

## THE JUDICIARY AND THE PUBLIC: JUDICIAL PERCEPTIONS

### ABSTRACT

The relationship among the judiciary, public attitudes, public confidence and the institutional authority of courts in a democracy is complex. It is frequently asserted that courts depend on public confidence for the effectiveness and, indeed, legitimacy of judicial authority. Drawing on national interviews and surveys with Australian judicial officers, this article considers the judiciary's views about the nature and prevalence of public attitudes. It investigates individual judicial and institutional responses to perceived public criticism and commentary and considers activities aimed at affirmatively promoting improved public knowledge of courts and judicial work. Understanding the judiciary's own perceptions and attitudes generates important insights into the nature and limits of communication between courts and the public.

### I INTRODUCTION

The relationship among judicial decisions, public attitudes, public confidence, and the institutional role of courts in a democracy, has been a topic of academic research<sup>1</sup>

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<sup>1</sup> Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006); Leslie J Moran, 'Managing the "Critical Independencies" of the Media and Judiciary in the United Kingdom' in Michael Asimow, Kathryn Brown and David Ray Papke (eds), *Law and Popular Culture: International Perspectives* (Cambridge Scholars Publishing, 2014) 195, 195–6; Ralph Henham, 'Penal Ideology, Sentencing and the Legitimacy of Trial Justice' (2012) 57 *Crime, Law and Social Change* 77, 79 n 4 (discussing the concept of the 'relevance audience' of criminal trials). For research in Australia, see Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration, 1998) see especially 6–34; Australasian Institute of Judicial Administration, *Australian Courts: Serving Democracy and its Publics* (Australasian Institute of Judicial Administration, 2013). For a general review of research on 'public opinion and confidence', see Pamela D Schulz, *Courts*

and extra-curial judicial comment.<sup>2</sup> It is frequently asserted that the courts depend on public confidence for the effectiveness and legitimacy of judicial authority.<sup>3</sup> However, judicial perceptions of and concerns about public attitudes and public confidence have not been studied systematically or empirically in Australia.

This article first investigates judicial officers' perceptions and experiences of public attitudes and their expression. Second, it examines how individual judicial officers grapple with the need to communicate and engage with multiple audiences, ranging from an individual in court to an abstract or amorphous public. This analysis of the varied understandings expressed by judicial officers sheds important light on the nature and limits of the changing judicial, political and public roles in the communication between courts and the public.

This article uses different research methods and combines quantitative and qualitative data to investigate judicial perceptions. It draws primarily on face-to-face

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*and Judges on Trial: Analysing and Managing the Discourses of Disapproval* (Lit Verlag, 2010) 4–21. For broader reviews of related empirical research, see Mike Hough and Julian V Roberts, 'Public Confidence in Justice: An International Review' (Institute for Criminal Policy Research, 2004) (reviewing public confidence in criminal justice systems); James L Gibson, 'Public Images and Understandings of Courts' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 828 (reviewing 'contemporary work on public knowledge of, information about, and perceptions and judgments of law and courts': 829).

<sup>2</sup> For more recent extra-curial comment, see eg, Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40 *Monash University Law Review* 45; Chief Justice T F Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12 *Judicial Review* 27; Justice P A Keane, 'The Idea of the Professional Judge: The Challenges of Communication' (2015) 12 *Judicial Review* 301; Justice Robert Beech-Jones, 'The Dogs Bark but the Caravan Rolls On: Extra Judicial Responses to Criticism' (Speech delivered at a conference of South Australian magistrates, Adelaide, 8 May 2017) <[http://www.jca.asn.au/wp-content/uploads/2017/07/P83\\_02\\_02-Extra-Judicial-Responses-to-Criticism-for-publication.pdf](http://www.jca.asn.au/wp-content/uploads/2017/07/P83_02_02-Extra-Judicial-Responses-to-Criticism-for-publication.pdf)>. See also Justice Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209; George Zdenkowski, 'Magistrates' Courts and Public Confidence' (2007) 8 *Judicial Review* 385; Justice Michael Kirby, 'Attacks on Judges: A Universal Phenomenon' (1998) 72 *Australian Law Journal* 599. For further references, see James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2009) 114 n 9; Parker, above n 1, 22 n 73; and papers presented at the National Judicial College of Australia conference 'Confidence in the Courts', Canberra, 9–11 February 2007.

<sup>3</sup> See Gibson, above n 1, 836–44; Hough and Roberts, above n 1, 2. The Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration, 3<sup>rd</sup> ed, 2017) 5 [2]. Cf, eg, similar comments by Chief Justice Murray Gleeson, 'Juries and Public Confidence in the Courts' [2007] (90) *Reform* 12, 12. See also Justice Kenny, above n 2, 210, 213, quoting *Gallagher v Durack* (1983) 152 CLR 238, 245 (Gibbs CJ, Mason, Wilson and Brennan JJ); Chief Justice Bathurst, above n 2, 38, quoting Chief Justice Brennan.

interviews with judicial officers throughout Australia,<sup>4</sup> as well as national surveys of the entire Australian judiciary conducted over several years, and extra-curial comments from judicial officers in speeches or writings. Interviews provide direct accounts of judicial attitudes and experiences, coupled with opportunities for judicial officers to be reflexive regarding the judicial role.<sup>5</sup> The surveys allow the views of a large number of judicial officers to be aggregated. Judicial speeches and writings are occasions where members of the judiciary can express views on issues affecting the courts and judiciary outside of the limits of formal judgments. Using these different sources provides in-depth understanding of the attitudes of the judiciary generally, as well as capturing specific individual views and experiences.<sup>6</sup>

Part II provides a brief overview of the relationship among public attitudes, courts and the judiciary in a democracy, as background to the analysis of judicial perceptions about public attitudes towards the courts. Part III considers the judiciary's views about the nature and prevalence of public attitudes, as well as individual and institutional responses to perceived public criticism, especially when thought to be unwarranted or ill-informed. Part IV examines judicial attitudes towards activities affirmatively promoting positive public understanding of courts and judicial work.

## II THE JUDICIARY AND PUBLIC IN A DEMOCRACY

The judiciary and courts occupy an ambivalent position in relation to the public and its attitudes. As a branch of government, the judiciary is subject to criticism, commentary and opinion expressed in the public sphere across different media. In spite of this, courts and judicial officers have limited capacity to respond to or influence public opinion, in part due to the nature of the judicial role.<sup>7</sup> The separation of powers allocates constitutional responsibility to the executive and legislature to

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<sup>4</sup> A total of 38 interviews were conducted in 2012–13 with judicial officers from all court levels, in every state and territory, including metropolitan and regional locations, but not federal courts. Quotes taken from the interviews are used verbatim, only deleting identifying and potentially identifying material, and retaining qualities of natural, 'everyday speech' such as unfinished sentences, repeated phrases and filler words like 'umm', to maintain the narrative quality of the interviews: David Silverman, *Doing Qualitative Research* (SAGE Publications, 5<sup>th</sup> ed, 2018). This data source is indicated by the code 'I ##,' in which I identifies these interviews and ## refers to an individual interviewee. For more information, see the Appendix.

<sup>5</sup> Mary Holmes, 'Researching Emotional Reflexivity' (2015) 9 *Emotion Review* 61; Jason L Pierce, 'Interviewing Australia's Judiciary: Research Note' (2002) 37 *Australian Journal of Political Science* 131.

<sup>6</sup> Robert K Merton and Patricia L Kendall, 'The Focused Interview' (1946) 51 *American Journal of Sociology* 541; see also Deborah R Hensler, 'Studying Gender Bias in the Courts: Stories and Statistics' (1993) 45 *Stanford Law Review* 2187.

<sup>7</sup> See The Council of Chief Justices of Australia and New Zealand, above n 3, 7 [2.2.2], 25–6 [5.7]; Thomas, above n 2, ch 7; Chief Justice Bathurst, above n 2, 36–7; Justice Keane, above n 2, 311, 314; Justice Geoffrey L Davies, 'Judicial Reticence' (1998) 8 *Journal of Judicial Administration* 88; Justice Kenny, above n 2, 221.

engage politically with the electorate.<sup>8</sup> This contrasts with the judicial role: to decide cases brought before the court by parties, and to do so impartially and dispassionately, by applying law to fact. The complexity of the judiciary's position in relation to public attitudes and the media can result in tension for individual judicial officers and challenges for courts as institutions. Understanding judicial perceptions of these complexities may provide a basis for effectively addressing the challenges, especially because the judiciary — individually, collectively and institutionally through the courts — bears the primary responsibility for communicating with the public about its work.

A central concept in addressing the relation between the judiciary and the public in a democracy is the concept of public confidence, held out as a core requirement for the legitimacy of judicial authority.<sup>9</sup> The importance of public confidence has been emphasised in the context of concern about generally declining trust in political leaders and government institutions: 'In a democracy, the authority of governmental leaders and institutions presumably depends in part on the extent to which the public has confidence and trust in those institutions and leaders.'<sup>10</sup> However, the nature of this public confidence is difficult to identify. It is sometimes approached as an empirical fact capable of measurement, especially through public opinion surveys.<sup>11</sup>

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<sup>8</sup> Gareth Griffith, 'Judicial Accountability' (Background Paper 1/98, NSW Parliamentary Library Research Service, 1998) 8–9; Chief Justice Bathurst, above n 2, 36; Justice Kenny, above n 2, 209–10.

<sup>9</sup> See above n 3.

<sup>10</sup> Michel J Crozier, Samuel P Huntington and Joji Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York University Press, 1975) 76; Kenneth Newton and Pippa Norris, 'Confidence in Public Institutions: Faith, Culture or Performance' in Susan J Pharr and Robert D Putnam (eds), *Disaffected Democracies: What's Troubling the Trilateral Countries?* (Princeton University Press, 2000) 52.

<sup>11</sup> See generally Hough and Roberts, above n 1, 7–9 (reviewing the measurement of confidence in survey research); Karen Gelb, 'Measuring Public Opinion about Sentencing' (Sentencing Advisory Council, September 2008) 2–28 (reviewing the literature on survey methods and public opinion about sentencing). See, eg, in Australia, Lynne Roberts and David Indermaur, 'What Australians Think about Crime and Justice: Results from the 2007 Survey of Social Attitudes' (AIC Report 101, Australian Institute of Criminology, 2009) (drawing on data from the *2007 Australian Survey of Social Attitudes*, N=8, 133). See, eg, in NSW, the three waves of the New South Wales Bureau of Crime and Statistics and Research ('BOCSAR') *Confidence in the Criminal Justice System* surveys: Craig Jones, Don Weatherburn and Katherine McFarlane, 'Public Confidence in the New South Wales Criminal Justice System' [2008] (118) *Crime and Justice Bulletin* (first wave 2007 survey, N=2002); Lucy Snowball and Craig Jones, 'Public Confidence in the New South Wales Criminal Justice System: 2012 Update' [2012] (165) *Crime and Justice Bulletin* (second wave 2012 survey, N=2001); Imogen Halstead, 'Public Confidence in the New South Wales Criminal Justice System: 2014 Update' [2015] (182) *Crime and Justice Bulletin* (third wave 2014 survey, N=1989). See, eg, in Victoria, Karen Gelb, 'Predictors of Confidence: Community Views in Victoria' (Sentencing Advisory Council, 2011) (2008 survey, N=1200).

