forms of secret evidence adduced in judicial proceedings but not disclosed to the affected party or their legal representative; the suppression of information that may identify a notifier in cases involving reports to the Department of Family and Community Services are all issues that arise from time to time.

The High Court in *Condon v Pompano Pty Ltd* [2013] HCA 7 ('*Pompano*'), *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 and *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 established a precedent for the judicial use of secret evidence in Australia.

In *Pompano*, Hayne, Crennan, Kiefel and Bell JJ held at [157]:

if an adversarial system is followed, that system assumes, as a general rule, that opposing parties will know what case an opposite party seeks to make and how that party seeks to make it. As the trade secrets cases show, however, the general rule is not absolute. There are circumstances in which competing interests compel some qualification to its application. And, if legislation provides for novel procedures which depart from the general rule described, the question is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice".

The provisions of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) make it clear that the Department cannot be compelled to produce a 'report' even where the report contains material that is of significant probative value to an accused.

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) aims to prevent the disclosure of information in federal criminal and civil proceedings where disclosure is likely to prejudice national security. Closed hearings

are provided for in the Act. Further, the court may exclude both the accused and their lawyer from the hearings if the lawyer does not have an appropriate security clearance.

There will be occasions when the interests of national security, protection of witnesses and notifiers, and the protection of ongoing investigations require the nondisclosure of information to an accused person and/or their legal representative. That this is so is not controversial in my view and, in some cases, is necessary. There may be measures, such as the appointment of special advocates in closed hearings, capable of addressing potential procedural unfairness.

It is essential, however, that the tension between suppression of information on the one hand and procedural fairness and the right to a fair trial on the other is at the forefront of the judicial mind, and that a fair and just balance between those interests is maintained so as not to compromise the fundamental principles that underpin our criminal justice system.

Lord Kerr in the United Kingdom Supreme Court decision of *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 (at [93]) put it better than I can:

The appellants' second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive - for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be

presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.

I suggested earlier that the appointment of special advocates may be one way to redress the balance. Another may be the exclusion of evidence. A third may be the discontinuation of proceedings. All will depend on the particular circumstances. The point is that we cannot become complacent about these issues. The essential question must be whether the balance between the various interests can be struck in such a way as to afford an individual procedural fairness and a fair trial, always bearing in mind that an individual's liberty is at stake.

We must be particularly vigilant about protecting fair trial rights. This is a responsibility borne not only by the judiciary but by prosecuting authorities and those who advocate for the accused.

Legal Aid Funding

Skilful representation of an accused is, of course, another essential pillar of a well-functioning criminal justice system. A well-funded legal aid system and well-funded Aboriginal Legal Services are necessary to ensure the effective availability of legal counsel and an accused's right to a fair trial.

It goes to the heart of access to justice, which is in turn essential to the maintenance of a fair and just legal system, and is also critical in safeguarding basic human rights and the rights of vulnerable and marginalised people in our community. I would go further – it is a fundamental principle of any democratic society that all those living within it have equal access to justice, equal access to skilled lawyers, and equal access to resources necessary to properly prepare and present cases.

Stories recounted by ALS solicitors that the organisation cannot afford a psychometric report in the case of a cognitively impaired client who applies for bail should be a thing of the past. They are not.

A submission by New South Wales Young Lawyers to the Senate Inquiry into Access to Justice observed that many reports have considered the adequacy of legal aid in the past,²³ including the report considered by Professor Ronald Sackville as Commissioner for the Law and Poverty Reference of the Australian Government Commission of Inquiry into Poverty in 1975. The *Sackville Report* highlighted the importance of legal aid in redressing disadvantage in the legal system.

In 2004, the Senate Legal and Constitutional Affairs Committee held a similar inquiry into Legal Aid and access to justice.²⁴ This report highlighted significant problems relating to the adequacy of Legal Aid including chronic underfunding.

In October 2016, the Senate *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* stated that the evidence to the Committee reiterates that the funding for legal assistance services is inadequate and that more funding is needed for Indigenous-specific legal services as well as Legal Aid and Community Legal Centres.²⁵

Murray Gleeson, when Chief Justice, observed:

²³ New South Wales Young Lawyers Human Rights Committee, Submission No 28 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Access to Justice* (5 May 2009) 9.

²⁴ Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (Report, 8 June 2004).

²⁵ Senate Finance and Public Administration References Committee, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (Report, October 2016) 115 [8.2].

The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.²⁶

The administration of justice depends upon legal practitioners applying their skill and diligence in representing the indigent. The whole system depends upon it. We do not want to go down the track where people are unrepresented or poorly represented. Not only is this morally reprehensible but it will inevitably lead to greater expense in the long run. The provision of a properly funded Legal Aid system and the proper funding of Aboriginal Legal Services requires attention and are issues about which there should be no complacency.

Diversity on the Bench

I spoke earlier of the public confidence in our justice system that is required to ensure the continued independence of the judiciary. Public confidence in the judiciary is dependent on whether the face of the judiciary is representative of the community, at least to some degree.

This leads me to my final point. There is a lot of work yet to be done to achieve diversity on the Bench. Here, I do not refer only to gender diversity, but to other forms of diversity including ethnic and cultural diversity.

For those of you who have not had the experience of walking the corridors of judicial chambers, you would not have seen the annual photo boards of serving judges.

²⁶ Chief Justice Murray Gleeson QC, 'State of Judicature' (Speech, Australian Legal Convention, Canberra, 10 October 1999).

In some of those presentations, it is difficult to discern any difference between those depicted: all men; all of a certain age; all white. Admittedly, the photo boards of which I speak date back a number of decades.

Fortunately, that landscape has changed. For instance, I am happy to report that in the District Court of New South Wales, gender diversity is being addressed. About 33% of the judges in my court are women.

However, we should not be complacent. Simply because we are moving closer to gender balance does not mean the job is done. Judicial diversity obviously extends beyond gender to include many other attributes and experiences, including ethnic background, professional experience, socio-economic background and sexual orientation. Stop and think about how many judicial officers come from ethnically or culturally diverse backgrounds. Not many. Then stop and think about the cultural and ethnic diversity in our community.

Then High Court Justice Michael McHugh said that ‘when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution’. ²⁷

A judiciary that fails to reflect the make-up of the society from which it is drawn will sooner or later lose the confidence of that society

It is therefore essential that we encourage and mentor lawyers with diverse backgrounds, not only to enter the profession but to remain in the profession; to go to the Bar and remain at the Bar; to reach the senior ranks of the Bar. It is only through this process that the judiciary will become more diverse and reflect the society from which it is drawn.

²⁷ Justice Michael McHugh QC, ‘Women Justices for the High Court’ (Speech, High Court Dinner hosted by the West Australian Law Society, 27 October 2004).

I gave a great deal of thought about how to end this lecture. I even tried to find a country music lyric that would draw together the various themes. That proved to be impossible. In the end, I decided to finish where I started – with Paul and his legacy. We all have a role to play in ensuring best practice in our criminal justice system. That goal is not achieved if we are complacent – if we simply walk the line.