

Australian Judicial Conference: 2002 Colloquium

Presenter: Tracey Cain, The Strategic Issues Management Group
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Thank you, Justice Sheller and thank you for the invitation to speak to you today.

I have been asked to address a number of facets of the relationship between the Australian judiciary and the Australian media.

In doing so, I do not intend to recap on material presented at last year's meeting, or general discussion points which have been circulating for some time. Rather, I intend to use this address to consolidate and analyse that material in order to provide you with a detailed picture of your current environment and options for the future.

I believe I can bring to the table expertise and insight gained as a working journalist, a political media adviser and now a communications consultant specialising in strategies for the legal sector.

But first, the current environment.

I am sure by now you are all aware of the Kilmuir Rules from the Lord Chancellor in 1955. When invited by the BBC to allow senior judges to participate in radio programs about great judges of the past, he responded with:

"It is, I think, agreed that there are positive advantages to the public when serious and important topics are dealt with through the medium of broadcasting by the highest authorities... But the overriding consideration in the opinion of myself and my colleagues is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism. It would moreover, be inappropriate for the judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment..."

I would like to draw your attention to the two passages underlined – for I will refer to those as the morning progresses.

Some 45 years later, the now Lord Chancellor has his own Press Office, and with their assistance has published a handbook – A Guide for Judges on Dealing with the Media. The guide talks about the Press Office being a central advice unit for the Judiciary and its overall strategy with the media – as opposed to the work undertaken at a court level with media information officers to provide case-based and court-based information to journalists.

This in itself is an important distinction. In Australia, we have had court media information officers for some time and they have been very successful in attending to the needs of journalists covering the court round – but who is running the strategy for the judiciary as an institution?

I would like to take a step back and examine how we ended up in the present environment.

There is little doubt the media has changed and how those changes have generated a new environment for media-judicial relations. In fact, the treatment of the law and the judiciary is one of the most elegant case studies of media evolution over the past 45 years since Lord Kilmuir uttered those rules.

Back in the 1960s and 1970s, Australian journalists were a fairly generic breed.

With the exception of sportswriters and opinion columnists; newspaper, radio and television journalists covered the full gamut of stories of the day. In a number of cases, some covered the same story for different newspapers and sometimes for television and radio as well.

But even then, there was one exception, viewed, by journalists and editors as a blueprint for the future. This was the Federal Parliamentary Press Gallery, where journalists from all over the country worked in a specialist community, defined by a focused subject – being of course the Commonwealth Parliament and its deliberations.

The Federal Parliamentary Press Gallery, and to a lesser extent the State Galleries which it spawned, were of interest to news managers for two reasons.

First, they were very efficient. They held the specialists in situ, contacts and networks could be established, there was reduced the risk of being scooped by a competitor now sitting in the next office, and it was cheap – subsidised rent, no travel costs, and guaranteed daily news material. These journalists developed detailed background knowledge necessary to allow rapid interpretation of the substance and significance of day-to-day Parliamentary events – giving rise to the interpretation of news rather than factual reporting of it in the past tense.

The second attraction of the Federal Gallery was its regard among practising journalists as a prestigious posting. This meant it could be used to foster competition, and as a carrot to coax journalists, temporarily into less desirable postings. Those of you who read Andrew Neil's famous biography of Rupert Murdoch as the Sun King would know of his management style of giving two aspiring journalists or editors identical jobs, to see which would rise, and which fall. This attitude to competition, that it is healthy for the crew, and a source of power for the helmsman, is not unrepresentative of media management practice in this country.

But what I really wanted to emphasise is how the efficiency and competitive value of the Federal Parliamentary Press Gallery prompted the rapid increase in the development of specialist postings. Of relevance to the Judiciary, one of the first rounds to be created was the police round, which later evolved to the addition of a specialist courts round. The current trend is for court reporting to be covered by Parliamentary Press Gallery reporters again – after all they are only down the road in Canberra or across the Street in Sydney.

Specialist journalists, on the face of the matter, are a good thing. They tend to approach stories with greater depth of knowledge than their generalist predecessors. And they have the luxury of developing a story over time, which gives room to check facts, and to tell both sides.

Just one more point about the development of specialist rounds – the police reporters established a formula, which even now applies to journalism style around the country and which impacts on your environment more than that of any other profession.

The 'Story Clock' as it was called permitted journalists to drop in and out of a story quickly and easily – but still to capture the most entertaining aspects for readers. The Clock is based on the natural points to the story – when the crime is committed, police speaking from the scene, a person is charged, the committal begins and ends, and the trial begins and ends, with the final chapter being personal commentary from family or victims. If you think of the reporting of crimes in recent years you will see that that formula is alive and well.

