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Introduction

It is no accident that law and legal issues have increasingly become the focus of public attention. The rule of law as administered by an independent judiciary is an integral element of a modern democratic system of government. More than that, the administration of justice is a vital protection of individual and human rights. That protection, it is now acknowledged, forms part of modern democratic government. So it comes as no surprise to find that the work of the courts is the subject of close political and public scrutiny.

Yet, in my earlier days, there was an insistence on the separation of law and politics. That separation, never easy to maintain, is even more difficult to justify today. That is because law and politics, though different processes, are closely inter-related. On the other hand, politicians are quick to complain that activist judges are trespassing into the political realm. On the other hand, politicians regularly require the courts to give effect to their political policies, when they enact laws which the courts must enforce. Laws reflect policies, though some policies are more overtly and controversially political than others.

Difficulty arises when laws, based on politically expedient law and order policies, make use of the judiciary as an instrument in the imposition of harsh and oppressive sentencing régimes. That difficulty is by no means confined to Australia. It was the cause of a pronounced rift between the Conservative government led by Mr Major in the United Kingdom and the English judges in 1994-1996.

Draconian sentencing laws are often, if not always, associated with apprehension about an upsurge in crime and a perception that the courts are "soft" on crime. In other words, an apparent gulf opens up between the level of penalties imposed by the courts, as perceived by the public, and the level of penalties which the public believes to be appropriate. That apparent gulf may perhaps be explained by ignorance on the part of the public and sensationalism on the part of the media and political manipulation of basic facts and selected cases. What is important, however, is that we cannot expect a fair public debate in which both sides of the issues relating to punishment will be ventilated. Experience teaches us that, more often than not, politicians will endeavour to outbid each other in promising severe punishment.

That means that the courts, through no choice of their own, become the instruments of harsh punishment. To some extent, judges and magistrates can protect themselves by making it clear that they have no choice in the matter. But that leaves unsolved the problem of public misperception about the sentencing process and the apparent gulf to which I have referred.

The courts and public opinion

The relationship between the courts and public opinion, a topic largely ignored in the past, is becoming increasingly important. In Australia, we have not devoted sufficient thought to the relationship between public opinion and sentencing, a matter to which Lord Bingham LCJ has recently directed some attention in

England. This is another area of the law where the judges will find it necessary to explain to the public what their function is and what is involved. Judicial reticence is part of the problem.

In England, there is authority to support the proposition that sentencing judges are at least under a duty to consider the relevance of public opinion and to take account of it in sentencing.[1] In *R v Secretary of State for the Home Department; ex parte Venables and Thompson*,[2] the House of Lords was called upon to review the decision taken by the Home Secretary to set at 15 years the tariff for the two young boys Venables and Thompson who had been convicted of murdering 2 years old James Bulger. The trial judge had recommended 8 years and the Lord Chief Justice had proposed 10 years. In departing from these recommendations, the Home Secretary had taken into account public petitions and correspondence urging him to impose much sterner punishment. By a majority of 3 to 2, the House of Lords held that the Home Secretary had acted unfairly in taking these matters into account, drawing an analogy between the position of the Home Secretary and the position of a trial judge when passing a determinate sentence.

Two of the majority (Lord Goff of Chieveley and Lord Steyn) considered that public opinion is always a relevant factor in sentencing. They drew a distinction between public clamour that a particular offender be severely punished

[1] S. Shute, "The Place of Public Opinion in Sentencing Law" [19989] *Criminal Law Review* 465.

[2] [1997] 3 WLR 23.

(inadmissible) and public concern of a more general kind (legitimate).[3] Lord Steyn considered that sentencers could take account of general considerations such as "public confidence in the criminal justice system" as well as "public concern about the severity or lack of severity of sentences imposed on children for crimes of violence". However, his Lordship thought that sentencers were not entitled to take into account "a high voltage atmosphere" created by a newspaper campaign or a public demonstration.[4] Lord Hope, the other member of the majority, seemed also to take the view that there was a place for public opinion. On the other hand, the minority (Lord Browne-Wilkinson and Lord Lloyd of Berwick) thought that the distinction drawn between the two different classes of public opinion by the majority was unworkable.