Public confidence is also often invoked as an abstract or self-evident notion, without interrogation or explanation, especially in relation to courts.<sup>12</sup>

Both the legal and empirical approaches are beset with ambiguities. Exactly what is confidence, how can it be identified, how can the extent or degree of confidence be assessed? What are the indicia of confidence? Towards what is the confidence directed? Referring to confidence in the courts, judiciary or legal system is vague, as these manifest in many ways. The concept of the ‘public’ is complex and can be ‘problematic’.<sup>13</sup> Definitional questions arise over who or what constitutes ‘the public’,<sup>14</sup> ‘the community’ and ‘the media’. While careful social and legal research can make definitions explicit, and identify indicators of public confidence, these are not conclusive, and the varied potential meanings are rarely addressed in the legal or judicial commentary which invokes public confidence.

In the research underpinning this article, interviewees use the terms ‘public’, ‘confidence’ and ‘media’ fairly broadly, as having ordinary shared conversational meanings. In analysing and commenting on the data, the authors continue this generic usage, as well as problematising or commenting on any implicit ambiguities.

Judicial engagement with the public is complicated by the realisation that, while some audiences can be addressed directly, most people engage with the courts only indirectly via media reports (both conventional and social). People may have direct experience with the courts as a litigant, criminal defendant, witness, juror or by attending court as a member of the public. However, research finds that ‘[v]ery few Australians have any first-hand experience of their courts’, though when they have such experience, it can be highly influential on their views of the judiciary.<sup>15</sup> Other sources of information may include personal contact with someone else with experience of the courts, such as friends or family, or information provided by the courts themselves, such as through case decisions or sentencing remarks published online or in print, judgment summaries, social media communications or presentations to school or community groups. For most, the major sources of information

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<sup>12</sup> Chief Justice Gleeson alluded to this characteristic of the concept of public confidence in his remark that ‘[m]uch of what we call public confidence consists of taking things for granted’: Chief Justice Murray Gleeson, ‘Public Confidence in the Courts’ (Speech delivered at the National Judicial College of Australia, Canberra, 9 February 2007) 5.

<sup>13</sup> David Green, ‘Public Opinion versus Public Judgment about Crime: Correcting the “Comedy of Errors”’ (2006) 46 *British Journal of Criminology* 131, 131 n 1; Andrew J Perrin and Katherine McFarland, ‘Social Theory and Public Opinion’ (2011) 37 *Annual Review of Sociology* 87, 88.

<sup>14</sup> See Parker, above n 1, 12–4, 35–48 (considering who constitutes the ‘publics of Australian courts’); *Wainohu v New South Wales* (2011) 243 CLR 181, 248–9 [174]–[175] (Hayne J); Justice Kenny, above n 2, 209–10.

<sup>15</sup> Sharyn Roach Anleu and Kathy Mack, ‘The Work of the Australian Judiciary: Public and Judicial Attitudes’ (2010) 20 *Journal of Judicial Administration* 3, 3. See also Jones, Weatherburn and McFarlane, above n 11, 6–7 (where 20.6 per cent of respondents to a 2007 NSW survey responded that ‘personal experience’ was ‘the most influential’ source of information about the criminal justice system).

are from media including newspapers, television, radio, internet sites, and social media.<sup>16</sup> These can play varied roles in the relationship between the courts, the judiciary and the public. Providing information about courts and judges and their decisions to wide audiences, or raising concerns or criticisms, can be important in ensuring judicial accountability in a largely informal regulatory scheme.<sup>17</sup> Alternatively, the work of the courts can be a commercial resource for various media, to boost ratings, sell papers or increase page views or clicks, sometimes accomplished through reports that are sensational.<sup>18</sup>

The next section focuses concretely on judicial understanding of, and attitudes towards, various dimensions of public confidence or ‘the public’, in light of the myriad audiences for the courts and their work. There are notably different judicial views about the proper role for the court and the individual judicial officer in relation to public attitudes, particularly when public views are regarded as unwarranted or ill-informed. These varied attitudes may underpin difficulties with formulating appropriate responses from the judiciary or a court as a whole.

### III JUDICIAL PERCEPTIONS

There are several themes in the judicial attitudes expressed in the interviews in relation to broad issues of communication about and between the judiciary and the public. Some interviewees express concern with negative views from various publics regarding the courts and their decisions, and some suggest that these are increasing in scope and intensity. Others disagree about both the seriousness of the criticism and any recent increase. Several interviewees identify the importance of changes in the kind of media in which communications might take place, whether among different publics or between the court and its various audiences. These interviewees

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<sup>16</sup> Roberts and Indermaur, drawing on 2007 data, report that ‘[b]roadcast and tabloid media provide the major source of information for most members of the public about crime and justice. Almost 80 per cent of respondents rate TV, radio and newspapers as fairly or very important sources of information’: above n 11, ix, see also 9. See also the results of the 2007 BOSCAR survey: Jones, Weatherburn and McFarlane, above n 11, 4, 7; Halstead, above n 11, 2, citing Roberts et al, *Penal Populism and Public Opinion* (Oxford University Press, 2003); but see Halstead, above n 11, 18: ‘[s]ince people tend to source information that accords with their pre-existing views ... the findings presented very likely at least in part reflects individuals’ purposeful selection of which news to consume, rather than necessarily demonstrating the influence of media providers’ (citations omitted).

<sup>17</sup> Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook, 5<sup>th</sup> ed, 2015) 235–40; Chief Justice Marilyn Warren, ‘Open Justice in the Technological Age’, above n 2, 45–7; H P Lee, ‘Of Courts and Judges: Under the Spotlight, in the Limelight and Seeing the Light’ (2015) 41 *Monash University Law Review* 283, 283–4; Law Reform Commission of Western Australia, *Complaints against Judiciary: Final Report*, Project No 102 (2013) 13–4.

<sup>18</sup> Leslie Moran, ‘Managing the News Image of the Judiciary: The Role of Judicial Press Officers’ (2014) 4 *Oñati Socio-Legal Series* 799, 804; Schulz, above n 1, 27–41.

identify a move away from conventional mass print and broadcast media to social media: blogs, Facebook and Twitter feeds which are quasi-public. Finally, there is a sense among some interviewees that public comment on judicial work, however critical or ill-informed, is inevitable.

### *A Negative Public Attitudes*

In the interviews, some judicial officers express concern about the ways in which the public and the media engage with the courts and the judiciary. These concerns might be expressed as a belief that media reports are simplistic and inaccurate, leaving the public disadvantaged by its lack of access to full information.<sup>19</sup> Several of these issues are raised by one magistrate, who expresses concern about perceived incorrect media coverage:

the problem ... is I think a lot of it's misinformed, a lot of it is inaccurate and I'm not sure that whilst the general public are getting what the papers and the talk back media are feeding them, that they really understand how things fit into the scheme of the justice system. You know, everybody wants everybody hung and quartered, sent to jail and that's just an unrealistic expectation.<sup>20</sup>

This magistrate provides a view of an undifferentiated and un-reflexive public — like a sponge — just soaking up the material the media are ‘feeding them’. The magistrate suggests that the public relies on this misinformation and inaccuracies, precisely because of their considerable simplification, which makes them easy to understand or to accept. What is missing is a deeper understanding of the justice system among members of the ‘general public’. The view of the public that this judicial officer presents is itself somewhat simplistic and homogeneous. The statement that ‘everybody wants everyone hung and quartered’ presents an image of a public whose attitudes are mainly expressed through moral outrage, rather than rational reflection.<sup>21</sup> This comment also implicitly contrasts the rational, impartial work of the judiciary with the irrational, partial sentiments of an abstract public, and associates the public with politics rather than law.

This comment also reflects a judicial understanding that the media plays an important-intermediary role in providing access to the court's work. This judicial

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<sup>19</sup> Compare the perceptions described by Justice Davies, above n 7, 91; Justice Keane, above n 2, 309–10.

<sup>20</sup> I 19, Interview Transcript. (When referencing interviewees, the term ‘judge’ will be used to identify any member of a higher court, irrespective of whether they are formally titled ‘Judge’ or ‘Justice’. The number indicates the particular judge or magistrate interviewed, so that it is possible to tell when comments come from the same or different interviewees, while maintaining anonymity. Quotes are given verbatim, with any identifying details deleted. For more information, see the Appendix).

<sup>21</sup> See generally Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Macgibbon & Kee, 1972).

officer believes that misinformed media coverage leads the public to have negative, inaccurate attitudes towards the judiciary.

Some judicial officers interviewed express the view that the media's coverage of the courts and the judiciary has become more aggressively critical than in the past and subject to fewer quality controls. As one judge states:

over the course of, you know, my time in law, the media has become I think far more aggressive and less respectful of the judicial role. They're prepared to publish things more readily, and as I say, more aggressively. Yes I mean that's been progressing though for some years now.<sup>22</sup>

Another judge identifies changes in the mass media and a lessening of respect for courts and judicial officers compared with the past. This judge expresses a belief that it was now acceptable 'to attack the institutions of democracy'.<sup>23</sup>

Other interviewees suggest that there are fewer controls, particularly self-control regarding criticism, which may lead members of the public in and out of court to express more and more hostile criticism: 'I think people are quite bold about voicing such criticism. I don't know whether there is more criticism but I think it's just voiced more — you know nobody's reticent about criticising the judiciary these days'.<sup>24</sup>

Another judge comments: 'I see Australia's always having been an egalitarian society but when I started in the law there was a sense that judicial authority was just accepted and people would, would be deferential. There's not that acceptance now. You sort of have to earn respect'.<sup>25</sup>

There are several threads in these four comments. All describe a perceived change in the way the judiciary or judicial authority is regarded in the present day, though elements of the perceived change are identified differently. Three speak of reduced respect, while a fourth speaks of a perception of greater deference in an unspecified past. One interviewee speaks of 'criticism', others of 'attack' or 'aggress[ion]', while another refers to the loss of 'reticen[ce]'.<sup>26</sup>

These differences may suggest variations in the nature of the perceived public discourse and the potential impact on public confidence. Criticism may be warranted, but attacks go beyond justified comment. Courts can be respected and still be criticised, as one interviewee comments. At least one judicial officer acknowledges 'sometimes the courts do get it wrong and they are out of touch with community expectations'.<sup>26</sup>

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<sup>22</sup> I 10, Interview Transcript.

<sup>23</sup> Extract from interviewer's notes for I 14.

<sup>24</sup> I 09, Interview Transcript.

<sup>25</sup> I 15, Interview Transcript.

<sup>26</sup> I 24, Interview Transcript.



However, expectations of ‘reticence’ or ‘deference’ could imply a protected status which may go beyond what is justified in a democracy with freedom of political speech, in light of the court’s role as a branch of government in a democracy.<sup>27</sup> The time period over which change is identified is either unspecified, or linked to the respondent’s overall engagement with the law (eg ‘my time in law’), or based on a comparison to ‘when I started’, reflecting the way the question was phrased.