But it is now broader than police rounds – it is still used by court reporters and it has been adopted in the reporting of business by mainstream media. Just look at the way coverage on insolvency law, corporate collapse and plaintiff legal cases – it is all about the story clock – there's always an update to be had, there is always a sentence which sets the scene and it is simple and generic.

Now, some business stories have always been big. Skase, Bond and their ilk, were always big stories, but they were really stories of celebrity downfall, rather than corporate failure. In a good survey of the latter in their book, "Corporate Collapse", Clarke, Dean and Oliver note the then editor of the Sydney Morning Herald in 1965 commenting on the celebrated H.G. Palmer receivership that, '...after retrospective accounting restatements, "H.G. Palmer has never been a profitable business since it came on to the Stock Exchange in 1949."'

Of course, profit and stock value have long since parted company, so perhaps the latter part of that comment might seem insignificant today. If, in 2000, it had been H.G. Palmer.Com, or in 2001 it had been Palmer.Tel, or in 2002 H.G. Palmer Biotechnology Ltd, then no one would blink.

But the more telling part of the quote is at the beginning, in the context. To declare the misrepresentation of the company's position, the SMH Financial Editor had waited for 'retrospective accounting restatements.' Nothing so mundane would be required today, rather we can rely for public conviction on the facts that shareholders have lost money, while former Directors are not poor.

If I might make a couple of predictions here today, the first is that the media and public focus on major corporate cases will increase at an exponential rate. Part of this is due to the demonstrated appetite of news consumers for such coverage. Part of it lies with the complex relationship that Australians, and particularly Australian journalists have with the notions of wealth and success. And part of it will be driven by the increasing interest among the more competent plaintiff lawyers in corporate failure and directors' liabilities as fertile fields for individual and class actions.

Similarly, comments such as Commissioner Fels's remark earlier this week about collusive conduct requiring prison sentence, will only seek to increase the bloodlust for corporate scalps.

This is bad news for the courts in terms of their public standing. Returning to my earlier point about expectations and not wanting to disappoint your audience, it is always less likely that the "natural sequence" demanded by the story clock will play out in corporate and civil actions, as opposed to criminal cases.

The 'Story Clock' is a necessary evil for today's journalists – how else can they cope with the increased number of stories to cover, the never ending need to simplify and shorten stories. They are told to write for 10-13 year olds, they are told to stick to the 13 second grab, and they are told to make it catchy and dramatic. Above all, cadet journalists are told to make their stories about people and personalities.

Maybe this is the result of technology advances or maybe the amalgamation of news outlets – but news has stopped being a community service and is now entertainment. As such it is at the whim of the reader, mass opinion, and popularity. If people don't like your news they switch stations or stop buying your newspaper and before you know it there is less money at head office to spend on journalists.

The real impact of this, is that the original primary goal of journalistic specialisation has been subsumed by competition and audience demand issues. The specialists have necessarily become generalists, feeding tidbits rather than real knowledge, and flashcards in place of stories.

I was amused the other day to look at a major newspaper which offered a guide to faking understanding of the stories of the day if faced with the prospect of intelligent conversation. The names, key events, and preferred interpretation were given, without the troublesome background, context or alternative viewpoint. This, like the Ten-minute Herald, the Age's breakout summaries, and half-hourly radio reports on the happenings at the Big Brother household, are signs of the times.

Now, all this, even in the general or abstract case, is bad enough. But when it is applied to the courts and the judiciary, it is naturally of great concern.

For you a more foreign environment is not imaginable – for you focus on complex detail for lengthy periods of time, fundamental principles of law, and you give great thought to the justice of the situation and to the impact of your decisions.

At the moment you are being used as material for the 'controversies of the day'.

The media's hype around a particular case and the inappropriate focus on certain aspects to the exclusion of all others, creates expectations about the outcome from the Judiciary. But when a different sentence or ruling is handed down, then the public cries that the Judiciary is out of touch. And it is no use explaining to the public that the media is out of touch – because who would report that?

With the development of the television style called 'real tv' – people like to make their own judgement, they like a twist in the tail and they like their expectations to be fulfilled. Everything is a story.

Increasingly, the Judiciary is being painted as obstacles to justice rather than guardians of it. You are seen as the people who do not deliver on expectations, who are out of touch, who have no defender and no supporters. I am sure I do not need to tell you that this is a dangerous trend – if enough mud is thrown some will stick.