Venables and Thompson have taken their case to the European Court of Human Rights, alleging, among other things, that the Home Secretary's right to set a murderer's tariff contravenes art. 6 of the European Convention. That article guarantees to a citizen who has a criminal charge brought against him "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

There are, of course, problems inherent in the English approach. First, there is the difficulty in the distinction which the majority in *Venables and Thompson* drew. Secondly, there is the problem of identifying public concern of a more general

[3] ibid at 41.

[4] ibid at 74.

nature, that is, the true state of informed public opinion. Thirdly, there is a need to state just how that state of public opinion should inform or confine the sentencing discretion. On any view, these are very considerable problems.

At the same time, we have it on the authority of Lord Bingham LCJ that the sharp rise in the use of custody by English judges that occurred after 1993 was probably a response to not just to legislation but also to highly publicised crimes, ministerial speeches and intense media pressure.[5] That statement may generate some misgivings because it suggests that English judges are susceptible to ministerial influence and media pressure. On the other hand, if judges are to take account of public concerns of a more general nature, may it not be appropriate for them to have regard to ministerial statements and to responsible editorials? I am not advocating an affirmative answer to that question. I am simply highlighting a conundrum.

Criticism of the courts and response to it

In Australia, more so than in England, judges have come under attack from politicians. The continuing campaign waged by Mr Ruddock, the Federal Minister for Immigration, against unnamed judges of the Federal Court, in relation to immigration decisions is perhaps the most striking illustration. What is the purpose of these criticisms? Is it to influence the making of decisions in future cases, perhaps even in appeals? One would hope not.

[5] *R v Brewster* [1998] 1 Cr App R (s) 181 at 184.

In earlier times one might have expected an Attorney-General to exercise an effective restraining hand. But those days are behind us. Indeed, when the Federal Attorney-General announced that it is not his responsibility to defend the courts, he effectively told his colleagues that they need have no concerns about his intervention.

At the same time the courts refrain from exercising the power to punish for contempt statements and actions calculated to influence the outcome of cases, recognising the importance of preserving freedom of expressions on issues of public interest. The courts and the judiciary now threaten to become a defenceless target. To make matters worse some politicians have strongly urged that judges should maintain silence in public and certainly on matters that have any political significance.

Taken to its logical extreme that view would deprive the judges of the right to respond to criticism, to explain what is involved in the sentencing process and to discuss the ramifications of stern sentencing régimes. That is because those régimes are now a central issue in contemporary politics and an issue about which, as I have said, the public is not fully informed. It seems to me that unless Attorneys-General do more to protect the judiciary from the criticism of their political colleagues, judges may have no alternative but to speak on their own behalf and on matters that are political simply because what the judges have done or are doing is the subject of political criticism. If the Attorneys won't do so, the judges may do so themselves, undesirable though that may be.

It is not feasible to suggest that the judges can always speak through information officers and, in the case of the High Court, the Federal Government has refused to provide additional funding for an information officer.

It has never been my view that an Attorney is under a duty to defend the judges whenever they come under criticism. Criticism may on occasions be justified. But when criticism is unjustified and it is damaging to public confidence in the judiciary, one would have thought that there was some role for an Attorney. Seemingly that is not the case. Indeed, there is little overt evidence to suggest that Attorneys now exercise an effective restraining influence on their colleagues.

Sentencing is the area above all others where the inter-action between the judges, the executive government, the media and public opinion is both fundamental and problematic. So it is there, rather than anywhere else, that we shall see the future shape of communications between the court and the community.

Mandatory sentencing

In various jurisdictions in Australia, following overseas examples, notably American, mandatory sentencing régimes have been introduced. I use the word "mandatory" to include cases where a court is required to impose a minimum sentence of imprisonment as well as cases where the court is required to impose a specific term of imprisonment.

Section 78A of the *Sentencing Act* 1997 (NT) is an instance of the first category. The section, which deals with property offences, deprives the court of a discretion to impose no sentence or a sentence less than that specified. The question then is whether the sentencing régime for which the Sentencing Act provides imposes on the courts a non-judicial function or interferes with the judicial function. Where a court finds a first offender over the age of 17 guilty of such an offence, the court

> "shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days".