Data from the National Surveys provides further insight into judicial perceptions of personal and hostile criticism.<sup>28</sup> These surveys contain open-ended questions giving respondents scope to reflect generally about their judicial career or about other issues; there were no questions specifically about public or media attitudes. Concerns about how the media, the public and politicians relate to the courts and judges were specifically mentioned only by a small number of respondents and were made some years before social media had a very significant role. Nonetheless, they are important, first to suggest that this is a longstanding problem, at least for some in the judiciary, and second, to show how perceived criticism can affect individual judicial officers on a personal level.

Four judges describe their perceptions of the impact of negative media treatment:<sup>29</sup> ‘The media is generally unfair. That can be frustrating but it goes with the territory’;<sup>30</sup> ‘And I suspect that the *consistently negative media view* of judges gets me down though I try not to think about it’;<sup>31</sup> ‘It grieves me that *so often* the media criticises the judiciary w/out [sic] opposition or response’;<sup>32</sup> ‘Demanding, challenging but

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<sup>27</sup> John Williams, ‘Of “Fragile Bastions”, “Political Judges” and “Robust Debates”: Judges and Their Critics’ in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 210, 212–5 (summarising the constitutional foundations of judicial criticism), 219–20 (discussing criticism of the impartiality, diligence and capacity of a judicial officer); Butler and Rodrick, above n 17, 444–5 (discussing the ‘right to criticise’ in the context of scandalising the court contempt). See especially Williams at 215, quoting *Coleman v Power* (2004) 220 CLR 1, 91 [230] (Kirby J). See also Chief Justice Bathurst, above n 2, 37; Justice Keane, above n 2, 307; Justice Steven Rares, ‘Politicians Attacking Judges’ (Media Release, 20 November 2015) <<http://www.jca.asn.au/wp-content/uploads/2013/10/JCA-Press-Release-20-November-2015.pdf>>.

<sup>28</sup> See Appendix.

<sup>29</sup> These quotes are from respondents to the National Survey of Australian Judges 2007. This data source is indicated by the code ‘NSAJ07 ####’ in which NSAJ07 identifies the Survey and the four-digit number refers to the individual interviewee. Quotations are provided verbatim, as written in the survey booklets, though any information which might identify a respondent has been removed. For more information on the surveys, see the Appendix.

<sup>30</sup> NSAJ07 1024.

<sup>31</sup> NSAJ07 1095 (emphasis altered: underlined in original).

<sup>32</sup> NSAJ07 1146 (emphasis altered: underlined in original).

interesting. Frustrating aspects are the ignorance of media and public about the role of judges'.<sup>33</sup>

The first three comments speak only of the media and emphasise unfairness, negativity or criticism, while the fourth treats the public and media together and identifies the problem as ignorance, rather than negativity. All four express emotional responses: 'frustrating', 'grieves me' or 'gets me down'. The second and third comments also identify frequency as an aspect of the problem: that such criticism is 'consistently negative' or occurs 'so often'. However, each has slightly different reactions to their concerns. One recognises that criticism 'goes with the territory'; another finds that the judicial role is still interesting while a third tries not to think about it. Another implies that an opposing response would alleviate some of the harm done by criticism which may be unwarranted or proceed from ignorance.

Two judges use stronger language to describe the negative effects of criticism, identifying reduced satisfaction and loss of respect or status: 'The criticism of judges by the media and politicians over recent years has diminished the satisfaction of being a judge, and ... has demeaned a judge's status, and is a strong disincentive to accepting judicial appointment now';<sup>34</sup> '[r]ecent lack of respect for the separation of powers/judiciary/complexity & difficulty of our work & in fact constant ill-informed criticism by our political leaders & hence media & public, has made the job more intensely difficult & less satisfying'.<sup>35</sup>

Each of these respondents sees the problem as criticism from politicians as well as media sources, which impacts on public opinion, and therefore diminishes the status of the judicial role, while increasing the difficulty of the work. These two judges also see this as a problem which is 'recent', or has occurred 'over recent years'. While 'recent' in 2007 is now 10 years ago, these comments indicate that the concerns expressed are not new.

A respondent to the 2002 Magistrates Survey also regards 'ill-informed media criticism' as a 'growing tendency', suggesting an even longer history of concern, before the advent of social media:<sup>36</sup> 'The most concerning feature of life on the bench is the growing tendency towards ill-informed media criticism of the judiciary, which I fear will eventually result in diminished community respect for the legal system and the judiciary'.<sup>37</sup>

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<sup>33</sup> NSAJ07 1253.

<sup>34</sup> NSAJ07 1261.

<sup>35</sup> NSAJ07 1133.

<sup>36</sup> This quote is from a respondent to the National Survey of Australian Magistrates 2002. This data source is indicated by the code 'NSAM02 ###' in which NSAM02 identifies the Survey and the three-digit number refers to the individual interviewee. Quotations are provided verbatim, as written in the survey booklets, though any information which might identify a respondent has been removed. For more information on the surveys, see the Appendix.

<sup>37</sup> NSAM02 113.

As well as regarding the judicial role and work as more difficult or less satisfying, a comment above suggests that this criticism is a ‘disincentive to accepting judicial appointment.’ Another judge suggests that it can also be a reason to leave the judiciary. In response to the question ‘What factors affect your planned retirement age?’, one judge lists four reasons, including ‘getting tired of the role & the opprobrium judges attract in the media’ and ‘the antipathy displayed by govt [sic] towards judges & courts’.<sup>38</sup>

Although these experiences were described by a very small number of respondents, they were unprompted and suggest a range of possible effects of perceived personal, harsh or unwarranted commentary on judicial officers personally, and on the recruitment and retention of judicial officers.<sup>39</sup> Recently, Greg Reinhardt, Executive Director of the Australasian Institute of Judicial Administration (‘AIJA’), suggests that online criticism of judges ‘is distressing’ for judicial officers.<sup>40</sup>

As well as a concern about generally and increasingly negative criticism, the more recent interviews identify a deeper lack of understanding on the part of the public about the role of courts. Interviewee 19 above states, ‘I’m not sure they really understand ... how things fit into the scheme of the justice system.’ One aspect of this lack of understanding has been the subject of public comment by Justice Keane, who writes of the importance of the ‘cold neutrality of an impartial judge’, citing Edmund Burke, and the need for ‘communicating the value of ... politically neutral professionalism ... [to] the broader community.’<sup>41</sup> Empirical research suggests that a substantial proportion of Australians put a higher value on legal knowledge as an essential skill for the judiciary, ahead of impartiality, while nearly all judges and magistrates identify impartiality (and integrity) as essential for their work, well ahead of legal knowledge.<sup>42</sup> This suggests that there is a need for improvement in public understanding of the value of judicial impartiality.

The interviews also reveal disagreement about the nature and extent of public criticism of the courts, and in particular, whether public criticism was becoming more problematic for the courts.

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<sup>38</sup> NSAJ07 1017.

<sup>39</sup> Cf survey research in the United Kingdom which found that ‘[o]nly very small numbers of judges feel valued by the media (3 per cent or 46 of the 1559 judges who responded ... in the survey)’; see Cheryl Thomas, ‘2016 UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals’ (Report, UCL Judicial Institute, 7 February 2017) <<https://www.judiciary.gov.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf>>.

<sup>40</sup> G J Reinhardt, ‘Symposium: Challenges of Social Media for Courts & Tribunals’ (2016) 90 *Australian Law Journal* 542, 543. See also Justice Beech-Jones, ‘The Dogs Bark but the Caravan Rolls On’, above n 2, 10, who describes how ‘publicity’ in the media can be ‘distressing’ for judicial officers and courts.

<sup>41</sup> Justice Keane, above n 2, 304; Justice Kenny, above n 2, 216.

<sup>42</sup> Roach Anleu and Mack, above n 14, 14–7.

*B Varied Perceptions about Public Attitudes*

Unlike the views analysed in the section above, some judicial officers do not perceive a recent change in the frequency or nature of media and community criticism. One judge states: 'I think the expectation of the courts is, has always been a, there's always been a disconnect between, umm, what sometimes, umm, the press and the public call for [and] what we can do but I don't think that's new'.<sup>43</sup> Another interviewee comments:

I don't think that's changed. I think it's – no, I think, I was about to say it's more ill-informed than it used to be but I don't think, I don't think it's more ill-informed, I think it's continued to be uniformly, fairly ill-informed.<sup>44</sup>

In contrast, others say they don't 'know whether there is more criticism' (I 9).

These differences in perceptions might be influenced by several factors. Some types of courts may receive more or less media coverage than others. One magistrate links the lack of media focus on the Magistrates Court to the 'lesser level' of crime heard in that court:

I mean the media focus has always been, or not always been but has been umm, if there is a focus, on adequacies of sentencing. ... You don't often get that in our court, you don't often get that criticism of inadequacy perhaps because we're dealing with a lesser level. We're not dealing with that, we're not dealing with that sort of category of horrendous or terrible crime, umm, and well we don't deal with that then the sentences that we impose are not usually open to criticism.<sup>45</sup>

The geographic location of some courts may also affect media coverage. In one smaller jurisdiction, the local newspaper routinely publishes a photo of the face of the magistrate when reporting on a case. It is also likely that individual judicial officers experience criticism in different ways, perhaps reflecting previous experience with public or media engagement, either positive or negative. This difference between how individuals experience criticism is acknowledged by one judge in a comment in response to an open-ended survey question:

[there] is the constant tension one feels as a judge in the community because of the need for vigilance in relation to all aspects of behaviour. In my case, as a long term regional judge with a lot of community involvement and a large family, I am often asked in public places eg on the street, at the supermarket, about issues to do with my job. I do not find this stressful but some might. It is certainly not as acute in the city, however it is something that is often in my thoughts. My impression is that the community has a high regard for its judges and magistrates, and tends to significantly discount the negativity that is sometimes generated by

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<sup>43</sup> I 36, Interview Transcript.

<sup>44</sup> I 20, Interview Transcript.

<sup>45</sup> I 17, Interview Transcript.

sections of the media. In relation to the media, I have served two long periods as a judge in a regional area served by a daily Murdoch tabloid and I have never felt victimised or unfairly treated by the papers. There are times when I feel their coverage of courts is superficial and overly simplistic, but I do not share the concern many judges feel about the effect of media coverage on public confidence in the judiciary.<sup>46</sup>

This reflection contrasts with the experiences described by the judges in the section above.

Varied judicial views may also reflect different understandings of the judicial role and the extent to which criticism is acceptable or even legitimate. This is discussed more fully in Part III (D) below.

Another theme that arose was disagreement as to the extent to which media reporting and public opinion overlap. Like the survey respondent immediately above, some interviewees maintain that negative reporting is not indicative of public perceptions:

I think there's a perception that public views are what is written in the media and an acceptance that that's not necessarily so. Umm, what is written in the media is often the view of a small minority, umm, built up by a journalist to be the public's views, umm, and it's not necessarily so.<sup>47</sup>

This response separates what is reported by the media from what the judicial officer thinks is believed by the public. This judicial officer describes reports as being 'the view of a small minority' or disconnected from a broader 'public'. This is a different conception of the relationship between the mass media — especially the print media — and public views to the one painted by the judicial officer (I 19) above.