This is a dreadful situation, and not just for the courts. It undermines the concepts of justice, truth, fair governance and accountability which underpin open society. And it must not be allowed to continue.

The mud is sticking – public confidence in the judiciary has been and is continuing to be undermined. It is now common place in the media to take a swipe at an individual

on the bench – to write as fact comments that judges ignore crucial evidence, and to question the sentence handed down.

When public confidence is undermined, politicians start to take interest. After all they are answerable to the polls and increasingly there is a belief that the media lead not reflect public opinion. A good illustration of this is a recent article that appeared in The Australian after the ‘termination’ of NSW Police Commissioner Peter Ryan. The article heralded that his days were numbered once Radio Personality Alan Jones had declared ‘this man should go’.

Many of you would have heard Attorney General Darrell Williams at this conference last year stating categorically that he would not defend the judiciary as he views that as being contrary to the concept of judicial independence. He, like other politicians are taking the popular route of siding with the media, wrongly believing that they are the new defenders of justice, the new watchdogs.

And unfortunately, the methods used to convey the recent accusations against High Court Judge Mr Justice Kirby illustrate that there is a fundamental misunderstanding at the highest levels of government about the principles of democracy.

In response, some Judges are attempting to build their reputation by including ‘media grabs’ in their judgements, by scolding defendants or passing social commentary from the bench, or even by siding with the government on political issues.

This is more dangerous than anything I have mentioned today – because this leads to playing to the opinion polls. It is the risky confusion of public confidence with public approval.

This is a self-perpetuating cycle.

So how can you break the cycle, stop the undermining of the Judiciary, and rebuild the image of the third arm of government?

The answer is not as simple as either following the Kilmuir Rules or not...speaking or not speaking.

If I can take a moment to talk about corporate communications...

In the corporate sector, in the 1970s there was a set of rules developed for dealing with the media in a crisis. These were called the Tylenol Rules – derived from the way the company handled a product recall when their tablets had been sabotaged.

The rules dictated – fly to the scene of the crisis, call a media conference, state what has happened, issue a veiled apology, and remind people this has never happened before and will never happen again.

Sounds pretty simple. But, when the Exxon Valdez oil spill occurred, the CEO of the company tried to follow the Tylenol Rules to the letter. He flew to the scene – which took him about 6 hours because it was in such a remote area. Of course only then did he realise it was impossible to call a media conference because they could not get there. By the time he returned, the media was extremely critical about the company – implying they were not in control of the incident, that without their CEO, who was travelling, they had been paralysed for the first 20 hours of the disaster.

Following this it was universally accepted amongst issues management advisers that one set of rules can no longer apply for every situation.

That is my first point.

My second point to be drawn from the way corporations manage their communications is that not one of them relies solely on the media to get the message across. There are so many options – web sites, newsletters, information campaigns, and direct mail. The point is that if you can communicate directly with stakeholders, why rely on a journalist interpreting the facts, writing them, them being agreed to by the editor, and eventually placed in the paper. It is about risk management.

The third point, which marks the start of the development of any communications campaign is the simple question – is what is being said in the media or by stakeholders true – is our product defective? For you can not mislead in communications – if you claim to be what you are not you eventually end up in a worse position.

In preparing today's presentation I came across an article by a Sydney columnist a few weeks ago. She wrote that "A retired judge once tried to explain to me why it seemed judges and magistrates were lenient with criminals and out of touch with community expectations of stern punishment for offences such as home burglary. By no means a bleeding heart, he nonetheless described the horror of sentencing day, how judges dreaded having to punish their fellow man, how difficult the decision to lock up the unfortunate wretches before them, including many who were drug-addicted."

Her conclusion was that, while this may be admirable, it is nonetheless out of touch with the media's household deity of "community expectations", and therefore the judicial attitude needed revision.

I also spoke with a number of journalists covering your round.

From what they tell me, my advice to you is that there is a broader problem than media coverage. There is a fundamental lack of understanding of the role, significance and value of the Judiciary and the principles that underpin the legal system in this country – and if the journalists writing the story don't understand chances are their audience don't either.

I am not suggesting ignore the media – I do not think you can afford to. But nor am I suggesting that you consider full engagement to the exclusion of any other form of communication.

I believe the solutions lies with the JCA.

In the introduction to last year's conference papers, it clearly states that The Judicial Conference of Australia was set up to serve the public interest in two particular respects.