A second offence results in a term of imprisonment for not less than 90 days and a third offence results in a term of imprisonment of not less than 12 months. Moreover, these sentences for property offences are not to be served concurrently with a term of imprisonment for another offence, whether it be a property offence or not.[6]

A person aged 15 or 16 found guilty of a relevant property offence is liable to a mandatory minimum sentence of 28 days' detention for one prior conviction.

The court's general discretion under s. 7 of the Sentencing Act, where a person is found guilty of an offence, to make various orders not involving imprisonment, is excluded. That is because s. 5 expressly states that it is

> "subject to any specific provision relating to the offence".

Section 5 is therefore subject to s. 78A.

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[6] s. 78A(3A).

Quite apart from the exclusion of the s. 5 discretion, s. 78A strips a court of part of the discretion which it ordinarily has in deciding what punishment or penalty is appropriate in the light of the offence and the particular circumstances in which it was committed. For the most part, legislatures, in leaving the courts with that discretion, have recognised that like offences, by reason of the differing circumstances in which they are or may be committed, may merit differential treatment by the courts simply because the different circumstances may reveal varying degrees of moral responsibility or blameworthiness.

Constitutional validity

Subject to constitutional limitations, the legislatures can confer on courts such jurisdiction and powers as the legislatures think appropriate. In the case of the High Court and the Federal Courts, Parliament cannot, under the Constitution, entrust them with the exercise of non-judicial functions (except when they are incidental to the exercise of judicial power) or interfere with the exercise of the judicial function. As a result of the decision in *Kable v DPP (NSW)*,[7] it seems that a similar restriction applies to State courts, though it is possible that the restriction may be qualified in some way. With Territory courts, the position is not finally resolved. But, having regard to the recent judgments in *Kruger v Commonwealth*,[8] we would be wise to assume that compliance with Ch III is requisite and that the legislature is subject to the limitation that applies to the High

[7] (1996) 189 CLR 51.

[8] (1997) 190 CLR 1.

Court and Federal courts, namely that a non-judicial function cannot be entrusted to the court and that the judicial function cannot be impaired. In *Kruger*, the High Court was evenly divided on the question whether the exercise of judicial power by Northern Territory courts was subject to the requirements of Ch III.

Do the considerations to which I have referred result in invalidity? The authorities indicate a negative answer to the question. First, there was the decision of the High Court in *Palling v Corfield*[8] in 1970. Under s. 49(2) of the *National Service Act* 1951 (Cth), a person who was convicted of the offence of failing to respond to a national service notice was liable to a fine ranging from $40 to $200 and, at the request of the prosecutor, an additional mandatory sentence of seven days imprisonment if the defendant continued to refuse to comply with the requirements of national service. The High Court was unanimous in rejecting an argument that the mandatory imposition of the additional penalty was a contravention of the separation of powers. The Court held that the sub-section did not confer part of the judicial power of the Commonwealth on the prosecution or constitute an interference with judicial functions or attempt to delegate legislative power to the prosecution. Legislative power by way of prescribing penalty was likened to the legislative power in determining the elements of the offence.

Barwick CJ stated -

> It is beyond question that the Parliament can prescribe such penalty as it thinks fir for the offences which it creates. It may make the penalty absolute

[8] (1970) 123 CLR 52; see also *Sillery v The Queen* (1981) 180 CLR 353.

> in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament."[10]

The Chief Justice concluded his remarks on this point by stating -

> "It is not ... a breach of the Constitution not to confide any discretion to the court as to the penalty imposed."

The Chief Justice also rejected an argument that it was the prosecutor who effectively imposed the sentence.

The other members of the Court expressed similar views. It would seem that *Palling v Corfield* denies that s. 78A is constitutionally invalid.

Before I deal with the next case *Wynbyne v Marshall*,[11] I should refer to a strand of thinking which surfaced in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (the Hindmarsh Island Case)*[12] and has played a prominent part in recent High Court cases, including, of course, *Kable*. In *Hindmarsh Island* the Minister appointed a

[10] (1970) 123 CLR at 58.

[11] (1997) 117 NTR 11.

[12] (1996) 189 CLR 1.

federal judge, under s.10 of the relevant statute, to deliver a report to him concerning the impact on aboriginal people of the proposal to construct the Hindmarsh Island Bridge. By majority, the High Court held that the section did not authorise the appointment. That was because, although the function, that of reporting, was given, not to a court but to the judge as a *persona designata*, the function was incompatible with the holding of judicial office under Ch. III of the Constitution. This was because the judge was undertaking an executive function and giving legal advice to the executive in making a report on a political matter. In reaching this conclusion, the Court had regard to the perception that judicial participation in that activity would endanger public confidence in the integrity of the judicial system.