The perception that actual public attitudes are not synonymous with the claims by mass media about public opinion, or that assertions of prominent individuals do not reflect wider public sentiment has been borne out in empirical research. Innovative research that relies on ex-jurors to ascertain public opinion finds that 'jurors, as informed members of the public, reach similar sentencing decisions as judges much more often than the populist view of public opinion suggests.'<sup>48</sup> When members of the public obtain information beyond that contained in sensationalist headlines and news stories, and when they are apprised of the details of actual cases, their assessment is closer to the judicial officer's decision and lacks the moral outrage reflected in media accounts, especially in relation to criminal cases.

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<sup>46</sup> NSAJ07 1072.

<sup>47</sup> I 18, Interview Transcript.

<sup>48</sup> Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) 52 *British Journal of Criminology* 93, 107. See also Kate Warner, Julia Davis, Maggie Walter and Caroline Spiranovic, 'Are Judges Out of Touch?' (2014) 25 *Current Issues in Criminal Justice* 729.

Some interviewees recognise that the task of reporting on courts and their work is sometimes difficult, and perhaps getting harder, as traditional media are losing resources to train journalists and to gather information independently.<sup>49</sup> For example, one judge comments that:

Trying to report something in a nutshell is what the media has to do, they can't report a summing up of three hours in three column inches but they do their best and I understand they're doing their best but they sometimes misrepresent either what the summing up was or what the judgment was or what the sentence remarks were because they're trying to distil it into a pithy phrase.<sup>50</sup>

The analysis in the preceding two sections finds varied judicial perceptions about public attitudes generally and the role of the media in relation to courts and the public. While there is a strong view that media reporting is, at least sometimes, negative or sensational, this is regarded by some in the judiciary as not necessarily reflecting either media hostility or negative public opinion. However the 'media' referred to in these comments tends to be traditional print or broadcast media, with identifiable sources or authorship and available to public as a whole, such as newspapers, radio or TV. In contrast, some interviewees highlight the role of newer social media.

### *C Changes in Kind of Media*

Several interviewees, from different levels of court, describe their experiences and perceptions that social media and the internet generally have led to less restrained commentary about courts and judges:

I went searching for that on the, via the net on the weekend and found some blogs that were absolutely scathing and very personal of me, umm, so I became aware of that. I don't spend a lot of time on the net but it is where people, people can express themselves, it's easier for people to express themselves and so I think it does follow that you are aware of that, umm, I don't know that it changes terribly much.<sup>51</sup>

the big change I suppose has been the internet where things can go out viral on the internet and there's no real ability to censor and to manage that.<sup>52</sup>

Social media a real problem news about courts print, TV and online social media is out of control, there is no filter e.g. comments, blogs et cetera ... No facility to

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<sup>49</sup> See also Moran, above n 1, 200–2; Sharon Rodrick, 'Opportunities and Challenges for Open Justice in Light of the Changing Nature of Judicial Proceedings' (2017) 26 *Journal of Judicial Administration* 76, 78–9, see especially n 22. A similar view is expressed by Chief Justice Marilyn Warren, 'Open Justice in the Technological Age', above n 2, 47–50.

<sup>50</sup> I 22, Interview Transcript.

<sup>51</sup> I 30, Interview Transcript.

<sup>52</sup> I 11, Interview Transcript.

filter, or police social media savvy youngsters think such comments are fair game without restrictions very dangerous.<sup>53</sup>

These comments contain several different themes. First is the description or characterisation of the comments: ‘scathing’ and ‘personal’ suggest that some interviewees are particularly concerned about posts that go beyond justified or even rational criticisms of the process or outcome of a particular case, and so carry particular risks to individual judicial officers and to the legal system as a whole.<sup>54</sup> A second aspect, beyond the nature of the comments themselves, is the suggestion in the third quote that ‘such comments’ are now being normalised as appropriate commentary or ‘fair game’ on public figures or institutions, and that it is ‘easier for people to express themselves’ in these damaging ways. Frequent or sustained harsh and often anonymous commentary may generate desensitisation,<sup>55</sup> which could especially affect young people who are active on social media (the so-called ‘savvy youngsters’).

A third theme is the notion that the judicial officers themselves are now aware of certain kinds of comments about them, whereas, before the internet, they may not have realised how harshly some people felt toward courts or the judiciary. While some writers perceive a change in the nature or quality of attacks,<sup>56</sup> other commentators hold a different perception. Williams argues that ‘[t]he robust reflection on the courts or individual judges is by no means a new phenomenon.’<sup>57</sup> These mixed views are reflected in the point made by Interviewee 9 above: ‘I don’t know whether there is more criticism, but I think it is just voiced more.’ This judicial perception may be a consequence of social media.

This leads to a further theme: that such comments ‘can go out viral on the internet’ and so are now accessible to a much wider audience, while in the past, such comments might only have been made from one person to one or a few others, and perhaps

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<sup>53</sup> Extract from interviewer’s notes for I 13.

<sup>54</sup> See, eg, Justice Rares, above n 28. In that media release, Justice Rares as President of the Judicial Conference of Australia argues that ‘personal and intemperate attacks on courts’ by politicians in response to an appellate decision on sentencing can ‘damage our democracy and public confidence in the rule of law’: at 1.

<sup>55</sup> See, eg, Steven Prentice-Dunn and Ronald W Rogers in Paul B Paulus (ed), *Psychology of Group Influence* (Psychology Press, 2<sup>nd</sup> ed, 2015) 87. The authors discuss theories of ‘deindividuation’, understood as a process where ‘antecedent variables [such as anonymity and group size] lower private self-awareness, and thus disrupt the process of self-regulation’: at 89.

<sup>56</sup> Sharon Rodrick, ‘Achieving the Aims of Open Justice? The Relationship Between the Courts, the Media and the Public’ (2014) 19 *Deakin Law Review* 123, 138–40; James Plunkett, ‘The Role of the Attorney-General in Defending the Judiciary’ (2010) 19 *Journal of Judicial Administration* 160, 160; Justice Kirby, above n 2, 599.

<sup>57</sup> Williams, above n 21, 210. Justice Sackville commented in 2005 that ‘[a]lthough some commentators bemoan the increasing incidence and intensity of attacks upon the judiciary, there is nothing novel about vehement or even vicious criticism of courts and individual judges’: Justice Ronald Sackville, ‘The Judiciary and the Media: A Clash of Cultures’ (2005) 27(1) *Australian Journalism Review* 7, 10–11.

only orally. This greater reach of harsh comments, the difficulty of responding with the same scope, and the potential for harm to public confidence in the courts is echoed by Sackville J who expresses the view that ‘what has changed is the effect that damaging comments can have’.<sup>58</sup> It is also possible that less notice of such comments is taken by some members of the public due to desensitisation; while some social media comments may ‘go viral’, they might not be long lasting.

Finally, several comments from interviewees identify the inability to ‘censor and to manage’, that the internet is ‘out of control’, and that there is ‘no filter’. The phrase ‘no filter’ can indicate, in line with earlier suggestions that the speakers themselves are less restrained by values of respect or deference, but the greater concern appears to be the inability of any external authority to control these kinds of attacks: there is ‘no facility to filter, or police, social media’.

#### *D Judicial Perceptions of Public Criticism*

Some interviewees express the view that criticism is an unavoidable aspect of being a judicial officer. According to one interviewee, ‘you know you’ve got to be robust when you’re a judge and recognise that people will criticise you and you’ve got to kind of rise above it and so on’.<sup>59</sup> Similarly, a magistrate comments: ‘I’ve got to have broad shoulders, it literally comes with the territory’.<sup>60</sup>

These interviewees both use normative language to express a judicial officer’s obligation to be ‘robust’ to ‘rise above’ or to ‘have broad shoulders’ to carry the weight of negative comments. This expectation was also described by Chief Justice Robert French:

Well, of course it’s human nature perhaps for people to not enjoy criticism. On the other hand the judiciary, if you don’t have the capacity to, as it were, shrug off that kind of criticism and just say ... it’s like the weather, you know, it goes with the territory every now and again, it doesn’t happen very often, fortunately ... it goes with the territory and just get on with the job, then you really shouldn’t be in judicial office.<sup>61</sup>

This judicial acceptance of criticism might reflect an awareness of the limited ability for the judiciary to respond to criticism, even if that criticism is harsh, ill-informed

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<sup>58</sup> Justice Sackville, above n 57, 11.

<sup>59</sup> I 11, Interview Transcript.

<sup>60</sup> I 30, Interview Transcript.

<sup>61</sup> Damien Carrick, interview with Chief Justice Robert French (ABC Radio National, ‘Retiring Chief Justice Robert French’, *The Law Report*, 13 December 2016) <<http://www.abc.net.au/radionational/programs/lawreport/retiring-chief-justice-robert-french/8105828#transcript>>. See Justice Beech-Jones, ‘The Dogs Bark but the Caravan Rolls On’, above n 2, 11, who suggests that ‘[t]he most common, and sometimes the most advisable, approach to adopt in response to such criticism is to let it pass.’



or unjustified. If there is no realistic way to counter or respond, then being ‘robust’ and ‘rising above’ may be the best strategy.

On the other hand, some judicial officers’ acceptance of critical comment arises from a belief about the democratic right for people to criticise the courts and the judiciary.<sup>62</sup> This may inevitably entail personal criticism of judicial officers individually, as they are the embodiment and public face of courts as legal institutions.

This is reflected by one interviewee:

Yes, yes, I mean there’s, maybe it’s part of the entitlement generation but there’s a sense that judges should explain themselves, the courts should umm, explain what they’re doing and shouldn’t be hurt or upset by criticism or call it unfounded or unfair that — and you know theoretically that’s absolutely right because courts are open to the public, confidence in the judiciary is a fundamental aspect of a strong democratic society.<sup>63</sup>

Notwithstanding the acceptance suggested by this judicial officer, she goes on to emphasise the importance of engaging with the public in a positive way.

Overall, these judicial perceptions suggest several perspectives on the relationship between the public and the courts, and the role of the judiciary in a democracy. Judicial officers accept that commentary and (at least some) criticism of courts and judges is not a new phenomenon and is inevitable and even appropriate in a democracy. Interviewees also express the concern that public reporting of the courts’ work can be inaccurate, even aggressively so, and that members of the public are negatively influenced by that reporting leading to public attitudes about courts and the judiciary are misinformed and disrespectful. The changing media landscape raises particular concerns about the nature and reach of criticism, especially personal attacks.

These perceptions are regarded by some interviewees as contributing to an obligation or need for direct, positive communication with the various publics about their work and role.

#### IV INSTITUTIONAL RESPONSES TO PUBLIC CRITICISM

Whether public comments on the judiciary are unwarranted, ill-informed attacks or justified criticism inevitable for judicial officers as part of a key institution in a democracy, there is a judicial perception of a need to respond to criticisms by providing further information and explanation.<sup>64</sup> Some judicial officers appear to view criticism, especially when aggressive and unfiltered, as based on misinformation

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<sup>62</sup> See above n 22.