1. The first is to ensure that a strong and independent judiciary is maintained in Australia.
2. The second is to help the general public to understand what is meant by an independent judiciary and to appreciate why its continuation is essential to the rule of law.

The first of these is a combination of policy and maintaining public confidence, while the second is solely a matter of communications.

There is no doubt that we have a first rate legal system and members of the Judiciary are of an exceptional standard and on the whole are allowed to operate unfettered. So what has gone wrong with the image of the Australian judiciary, why is the general public so ignorant?

We are not alone with this problem.

I have already spoken about the Lord Chancellor's Media Guide for Judges – that was written published to address the very same issues that I have outlined this morning.

Across the USA various jurisdictions have undertaken training programs to train journalists on the principles of the law and to train judges on how to deal with the media.

The American Judicature Society has released a training program 'When Judges Speak Out' – designed to assist Judges in getting their messages across with the media and at public meetings.

In Hawaii, journalists are trained on the operation of the court, the fundamental principles of the law, and what can and can not be reported. They have gone one-step further and invited journalists to spend a day with a Judge and vice versa, so in the words of the strategy 'we can resolve the conflict through understanding each other better'.

The National Judicial College held two conferences (1996 and 2000) in Nevada to address the issue of 'Media and the Courts'. They focused on restraint, responsibilities and nuts and bolts coverage from both perspectives. Unfortunately no further conferences are planned.

I am not sure how many of you have heard of Court TV which began in 1991 as the world's first cable network dedicated to crime and justice. The initiative of Time Warner was to bring the 'drama' of crime and court to family living rooms. Programming focuses on shows such as NYPD Blue, major trials sometimes unedited, analysis of cases and legal issues, and general debate.

Federal Parliament in Australia broadcasts unedited on the ABC – an initiative of the Parliament to help raise awareness of the importance of the houses. There is tight control over the use of the vision – journalists are not allowed to unfairly edit or use the material in a disparaging way.

So how much of this is relevant to the JCA?

The first matter to resolve is how you, as members, see the JCA working in this environment and implementing its objectives.

Do you see it as the JCA's role to enter dialogue with the media – whether full engagement or not, and does that commentary extend beyond the institution to the defence of individual Judges?

I am conscious that this is your organisation and that I am an outsider, however, on the understanding that this is objective advice – here are some starting points.

The first remedy lies with acceptance. If there is substance to criticism of the courts, then there is great benefit in the Judiciary running its own stocktake, rather than waiting for Governments to commission an external reviewer. I don't think anyone here agrees with that as an option – otherwise you would not have a speaker presenting to you on this topic. Besides, I think we all agree that the way things are going the judiciary is no longer insulated from the 'controversies of the day' but rapidly becoming them.

The second option, and in the immediate instance, most important remedy, lies with strategic and effective engagement.

The capacity of judges in this country to interact effectively with the media is woeful at best. We have Judges seeking to correct facts on the record, without recognising that facts are the least of the matter. We have judges speaking occasionally out of pique, and I recognise the frustration which the sort of trends I have discussed here today must engender in you, but there is little prospect of remediation through verbal abuse. Journalists are just doing the job their public expects. They are a symptom, but they're not the problem.

I should note here, that I would make a crucial distinction between individual judges and the Judiciary as an institution and a community. While, on a superficial reading, it is individual judges who are under attack, what is really suffering is the standing and role of the judiciary as a whole – and this is where the battle must be waged.

However, engagement comes with its own problems. However well managed it is, you are playing someone else's game. And since that someone else is a full-time journalist, and you are a Judge, they will win. To really participate effectively, you need to play at their level, and that's the real problem.

What the Judiciary in Australia requires is not a stopgap, and it's not process management. It's community education. For the media, and their consumers, and for the governments who regard the hospital pass to the judiciary as an easy option.

It is possible to start people back on the track to regarding Judicial activity as sacrosanct, or close thereto. It will require education of the next generation at school levels, combined with a strategically managed discussion of judiciary communication through mainstream and specialist media.

To make one final prediction here today, I would suggest that, contrary to the expectations of the media, and contrary to international example, there is an opportunity re-elevate the view of Judges and their role in Australia.

We are different to the United States. Australians like the idea of genuinely independent Judges and the notion of trust in the Judiciary. These principles just need to be awakened. And that needs a deliberate education program. It really is not an option to disengage indefinitely, otherwise the role and perception of the Judiciary will continue to disintegrate and you will become the 'controversies of the day'.

Thank you again for your time this morning and for the invitation to address the Conference.