Judicial pre-occupation with maintaining public confidence in the administration of justice in face of apprehended dangers has become a recurrent theme in recent times. Seemingly, it is a by-product of the decline in public respect for, and acceptance of, the decisions of institutions of authority, such as the courts, and the emergence of a climate of scrutiny of court decisions and willingness to criticise them. In the new climate, it is legitimate to take account of the impact on public perceptions in determining whether a function is compatible with the judicial function.

It was this proposition that lay at the root of the argument presented on the special leave application in *Wynbyne*. The applicant, a 23 year old aboriginal female from a remote Northern Territory community, who had committed no previous

offences, pleaded guilty to two offences, one of stealing a can of beer, the other of unlawful entry. She was sentenced to 14 days imprisonment pursuant to the mandatory sentencing requirements of the *Sentencing Act* 1995 (NT). The magistrate observed that, but for the mandatory requirement, a non-custodial order would have been made. The High Court refused the special leave application on the ground that the appeal did not enjoy sufficient prospects of success.[13]

It would be a mistake to place too much reliance on a decision refusing a special leave application made by two Justices. On the other hand, it would be a mistake of at least equal magnitude to regard maintaining public confidence in the administration of justice as if it were a free-standing criterion of constitutional validity. The judgment of Brennan CJ in *Nicholas v The Queen*[14] effectively debunks that view.

The last decision in the line of authority is the very recent decision of the Privy Council in *Browne v The Queen.*[15] In that case, it was held that it was inconsistent with the basic principle of the separation of powers which was implicit in a West Indian constitution based on the Westminster model, that the Governor-General, who was a part of the Executive, should have the task of deciding on duration of

[13] See transcript *Wynbyne v Marshall* D174/1997, HCA, 21 May 1998 (Gaudron and Hayne JJ).

[14] (1998) 173 CLR 173.

[15] *The Times* newspaper, 11 May 1999.

the sentence of a juvenile who was ordered to be detained at the Governor-General's pleasure.

It was held that Parliament could prescribe a fixed punishment to be inflicted on all those found guilty of a defined offence, such as capital punishment for the crime of murder. But Parliament could not, consistently with the separation of powers, transfer from the judiciary to any executive body a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. So detention during the Governor-General's pleasure was unacceptable because it amounted to detention at the discretion of the executive, thereby breaching the doctrine of the separation of powers.

Considered in the light of the authorities just discussed, s. 78A would not be objectionable on the ground that it violates the separation of powers. To deprive the courts of their entire sentencing discretion or part of it and compel them to apply a fixed rule is not, according to Australian and English authority, a departure from the general doctrine of the separation of powers.

Some may be surprised that the authorities provide no support for the proposition that the judicial function in sentencing necessarily entails a sufficient element of discretion which enables a court to differentiate between different degrees of blameworthiness. Mandatory capital punishment in earlier times was inconsistent with that broad proposition as indeed were the mandatory penalties prescribed in the 18th and 19th centuries for a broad range of offences. It is possible that

capital punishment might now be seen as an outmoded exception to what is a more desirable rule, namely that punishment for a criminal offence necessarily entails discretionary considerations, that being an element in the separation of powers, in particular the separation of the judicial power. Unfortunately, the cases do not lend support to this proposition.

The considerations already mentioned do, however, provide powerful arguments against the adoption of the mandatory penalty régime prescribed by s. 78A. As Barwick CJ pointed out in *Palling v Corfield*, it is unusual and undesirable to deprive the court of its discretion as circumstances alter cases and it has been the traditional function of the courts to make the punishment appropriate to the circumstances as well as the nature of the crime.

A law which insists on the incarceration of a first offender, more especially a young offender, for theft, no matter how trivial the amount involved, regardless of alleviating circumstances, is inhuman in this day and age. Some might describe it as a cruel and unusual punishment, to adopt the language of a Bill of Rights. A moment's reflection on the conditions which prevail in our prisons and on the character of some of their inmates is enough to lead inevitably to the conclusion that to send a youthful first offender for a trivial offence may well be a greater threat to humanity than the commission of the actual offence itself. There is no shortage of opinions from those experienced in the field of criminology who say that gaols are a fertile breeding ground of crime and that young offenders are at risk of becoming professional criminals as a result of imprisonment.