<sup>63</sup> I 15, Interview Transcript.

<sup>64</sup> Compare The Council of Chief Justices of Australia and New Zealand, above n 3, 25–6 [5.7].

or the absence of information regarding the nature of judicial authority, the working of the legal system and the role of judges.

The following comment suggests a long-standing need for a more positive focus to judicial communication in the public sphere: ‘I think there is an increased awareness amongst members of the judiciary to make sure that their decisions are understood and are explained — but I think that’s always been the case’.<sup>65</sup> This and earlier comments<sup>66</sup> indicate that some judicial officers believe that it is an institutional obligation to ensure that the work of courts and the judiciary is explained adequately. Bookman argues that community engagement ‘is an ethical obligation incumbent upon the judiciary’.<sup>67</sup> This duty is longstanding, reflecting principles of open justice and the importance of public confidence to judicial legitimacy and authority; it is also a response to perceptions of a changed media and public landscape.

Senior judicial officers are also promoting greater positive engagement with the public in light of social changes. Chief Justice Warren perceives that the changing ‘relationship between the courts and the media’ are among the ‘challenges driving the courts towards direct community engagement in order to preserve the operation of open justice’.<sup>68</sup> Similarly, Chief Justice Bathurst states:

the days when judges could speak solely through their judgments and expect the confidence of the community are ... gone. If judges do not take an active role in explaining what we do and why, criticisms of the administration of justice are likely to go unanswered and thus be accepted by many as unanswerable. Community confidence ... is too important to allow that to occur.<sup>69</sup>

Whether the motivation to communicate with the public is from a positive sense of the judiciary’s duty to the public or to respond to criticism viewed as uninformed, communication from the judiciary to the public is perceived to be needed. This raises the question of how courts and the judiciary can or should respond to the media criticisms and alleged public concerns as well as to improve public knowledge more generally. Judicial officers interviewed identify three main sources for possible response: from the Attorney-General of the particular jurisdiction; from the courts as organisations, usually via the head of jurisdiction or a designated media representative; or from individual judicial officers themselves.

Justice Davies states that ‘in the past Attorneys-General defended the judiciary and their judgments against unjustified attack’.<sup>70</sup> Thomas regards this traditional role of

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<sup>65</sup> I 12, Interview Transcript.

<sup>66</sup> See I 15, Interview Transcript, above n 63.

<sup>67</sup> Sam Bookman, ‘Judges and Community Engagement: An Institutional Obligation’ (2016) 26 *Journal of Judicial Administration* 3, 3.

<sup>68</sup> Chief Justice Marilyn Warren, ‘Open Justice in the Technological Age’, above n 2, 45.

<sup>69</sup> Chief Justice Bathurst, above n 2, 42.

<sup>70</sup> Geoffrey Davies, above n 7, 98; see generally Plunkett, above n 32.

Attorneys-General to respond to public criticisms as rising to the level of a constitutional convention.<sup>71</sup> However, in 2002, then Commonwealth Attorney-General Daryl Williams stated that ‘it is up to the judiciary to take the lead in defending themselves and their courts against criticism’,<sup>72</sup> indicating that this would no longer be his role. While this position was criticised within the judiciary as abdicating the Attorneys-General’s central responsibility for the justice system,<sup>73</sup> Davies J concludes that it is necessary to ‘accept that [the courts] can no longer rely on the Attorney[s]-General’ to defend the judiciary from public criticism.<sup>74</sup>

Other traditional mechanisms of direct control — such as contempt of court or suppression orders — are used less often by the courts perhaps in part because they are regarded as less effective.<sup>75</sup> An interviewee comments that

towards the end of the twentieth century, largely as a result of the influence of Michael Kirby and Michael McHugh, the notion of contempt as a controlling mechanism for people who were critical of the judges has diminished. These days basically, people say what they like and there’s not much actual use of the law of contempt.<sup>76</sup>

This shift might also reflect the current, more fragmented social and mass media landscape.<sup>77</sup> However, there has been legislation to formalise the powers of courts in the face of ‘disrespectful conduct’ in New South Wales,<sup>78</sup> and in June 2017, the

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<sup>71</sup> Thomas, above n 2, 131–3 [7.37]–[7.38].

<sup>72</sup> Daryl Williams, ‘The Role of the Attorney-General’ (2002) 13 *Public Law Review* 252, 261.

<sup>73</sup> Geoffrey Davies, above n 7, 98; Thomas, above n 2, 132–3 [7.37]–[7.38].

<sup>74</sup> Geoffrey Davies, above n 7, 98.

<sup>75</sup> See for an overview Butler and Rodrick, above n 17, 245–308 (reviewing common law and statutory bases for courts to control what can be accessed and reported publically), ch 6 (reviewing contempt of court law); see also Justice Beech-Jones, ‘The Dogs Bark but the Caravan Rolls On’, above n 2, 11 (describing these remedies as having ‘the potential to harm public respect for the Court in question not enhance it.’)

<sup>76</sup> I 21, Interview Transcript.

<sup>77</sup> See Reinhardt, above n 26, 543.

<sup>78</sup> Courts Legislation Amendment (Disrespectful Behaviour) Bill 2016 (NSW), inserting *Supreme Court Act 1970* (NSW) s 131, *Land and Environment Court Act 1979* (NSW) s 67A, *District Court Act 1973* (NSW) s 200A, *Local Court Act 2007* (NSW) s 24A, *Coroners Act 2009* (NSW) s 103A. See New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2016, 13–29; a litigant was charged with nine counts of a disrespectful behaviour offence for refusing to stand in the courtroom: see Ursula Malone, ‘Islamic State Recruiter’s Wife Moutia Elzahed Charged for Refusing to Stand in Court’, *ABC News* (online), 8 May 2017 <<http://www.abc.net.au/news/2017-05-08/isis-recruiters-wife-charged-for-refusing-to-stand-in-court/8508332>>.

Victorian Court of Appeal took the unusual approach of ordering three Federal Government ministers to appear in Court in relation to possible contempt of court.<sup>79</sup>

The current practice of Attorneys-General not to respond to criticisms of the courts and judiciary, and the reduced utility of punitive measures or direct suppression, has led some in the judiciary, including some interviewees, to believe that the courts and perhaps even individual judicial officers need to take a more active role communicating with the public, whether directly or via social media.<sup>80</sup> As one interviewee describes:

the misinformation and the malicious attacks on members of the judiciary ... have been umm just outrageous and I've never seen anything like it before so, but that's extreme, that is strange government with a bad Attorney-General umm, but I, the other point that I made earlier about whatever government you've got, they've effectively let judges loose to speak for themselves, to protect themselves, that's you know, that holds whichever government you're talking about and that, that's a challenge. That's a challenge for judges because you know, judges, we're all trained to speak for our decisions and our reasons and umm, to be placed in a position where you're having to also respond to broader criticism or even engage in discussions publicly, engage in discussions about reform of the law. It's a bit problematic.<sup>81</sup>

This judicial officer alludes to the separation of powers and the ambivalent location of the judiciary: judicial officers are the crucial link between the law and those before the courts and are 'trained to speak for our decisions and our reasons' in particular cases. Yet it is 'a bit problematic' if they also must deal with 'broader criticism' or defend themselves. This judicial officer identifies the tension and expresses

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<sup>79</sup> The Court of Appeal 'formed the view that there [was] a strong prima facie case' that the Ministers had committed contempt of court: Supreme Court of Victoria, 'Announcement of the Court of Appeal in Terrorism Matters' (Statement, 23 June 2017), 4–5 <<http://assets.justice.vic.gov.au/supreme/resources/ac9dfc82-53d2-4f75-b386-005b52447fce/statement+of+the+coa+in+dpp+v+mhk+and+dpp+v+besim.pdf>>. The Commonwealth Solicitor-General, on behalf of the Ministers, apologised and retracted the comments that constituted the contempt: at 4. The Court 'accept[ed] that the Ministers ... sufficiently acknowledged and accepted their contempt of Court and sufficiently purged the contempt': at 5; see also Lorraine Finlay and Joshua Forrester, 'Explainer: Why Three Government Ministers Might Face Contempt of Court Charges', *The Conversation*, 15 June 2017, <<http://theconversation.com/explainer-why-three-government-ministers-might-face-contempt-of-court-charges-79487>>. Justice Robert Beech-Jones, 'Grossly Improper and Unfair Attack on Victorian Judiciary' (Media Release, 13 June 2017).

<sup>80</sup> Compare similar comments from other judicial officers, eg, Chief Justice Bathurst, above n 2, 41–2; Chief Justice Marilyn Warren, 'Open Justice in the Technological Age', above n 2, 56–7; Justice Geoffrey L Davies, above n 7, 89–90, 93–6.

<sup>81</sup> I 37, Interview Transcript.

discomfort at the potential compromise of the judicial role as separate from the executive and legislature and its political and policy roles. Judges commenting on policy might be regarded as indicating partiality or bias.<sup>82</sup>

Given the limited role of Attorneys-General in responding to criticisms and concerns about individual judges engaging in public communication, the court as an organisation must itself take a key role in public engagement and communication, as one judicial officer points out: ‘The courts generally, here in [this state] particularly, have tried to reach out and communicate their role more effectively so that people are much more accepting of the, or understanding of the court’s role and how it operates’.<sup>83</sup> This comment demonstrates the assumption that communication about the role and work of courts is directly related to public understanding.

Interviewees identify a number of strategies courts undertake. These include publication of decisions, including summaries of judgments and detailed sentencing remarks, and providing general information about the court in a range of formats, including websites, as described by a magistrate: ‘we now publish on the website decisions that magistrates have made to try and encourage an understanding of why a decision’s been made and the public has access to that’.<sup>84</sup> More rarely, courts may publish a media release in response to a news article.<sup>85</sup>

The interviewee’s comment above and the one below suggest a positive function of the internet and social media is to enable public access to the court’s actual work, rather than being limited to reports generated by others, through whatever media, which will inevitably be filtered:

I’m all in favour of people having access to, umm, information about sentencing, about judgments. I like the idea that people can look at it, umm, because I think, until recently, people were reliant on what little got printed in the press and now they can go and have a look if they, if they’re so, if they’re interested enough in it, umm. So I, I don’t find that a problem, I think it’s actually a very good thing.<sup>86</sup>

‘Unfiltered’ reporting of court proceedings is sometimes allowed through media in court (including still or TV cameras, live Twitter or other social media feeds

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<sup>82</sup> The Council of Chief Justices of Australia and New Zealand, above n 3, 25–6 [5.7.1]; Thomas, above n 2, 120–3 [7.18]–[7.21].

<sup>83</sup> I 25, Interview Transcript.

<sup>84</sup> I 12, Interview Transcript.

<sup>85</sup> See, eg, Chief Justice Michael Grant, ‘Statement in Relation to Youth Sentencing’ (Statement, 20 January 2017) <<http://www.supremecourt.nt.gov.au/documents/2017-publications/Statement%20in%20relation%20to%20Youth%20Sentencing%20-%20NTSC%20website.pdf>>.

<sup>86</sup> I 36, Interview Transcript.

or platforms). These approaches have generated considerable discussion.<sup>87</sup> Live media activity making court proceedings available in real time has been limited in Australia, though some courts upload video recordings of court proceedings for later use.<sup>88</sup> Many courts now use a variety of social media platforms to communicate with diverse publics.<sup>89</sup>

A more conventional approach to providing general background information about how courts work are court open days, which often involve tours of court premises and the presence of judicial officers and other court staff to meet with members of the public. One judge describes this as a very positive experience:

I like talking about the work in a general sense because I want people to know what we do and because I'm proud of what I do and I don't think we should be hiding it, I think we should be telling people what we do and most people are very interested — like genuinely interested — we have an Open Day here in the Court usually every year, I don't think we've had it this year but we have it — and I'm a tour leader and we get into the court and people ask you and I say to them, 'you can ask me any question that you like, I can't talk about specific cases but

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<sup>87</sup> See Andrew Henderson, 'The High Court and the Cocktail Party from Hell: Can Social Media Improve Community Engagement with the Courts?' (2016) 25 *Journal of Judicial Administration* 175 (studying Twitter comments on two High Court of Australia matters); Marilyn Bromberg and Andrew Ekert, 'Haters Gonna Hate: When the Public Uses Social Media Comment Critically or Maliciously about Judicial Officers' (2017) 26 *Journal of Judicial Administration* 141 (studying government and business responses to critical or malicious social media comments); Marilyn Krawitz, 'Stop the Presses, But Not the Tweets: Why Australian Judicial Officials Should Permit Journalists to Use Social Media in the Courtroom' (2013) 15 *Flinders Law Journal* 1 (arguing that courts 'should release a standard policy that permits journalists to use social media in the courtroom' at 3); Alysia Blackham and George Williams, 'Social Media and the Judiciary: A Challenge to Judicial Independence?' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 223 (studying the Supreme Court of Victoria's use of Twitter).

<sup>88</sup> See, eg, the High Court of Australia, which upload videos of Full Court hearings: <<http://www.hcourt.gov.au/cases/recent-av-recordings>>; the Supreme Court of Victoria uploads audio recordings of some sentences and judgments: <<http://scvwebcast.com/sentences/#>>; the Federal Court of Australia uploaded video recordings for 21 judgments between 2000 and 2013: <<http://www.fedcourt.gov.au/digital-law-library/videos>>.

<sup>89</sup> See generally Butler and Rodrick, above n 17, 310–19 (summarising how courts and media have reported on court proceedings); Pamela D Schulz and Andrew J Cannon, 'Trial by Tweet? Findings on Facebook? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts' (2013) 5(1) *International Journal for Court Administration* 9; Marilyn Krawitz, 'Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts' (2014) 23 *Journal of Judicial Administration* 182.

you know just ask me questions' and a lot of people are very, very curious and very, you know, respectful of what you do.<sup>90</sup>

This interviewee describes the apparent respect manifested by those who are interested enough in courts to attend open day, compared with the views expressed above about the loss of respect for courts and judges, especially linked to (often anonymous) material on social media. Of course, activities like open days depend on members of the public taking the initiative to attend. Such a program may not reach those members of the community who are harshly critical of the courts or the judiciary, whether for lack of information or any other reason.

In most courts, strategies for media communication or public engagement are overseen or coordinated by a designated professional media liaison officer.<sup>91</sup> This initiative is consistent with Parker's recommendations to promote better communication between courts and the public<sup>92</sup> and is supported at a national level by the AIJA.<sup>93</sup> However, the limits of the liaison role and the broader strategy are indicated by one interviewee:

We do have a Media Liaison Officer who works with [the courts] and you'll get requests for judgments and I'm happy to oblige, umm, but we don't have an arrangement with the media that's satisfactory in educating the media as to what is important and what's not and what they might be more interested in or what they should report upon and what they shouldn't report upon and things like that.<sup>94</sup>

This comment suggests a perceived need for a more proactive strategy by courts to engage the media so that coverage can be shaped, to the extent possible, to reflect

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<sup>90</sup> I 06.

<sup>91</sup> Thomas, above n 2, 131; see, eg, in the Federal Court of Australia, 'The Director, Public Information deals with enquiries about cases and issues relating to the Court's work from media throughout Australia and internationally. These predominantly relate to the timely provision of judgments and guidance on how to access court files': Federal Court of Australia, *Annual Report 2015–2016* (2016). In South Australia, 'The Media and Communications Office [of the Courts Administration Authority] has corporate responsibility for media liaison and community based activities that are intended to improve public understanding of the role and work of the courts': Courts Administration Authority of South Australia, *For Media* <<http://www.courts.sa.gov.au/ForMedia/Pages/default.aspx>>.

<sup>92</sup> Parker, above n 1, 164.

<sup>93</sup> See, eg, through the organisation of regular conferences including AIJA Public Information Officers' Conference *Social Media and the Courts* (13–14 June 2013, Sydney) and *The Implications of Social Change on the Courts* (23–24 October 2014, Melbourne); AIJA Court and Legal Industry Media Officers' Conference, 19–20 November 2015, Adelaide; AIJA Court Media Officers' Conference, 4–5 August 2016, Brisbane; AIJA Court Media Officers' Conference, 31 August – 1 September 2017; see Reinhardt, above n 26 (summarising the 2016 conference).

<sup>94</sup> I 22, Interview Transcript.

what the court regards as important or, alternatively, should not be reported. It also indicates that strategies implemented by courts as institutions still depend on communication from individual judicial officers, whether in producing the decisions which go on the websites, meeting with members of the public on open days or other events, or even speaking to the public through public or social media.

## V INDIVIDUAL JUDICIAL OFFICERS' PUBLIC ENGAGEMENT AND COMMUNICATION

The importance of effective communication about specific judicial decisions, as well as about the work of the court more generally, as a route for the judiciary to enhance public confidence is reflected in some interviewees' comments. These are direct accounts of how judicial officers might try to communicate to the public in their work. They reflect the challenge of remaining impartial while also trying to satisfy a perceived duty to provide a public explanation of the work of the court.

They identify a range of strategies available to individual judicial officers to communicate directly with some public audiences, either in relation to specific cases or more generally about the role of judges and the work of the courts. Most traditional is through delivering decisions orally in courts open to the public or through written judgments which are publicly available. Presentations by judicial officers to schools, community groups or professional associations are another form of public communication. More controversially, judicial officers can make statements individually through conventional or social media.<sup>95</sup>

### *A Writing and Delivering Decisions*

The usual method of judicial communication with the public is making statements in open court in relation to specific cases, and oral or written statements of reasons. For example, Martin CJ supports judicial education programmes which teach judicial officers to 'writ[e] decisions which communicate effectively to a variety of audiences including the public ... in a structured, clear and concise way.'<sup>96</sup> Chief Justice Martin believes that such programmes maintain or increase public confidence

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<sup>95</sup> The Council of Chief Justices of Australia and New Zealand, above n 3, ch 9; see Justice Beech-Jones, above n 2, for a discussion of the shift from limited public comment by judges under the *Kilmuir Rules* to recent controversies where judicial officers and tribunal members made public comments; see also Margaret McMurdo, 'Should Judges Speak Out?' (Paper presented at the Judicial Conference of Australia Colloquium, Uluru, April 2001) <<http://jca.asn.au/wp-content/uploads/2013/11/mcmurdo.pdf>>.

<sup>96</sup> Chief Justice Wayne Martin, 'Judicial Education' in *Australian Courts: Serving Democracy and its Publics* (Australasian Institute of Judicial Administration, 2013) 81, 85.



because they ‘have a direct impact on how the judiciary interacts with and responds to the community’.<sup>97</sup>

Several interviewees note that possible attention from the public or the media can affect how judicial officers craft the language in their remarks and decisions:

In my case it affects me only from the point of view as where in a general list I just hear what I’ve got to hear and give a sentence straight away. If I’m aware that it may be going to attract media attention, doesn’t change what I’m going to do but it does change how I phrase it and if I don’t believe I can just do it off the cuff like I would normally do, I’d come off the bench for ten minutes, put down some points to make sure that I cover those areas and I probably, in decisions for that, cover areas that I wouldn’t normally, that I think might be going to be made public so that in an attempt to get the public to understand or what was before me, umm, but in terms of what I do I don’t pay too much attention.<sup>98</sup>

This comment suggests a broad understanding of who the audience is for court decisions.<sup>99</sup> This interviewee is aware of speaking to a wider public audience, as well as specific defendants in court. These wider audiences may get information from various sources — the media, the internet, blogs, even people texting or tweeting from within the courtroom — so it is especially important that the court communicate accurately and completely. This magistrate is very clear that anticipating that a decision may attract media and public interest affects only the manner of delivering the decision, not the outcome.

The comment below also identifies the need for clarity in written judgments:

Change in language and, and perhaps, umm, time because more time has to be given. I think reasons can be longer because they need to be, because of, because of that problem and I also think that there is a, a change in the style of writing. It’s simpler, language is simpler and less complex as a whole than it used to be in judgments. I’m hoping that’s the case.<sup>100</sup>

This judicial officer suggests simpler language is needed to effectively communicate a decision. This may improve communication with the parties, assist public understanding of a written judgment, and enhance journalists’ understanding of cases and their capacity to report on them.

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<sup>97</sup> Ibid; see, eg, High Court of Australia, *2017 Judgment Summaries* (21 June 2017) <<http://www.hcourt.gov.au/publications/judgment-summaries/2017-judgment-summaries>>.

<sup>98</sup> I 17, Interview Transcript.

<sup>99</sup> See Ryan C Black et al, ‘The Influence of Public Sentiment on Supreme Court Opinion Clarity’ (2016) 50 *Law & Society Review* 703, 703–4 (arguing that ‘when justices [of the United States Supreme Court] anticipate public opposition to their decisions, they write clearer opinions’).

<sup>100</sup> I 38, Interview Transcript.

Some judicial officers remark on the need for ‘care’ or to be ‘careful’ in delivering a decision or writing a judgment, perhaps to limit criticism:

I think people [judicial officers] now are probably quite careful and guarded about what they say. Umm, I don’t think that’s necessarily a negative thing, that you’re guarded and you don’t let fly with your own personal views which I know has happened in the past.<sup>101</sup>

I think that as a group we’re more mindful of the fact that things — that care needs to be taken in the way in which matters are expressed and, and the sensitivity with which the reasons are given.<sup>102</sup>

This is not necessarily a recent reaction, as a respondent to the 2007 National Survey comments that he writes ‘more comprehensive and time consuming reasons’ due to ‘increased public, media [and] political scrutiny’.<sup>103</sup>

These comments show how perceptions of public concern influence individual judges’ understanding of their role, ensuring their decisions are communicated in an informative and clear way.<sup>104</sup> By suggesting that ‘personal views’ need guarding and more control, Interviewee 35 implicitly distinguishes them from an impersonal law. Interviewee 38 goes further and highlights the importance of sensitivity when giving reasons, perhaps acknowledging the emotionally dense nature of the proceedings and the need to avert emotional outbursts or distress among victims or defendants when hearing the decision.<sup>105</sup> This discussion of the manner of communication contrasts the public as personal and emotional, with the judiciary as impartial, impersonal and emotionless.