I am not alone in thinking that effort put into rehabilitation, rather than retribution and deterrence, is more likely to be cost effective and lead to a better world. With indigenous and younger people, restorative justice programs have much to offer. The restorative justice approach, particularly in relation to indigenous people, has been implemented by courts in Canada and New Zealand.

In expressing this view, I should make it clear that I do not assert that heavy or harsh penalties have no effect at all on the crime rate. That proposition has been asserted from time to time but its correctness has not, in my view, been demonstrated. Crime rates appear to have been reduced in California ("three strikes and you're 'out' or is it 'in'") and New York (where infractions of the law are vigorously enforced). Some have argued that, in these jurisdictions, other factors are responsible for the reduction in crime. For my part, I find it difficult to accept that a régime of heavy penalties will have no effect at all. Just how much effect is a critical question and that may depend upon a range of circumstances, including the nature of the conduct, the significance of the deterrent and the motivations of those who comprise the offending class. If the effect be slight, as may well be the case in this instance, the detriments would seem to outweigh the advantage.

A régime of harsh penalties brings other unwanted consequences in its train. The massive increase in the prison population comes at a high cost to the Budget. The increase must be funded by increased taxation or, more likely, at the expense of expenditure on other matters such as education, health and welfare. Other

consequences which I do not have time to mention are instructively discussed in the Forum on Mandatory Sentencing Legislation in the *University of New South Wales Law Journal* (1999) Vol 22 pp. 256 *et seq.* It should be prescribed as compulsory reading for all politicians.

Finally, on this topic, Draconian legislation of this kind strengthens my view that it is time that we joined the other nations of the Western world in adopting a Bill of Rights. The Law Council argues that the legislation contravenes treaties which have been ratified by Australia, including the UN Convention on the Rights of the Child. Article 37(b) of the Convention provides -

> "no child shall be deprived of ... liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be ... used only as a measure of last resort and for the shortest appropriate period of time."

There is also a suggestion that the legislation is inconsistent with the International Covenant on Civil and Political Rights which has also been ratified by Australia.

The Law Council claims that mandatory sentencing as applied to aboriginals contravenes recommendation 92 of the Royal Commission into Aboriginal Deaths in Custody, imprisonment being viewed as a sanction of last resort. Mandatory sentencing may well result in the imprisonment of an increasing number of aboriginals - they already constitute a disproportionate proportion of the Australian prison population.

I am not in a position to express a concluded opinion on the correctness of the Law Council's views except to say that they are views which certainly require

careful consideration. Our attitude towards asylum seekers and aborigines is attracting media attention outside Australia. One example was a prominent news item appearing in the "New Straits Times" in Malaysia on 17 June, which featured a report by Amnesty International, under the heading "Australia developing a culture of confinement, says Amnesty". The newspaper gave an account adverse to Australia of police detention of aboriginal child suspects. Once again, the report suggested that Australia was in breach of the Convention on the Rights of the Child.

I emphasise that I am not saying the report is accurate. I mention it simply because media coverage of this kind is damaging to Australia as it accuses us of lacking interest in human rights. Moreover, media coverage of this kind will undercut our position when we assert that others are failing to observe human rights obligations.

Guideline judgments

What I have already said naturally leads to mention of the introduction of guideline sentencing judgments by the NSW Court of Criminal Appeal on 12 October 1998 in *Jurisic v R*.[16] In that case, the Court took the view that the time had arrived for an increase in sentences for dangerous driving causing death or grievous bodily harm and indicated the level of sentence. In effect, the Court followed the practice that had been adopted earlier in England. Although the Supreme Court of Western Australia has refused in a number of cases to issue

[16] [1998] 101 ACR 259.

guideline judgments under s. 143 of the *Sentencing Act* 1995 (WA), it has issued guidance judgments which serve a related, though not an identical purpose.[17]

The *Jurisic* initiative was not an exercise of statutory authority pursuant to a provision such as s. 143; it was simply a judicial initiative, as was the English practice. The *Jurisic* initiative served several principal purposes. By evaluating current sentencing practices, in the light of statistical information collated by the Judicial Commission of NSW, the Court concluded that the courts had not altered their sentencing practices in order to adjust to the increase in maximum penalties specified in legislation. This conclusion enabled the Court to propose a new and higher level of sentences.