The desire to be guarded might be a reaction to past controversies, to avoid criticism, whether warranted or undeserved. Being careful may also reflect a more positive goal of emphasising the impartiality and detachment of the judicial role. Others interviewed took the view that they do not even know if a journalist is in the room, suggesting that this would make no difference to their communication. In contrast, one interviewee claims that judicial officers may deliberately write in such a way as to get the attention of the media:

There are some members of the judiciary who would be accused of playing to the media. To, umm, you know fashioning sentencing remarks you know, to have a few catchy phrases in there or you know to give the media the grab that they’re

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<sup>101</sup> I 35, Interview Transcript.

<sup>102</sup> I 38, Interview Transcript.

<sup>103</sup> NSAJ07 1133.

<sup>104</sup> Thomas, above n 2, 31–33; Davies, above n 7, 97–8.

<sup>105</sup> This kind of concern is reflected in the *Conduct Guide*’s guidance on avoiding causing hurt: The Council of Chief Justices of Australia and New Zealand, above n 3, 21 [4.8].

looking for so umm I think the media plays a significant role in relation to what we do and the way we do it.<sup>106</sup>

This could suggest a fairly proactive approach to soliciting the media's attention; rather than just waiting to see what the media selects, some effort is made to shape what might be reported and how. Framing this as something a judicial officer would be 'accused of' implies that this interviewee does not approve of such a strategy, perhaps regarding it as inappropriately attention seeking.

While a desire to enhance public confidence may affect the style or nature of language adopted when judicial officers communicate decisions, interviewees are quite firm in asserting that there is no change in the substance or content of decisions in response to perceived media attention or public pressure. According to one magistrate quoted above: 'media attention doesn't change what I'm going to do' (I 19). Another interviewee, also quoted above, expresses a similar view about the judiciary more generally: 'I don't think that judges are become, are, umm, politicising their judgments to avoid the [local newspaper's] condemnation'.<sup>107</sup>

This judge appears to indicate that judicial decisions are not changing in substance to reflect press condemnation that is perceived as political.

Another judicial officer expresses a similar view and gives a more detailed explanation, articulating a very specific view of the role of the judiciary:

I think public opinion ought to drive the politicians who then set the laws and the plain fact of the matter is at the moment with [the sentencing act] which I have to apply — there are certain things in that, for example, which says imprisonment is absolutely a penalty of last resort. Now that is a law fixed by the politicians elected by the people and if, you know, public opinion starts, umm, starts changing a bit and people are anti-bikies or anti — the laws will change in due course. For our part we simply apply what's there, umm, I don't think magistrates respond to, and judicial officers generally, respond to public opinion.<sup>108</sup>

In this comment, the judicial officer adopts a formalistic view of the judicial role and separation of powers: 'we simply apply' the law and do not 'respond to public opinion'. Public attitudes and opinion can be a force for social change but are to be directed at the legislature, not the courts.

Another interviewee points out the limited nature of the judicial role, and the different roles of the executive government and the legislature, more bluntly:

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<sup>106</sup> I 35, Interview Transcript.

<sup>107</sup> I 38, Interview Transcript.

<sup>108</sup> I 30, Interview Transcript.

I don't think we should be responsive to community expectation. I think we should just be imposing the law and it's up to the government to make sure the law reflects community expectations, if that's important to them.<sup>109</sup>

On this view of the judicial role, the only legitimate basis for responding to public expectations is by applying the law as enacted by a democratically elected legislature and administered by the executive under Australia's constitutional principles of government. This emphasis on the separation of powers and the distinct nature of judicial power is echoed in other judicial commentary. For example, Keane J argues that judicial 'professionalism ... is the basis for our claim to legitimacy',<sup>110</sup> making decisions based on 'the rational application of predetermined laws to facts found on evidence adduced by the litigants in open court.'<sup>111</sup>

### *B Engagement and Communication Outside the Courtroom*

In addition to communicating with the public through judgments or other explanations in court, judicial officers may be active in or make presentations directly to professional or community groups.<sup>112</sup>

In the National Surveys, judicial officers were asked whether, since their appointment, they had or had not been a member of or engaged in community, professional and/or social associations (including business interests). Over one-half of magistrates and two-thirds of judges responded that they had been a member of or engaged in these associations. Survey respondents who indicated that they were a member of or engaged in an association were then asked to indicate the types of associations they were involved in. Almost all respondents who answered yes to the first question provided these further details, which were then categorised by research staff according to common responses and themes. The most common kinds of associations were professional associations, such as bar associations, law societies, and judicial associations, followed by organisations related to work as a judicial officer, such as in relation to victims of crime or Indigenous justice. While these associations are important audiences for the judiciary to engage with, they are likely to entail a familiar kind of legal knowledge and communication. Judicial officers involved in these organisations are not necessarily directly interacting with people outside the legal sphere, unless that occurs through the association's activities, such as where a law society might inform the public about the court system. In addition, similar though slightly fewer numbers of judicial officers were engaged in a variety of sporting, social, or health and welfare associations. The diversity of these associations suggests the many different publics with which a judicial officer might engage or communicate.

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<sup>109</sup> I 34, Interview Transcript.

<sup>110</sup> Justice Keane, above n 2, 314.

<sup>111</sup> Ibid 307; see also Justice Kenny, above n 2, 216–7.

<sup>112</sup> The Council of Chief Justices of Australia and New Zealand, above n 3, 31 [6.5], 33–4 [6.11]; see also Thomas, above n 2, 110–25 [7.1]–[7.27].

A further issue raised in the surveys was whether the respondent had been a board member of any of these associations since his or her appointment as a judicial officer. Of those who indicated membership in an association of some kind, about half of the magistrates and about two-thirds of the judges had undertaken board responsibilities.

Membership or engagement with these associations is likely to involve direct interaction with a variety of members of the community. Judicial involvement in these kinds of activities, and the people with whom the judiciary engages in those contexts, were explained more fully in the interviews. An interviewee states,

judges have become more involved I think as you know members of non-profit boards and so on, obviously not a profit making organisations but you know chairs of school councils or universities and councils and so on and that inevitably brings them a little bit closer into the public and the public gaze and involvement in public affairs and so on and I don't think that's a bad thing but it is — but what we've got to learn are the new dynamics, the new etiquette about how to run that process and what's acceptable and what's not and where to draw the line.<sup>113</sup>

While this judge may approve of greater judicial involvement with the public, it is also important to maintain certain boundaries, to affirm a judicial distance and to know when and how to limit dealings with the public. Useful engagement can also occur much more informally, outside of specific roles or presentations:

you know judges were very much I think separated from the community but judges are no longer separated from the community. You know lots of people are very surprised — you know when I — I meet people socially and maybe they asked me what I do and I always told them what I do, I never say oh I'm in the law or something ambiguous, I tell them I'm a judge and they're amazed you know because I don't think they expect, people in the community expect to see judges, you know, at a footy game or, you know, at a party, and most people are very interested in the work that judges do.<sup>114</sup>

The stereotype of judges being out of touch may be apparent in the surprise expressed when a judge is seen to be participating in ordinary activities. This judge notes that, in his experience, the response is generally one of interest rather than the extreme disrespect experienced in social media described by some judges.

Activities of individual judicial officers engaging directly with the public can be part of a wider court communication strategy.

I think just generally the community engagement that the court's doing is a, the court's a lot more active, umm, I mean there's been individual magistrates who are, who've always been active, there's some, always been some great people who are reaching out into the community, umm, but again it's been a bit ad hoc

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<sup>113</sup> I 11, Interview Transcript.

<sup>114</sup> I 06, Interview Transcript.

and I think as an institution it's kind of a bit more recognised now that that's part of what we do, umm, so it, there's more of it.<sup>115</sup>

Another possible avenue of judicial engagement with the public is through public speeches. A recent review of judicial speeches indicates that presentations are given largely to judicial or legal audiences at conferences, bar or law society functions, law schools or as an invited lecture or launch of a law book or journal.<sup>116</sup> While these may be formally open to a more general public, the audiences generally will be primarily legal or judicial and will not entail communication and expression tailored for a wider and legally uninformed public.

### C *Making Statements via Media*

Concern about negative public or media statements, and the failure of Attorneys-General to respond to criticisms in the ways that some judicial officers would like, has led to an expectation that judicial officers individually and collectively should respond to criticism. However, others point out that '[t]here is little scope for judges to reach out individually to the broader community.'<sup>117</sup> This is reinforced by clear statements in ethical guides limiting judicial participation in public debates.<sup>118</sup>

<sup>115</sup> I 16, Interview Transcript.

<sup>116</sup> The authors reviewed the presentations listed under each Justice of the High Court of Australia: High Court of Australia, *Speeches by Current Justices* <<http://www.hcourt.gov.au/publications/speeches/speeches-by-current-justices>>; The authors also reviewed the presentations listed under each former Justice of the High Court of Australia: High Court of Australia, *Speeches by Former Justices* <<http://www.hcourt.gov.au/publications/speeches/speeches-by-former-justices>>; see also Federal Court of Australia, *Annual Report 2016–17*, 167–88 <[http://www.fedcourt.gov.au/\\_\\_\\_data/assets/pdf\\_le/0013/46210/Annual-Report-2016-17-v2.pdf](http://www.fedcourt.gov.au/___data/assets/pdf_le/0013/46210/Annual-Report-2016-17-v2.pdf)>.

<sup>117</sup> Justice Keane, above n 2, 311; see also Lee, above n 17, 291–2.