In issuing the guideline judgment, the Court was effectively responding to strong criticism of judicial inconsistency in sentencing. The guideline judgment creates a framework or order within which sentences may be determined. In that sense, it is partly prescriptive but it is flexible so as to allow for variation so as to fit the circumstances of unusual cases. The partly prescriptive character of the guidelines enhance consistency in sentencing. From the time of Aristotle onwards inconsistency in the imposition of punishment has been regarded as a badge of inequality before the law and of injustice[18] which leads to an erosion of public confidence in the administration of justice.

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[17] See N. Morgan and B. Murray, "What's in a Name: Guideline Judgments in Australia" (1999) *Criminal Law Journal* 90.

[18] See *Griffiths v The Queen* (1977) 137 CLR at 326-327 per Jacobs J; *Lowe v The Queen* (1984) 154 CLR at 610-611 per Mason J (dissenting).

Guideline judgments, though in practice partly prescriptive, are in essence indicative only, ordering rather than restricting the exercise of the sentencing discretion of the trial judge. By reason of that characteristic, guideline judgments are not legislative in character. Even if one concedes that every case is individual, whatever that concession may mean, it is appropriate that the exercise of the sentencing discretion should be principled and seen to conform to an overall consistent pattern.

Guideline judgments represent a significant advance in promoting consistency. Consistency may nevertheless be difficult to achieve because there are conflicting theoretical approaches to sentencing and a guideline judgment does not necessarily set these conflicts to rest, as *Jurisic* acknowledges.

One concern is that the guideline judgments will lead to harsher, not lesser, sentences. The answer to that question will depend upon the future shape of legislative policy. In appropriate circumstances, that policy could lead to lesser sentences. It should be acknowledged, however, that an overt judicial move towards lesser sentences may in the future be susceptible to criticism. This consideration could conceivably inhibit such a move on the part of the judges.

A final comment about *Jurisic* is that it places great weight on the importance of public opinion. That brings us back to the conundrum to which *Jurisic* did not return an answer. In *Jurisic* the judgment is founded largely on the Judicial

Commission's statistical information and the legislative increase in the statutory maximum penalties.

The right to silence and an accused's silence at the trial

The never-ending debate on the right to silence shows no signs of abating. I do not intend to enter into that debate on this occasion - it is too large a subject. But I should mention *Weissensteiner v The Queen*,[19] a majority decision of the High Court in which I participated. For the reasons given by the majority in that case, the decision is not at variance with the right to silence, when that right is properly understood. The accused's silence at the trial is not treated as an admission. Nor is it an instance of a shifting onus. It is simply a matter of making the inference of guilt otherwise to be drawn from the evidence less unsafe than it might otherwise possibly appear.[20]

Juries

A final word on juries. In England, the Government has signalled its intention to restrict the right of defendants to be tried by jury in certain classes of less serious offences including theft, assault and possession of drugs. Magistrates will be asked to assess the gravity of the offence and decide whether a crown court jury or a magistrate's court should be used to try the case. The "reform" may affect as many as 20,000 cases a year. The "reform" has been strongly criticised in the

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[19] (1993) 178 CLR 218.

[20] *May v O'Sullivan* (1955) 43 CLR 654 at 658-659 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ; *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR at 178 per Isaacs J ("the silence of the Company, and its failure to explain, materially weakens any attempt to suggest in its favour possible hypotheses of innocence").

media on the ground that juries ensure the connection between the people and the law and that the legal system should not become the exclusive domain of professionals. The proposal could be an omen for the future in Australia. We have a history of copying English "reforms". Unfortunately, from time to time we copy the unmeritorious ones.

I would not be averse to a review of the jury system. At least then we would have a basis for structuring reforms. As it is, any change to the existing system would proceed from a basis of assumptions, not demonstrated findings. As it happens, the English jury "reform", like other "reforms" to the justice system with which we are familiar, proceeds simply from a desire on the part of government to reduce expenditure on the administration of justice.