<sup>118</sup> This norm is implied in media releases by the Judicial Conference of Australia, which occasionally describes personal criticism of judicial officers as unfair, in part, because the judicial officer cannot respond. See, eg, Judicial Conference of Australia, *Media Release by the Hon Justice Steven Rares: Personalised Campaign against District Court Judge Should Cease* (26 February 2016) <[http://www.jca.asn.au/wp-content/uploads/2013/10/P18\\_01\\_36-Personalised-attack-on-judge-26-Feb-2016.pdf](http://www.jca.asn.au/wp-content/uploads/2013/10/P18_01_36-Personalised-attack-on-judge-26-Feb-2016.pdf)>; Judicial Conference of Australia, *Media Release by the Justice Robert Beech-Jones: JCA Condemns Attack on Justice Kerr* (17 May 2017) <[http://www.jca.asn.au/wp-content/uploads/2013/10/P18\\_01\\_48-Media-release-JCA-Condemns-Attack-on-Justice-Kerr-May-2017.pdf](http://www.jca.asn.au/wp-content/uploads/2013/10/P18_01_48-Media-release-JCA-Condemns-Attack-on-Justice-Kerr-May-2017.pdf)>. See Justice Beech-Jones, 'The Dogs Bark but the Caravan Rolls On', above n 2, 2 (tracing the norm from the Kilmuir Rules to its evolution into the Australian *Guide to Judicial Conduct* [5.6]). In England and Wales, several judicial officers (mostly magistrates) have been disciplined, including through removal from office, for inappropriate interactions with the media. See, eg, Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Mrs Amanda Cornick JP* (14 October 2014) ('wrote to a national newspaper and spoke on a radio programme phone-in, detailing a particular case that had been before her, which could have easily identified the defendant'); Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Mr Abid*

Any moves for a greater judicial public engagement must confront the ambiguous and limited judicial role in direct public communication outside the courtroom. The leading sources of ethical guidance for the Australian judiciary, the *Guide to Judicial Conduct*<sup>119</sup> and Thomas' *Judicial Ethics in Australia*,<sup>120</sup> both express the general view advising caution for individual judicial officers and emphasising the role of the Chief Justice or other head of jurisdiction to speak publicly for the court.<sup>121</sup>

Some interviewees also agree that public communication, while accepted as necessary, is a distinct role for the head of jurisdiction:

I think the big difference has been, umm, an acceptance of having to engage with the public and explain the court processes rather than simply feel unfairly criticised and beleaguered so your Heads of Jurisdiction doing interviews, umm, and talking about the court and the work, the work of the court, has been a big change.<sup>122</sup>

Other judicial officers have identified particular concerns about the propriety or limits of judicial officers speaking directly to the media or the public:

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*Sharif* (29 July 2014) (making 'comments . . . in the press about the police and the justice system'); Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Mr Richard Page JP* (9 March 2016) (for 'comments on national television [that] would have caused a reasonable person to conclude he was biased and prejudiced against single sex adopters'); Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Mr Abul Hussain JP* (3 February 2016) (resigned 'following an investigation into an allegation that he had posted racist and anti-Semitic comments on social media'); Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Recorder Jason Dunn-Shaw* (11 April 2017) (investigated 'for using a pseudonym to post comments (some of which were abusive) on a newspaper website about a case in which he had been a judge and another in which he had been a barrister. In his own name he also used publically [sic] available social media sites to post material or not remove material which was not compatible with the dignity of judicial office or suggested a lack of impartiality on matters of public controversy'); see Judicial Conduct Investigations Office, *Disciplinary Statements* (2017) <<https://judicialconduct.judiciary.gov.uk/disciplinary-statements/2017/>>.

<sup>119</sup> The Council of Chief Justices of Australia and New Zealand, above n 3.

<sup>120</sup> Above n 2.

<sup>121</sup> The Council of Chief Justices of Australia and New Zealand, above n 3, 25–6 [5.7.1]; Chapter 9, which was added to the 3<sup>rd</sup> edition of the *Guide to Judicial Conduct*, advises particular caution in judicial use of social media even for private or personal communication; see also Thomas, above n 2, 134–5 [7.40]; see also Chief Justice Marilyn Warren, 'Judges Don't Spin' (Speech delivered at the Melbourne Press Club Luncheon, Melbourne, 16 April 2010) <<http://www.supremecourt.vic.gov.au/contact-us/speeches/judges-dont-spin>> 10.

<sup>122</sup> I 15, Interview Transcript.

I think it's pretty dangerous for us to be making comments about what we consider the community expectations to be — I think that's more of a political thing than for us, other than, you know the prevalence of a particular type of offending which really isn't much to do with community expectation.<sup>123</sup>

Another magistrate comments:

In doing that it's somewhat peculiar in that it's not so much changing to what people's — they think people, the system thinks people's [sic] expectations are but it's trying to influence expectations so it can continue in its way and have community accept it for what it is rather than adjust its practices to meet community expectations.<sup>124</sup>

These two comments emphasise the distinction between a) the courts making statements about what community expectations are or should be, a role for which they are not constitutionally or practically suited; and b) the ability of the courts through communication to inform public expectations, so that there is a better understanding of the role of the courts, and so to reducing illegitimate pressure on the court to 'adjust its practices to meet community expectations'.

In part because of this concern about the propriety of individual judicial officers speaking to the media, especially in relation to a particular case or controversy, some judicial officers have chosen to communicate with the media through professional associations. For example, one of the explicit objectives of the Judicial Conference of Australia is '[i]nforming the community about the proper role of the judiciary and the significance of an independent judiciary'.<sup>125</sup> To meet this goal, the Judicial Conference of Australia has commissioned and published reports<sup>126</sup> as well as issuing press releases commenting on various controversies involving the judiciary.<sup>127</sup>

The role of the Judicial Conference of Australia is somewhat distinctive, as it responds very directly to specific criticisms. In contrast, most of the views expressed above about judicial communication with (or through) the media, either from individual judicial officers or heads of jurisdiction, are framed more in terms of general public information.

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<sup>123</sup> I 34, Interview Transcript.

<sup>124</sup> I 25, Interview Transcript.

<sup>125</sup> Judicial Conference of Australia, *About Us* (2017) <<http://www.jca.asn.au/about-us/>>. According to its website, the JCA 'is the representative body of the Australian judiciary', comprising about 700 members, drawn from serving and retired magistrates, judges, masters and judicial registrars.

<sup>126</sup> See Judicial Conference of Australia, *Reports & Publications* (2017) <<http://www.jca.asn.au/reports-and-publications/>>.

<sup>127</sup> Judicial Conference of Australia, *Media Statements* (19 May 2017) <<http://www.jca.asn.au/media/>>. See, eg, above nn 21, 30, 50, 70.



## VI CONCLUSION

Public confidence is seen as essential to the effective functioning and even the legitimacy of judicial authority. Judicial officers express a variety of views about public opinion in relation to courts and the judiciary. Some express concern about harsh public criticism, and possible loss of public confidence. Others recognise that a wide range of public comment on institutions of government is an essential aspect of a robust democracy in a changing media context; unwarranted criticism, or even personal attack, may be an unavoidable consequence. These varied views are reflected in the different ways courts and individual judicial officers do, or do not, communicate with different publics, especially in response to criticism which is perceived as unjustified.

At the same time, the interviews suggest an overall judicial perception that public attitudes rely on information. An absence of accurate information or worse, wide circulation of inaccurate claims, may negatively affect public confidence. The remedy for this problem is perceived by judicial officers to be more and more accurate information. They believe that providing accessible, reasoned information about specific judicial decisions, and about the work of the court generally, is an important route for the judiciary to enhance public confidence.

The challenge, as understood by the judiciary, is how to communicate the ways courts work and the central values and processes of the judicial system that do, or should, matter to the public. They believe that such communication can resist unjustified or personal attacks, respond appropriately to justified criticism and enable informed public debate.

These views reflect the fundamental commitment of the judiciary and the legal system to impartiality, rationality and the evaluation of evidence as core values. While this commitment may seem quaint or even archaic in the current ‘post-truth’ era,<sup>128</sup> these judicial and legal values are central to the legitimacy of the courts as a key democratic institution. Courts and the judiciary must develop ways to communicate effectively to diverse publics via varied media, if they are to engage effectively with the new public spheres where opinions and attitudes are formed and disseminated.

## VII APPENDIX: RESEARCH METHODS

This article draws on data developed through extensive national studies as part of the Magistrates Research Project and the Judicial Research Project of Flinders

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<sup>128</sup> See, eg, Oxford Dictionaries, *Word of the Year 2016* (2017) Oxford University Press <<https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016>>.

University.<sup>129</sup> Data from two particular phases of the research are used in this article: interviews of judicial officers and the national surveys.

### *A National Interviews*

The 38 interviewees include judicial officers from all levels of courts in every state and territory and CBD and regional locations (but not Commonwealth courts). Interviews ranged in length from 25 minutes to one hour 33 minutes; the average length of interview time was 53 minutes (median 51 minutes). Nineteen of the interviewees are men and nineteen are women. Seventeen of the interviewees are magistrates (ten women, seven men); the others are judges (nine women, twelve men). Interviews were audio-recorded, then transcribed within the Project to maximise accuracy and confidentiality. A second staff member checked the transcripts against the audio files. Two interviewees did not consent to the interview being recorded. Detailed notes were taken by the interviewer during these interviews and elaborated on and typed up by the interviewer immediately after the interview. All interviews have been anonymised and all identifying information removed.

The material used in this article generally came when interviewees were asked about awareness of public attitudes and confidence and media in relation to the courts, as part of a general question about possible changes in expectations for the judiciary.

After careful initial readings of the interview transcripts, categories or themes ('codes') were developed and entered into NVIVO 10 for analysis of perceptions of judicial and court engagement with various publics/audiences. As an additional check, to ensure all relevant parts of the transcripts were identified, keyword searches were undertaken across transcripts for words such as 'public', 'community', 'media', 'internet' etc. All identified text was then carefully re-read and compared against other text to locate additional emergent subthemes and patterns, as reflected in the structure and analysis in this article.<sup>130</sup>

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<sup>129</sup> Funding for the research on which this paper is based includes: a 2001 University-Industry Research Collaborative Grant with Flinders University and the Association of Australian Magistrates ('AAM') and financial support from the AIJA; an Australian Research Council ('ARC') Linkage Project Grant (LP0210306) with AAM and all magistrates courts; and three ARC Discovery Project Grants (DP0665198, DP1096888, DP150103663). We are grateful to Rhiannon Davies, Colleen deLaine, and Rae Wood for their contributions to this paper and to other research and administrative assistants over the course of the Judicial Research Project. All phases of this research involving human subjects have been approved by the Flinders University Social and Behavioural Research Ethics Committee. Further information about these Projects is available on the Judicial Research Project website: Flinders University, Judicial Research Project <<http://www.flinders.edu.au/law/judicialresearch>>.

<sup>130</sup> See Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 941–2; Anselm Strauss and Juliet Corbin,

### B *National Surveys*

Two of the authors developed, pilot-tested, and administered the National Survey of Australian Judges to all 566 judges throughout Australia in March 2007 with a response rate of 55 per cent. Similarly, the 2007 National Survey of Australian Magistrates was sent to all 457 state and territory magistrates throughout Australia, with a response rate of 53 per cent. The respondents are generally representative of the judiciary as a whole, in terms of gender, age and time on the bench. The two 2007 surveys are substantially the same, with some variation in questions to reflect the different work in the different levels of court.<sup>131</sup> Surveys were sent out to every judge and magistrate rather than to a random sample. The surveys used a mix of closed and open-ended questions to cover a range of topics relating to current position, career background and education, everyday work, job satisfaction and demographic information.

The data from the surveys and the interviews are not cross-linked. Surveys were anonymous; there was no identification or tracking of survey booklets or respondents. It is impossible to know who did or did not respond, so the interviewees were not and could not be cross-referenced in any way with the survey participants, who remained anonymous. It is not possible for the researchers to know if any of the interviewees responded to either of the surveys, though it is clear that only some interviewees would have been in judicial office at the time of the surveys. Any interviewee first appointed to the judiciary after 2007 would not have received a survey.

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*Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (SAGE Publications, 1990) 75–95; David Silverman, *Interpreting Qualitative Data* (SAGE Publications, 5<sup>th</sup> ed, 2014).

<sup>131</sup> Both 2007 surveys are based on the 2002 National Survey of Australian Magistrates.

