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Criminal Justice – Serving the Community or Giving the Community a Serve?

by

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CRIMINAL LAWYERS ASSOCIATION NORTHERN TERRITORY
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The Hon J Doyle, Chief Justice of South Australia

The courts of Australia, and the criminal law that they administer, exist to serve the community.

The courts serve the Australian community by administering justice according to law and, in the area of the criminal law, by enforcing a body of law that protects the community from wrongdoing. The criminal law reflects values that the Australian community accepts as of sufficient importance to warrant upholding them by force of law. The criminal law serves the community by protecting it and by upholding core values.

To administer justice according to law, there must be a reliable system for determining innocence or guilt and for arriving at an appropriate sentence when guilt is determined. There must be competent judges and lawyers. The judges and lawyers must understand how to reconcile the requirement of justice according to law and St Paul's warning that the letter kills, but the spirit gives life. True justice requires that these conflicting requirements be reconciled.

The criminal justice system of Australia satisfies these requirements. There is and always will be room for improvement. The justice system is a human institution, and those who administer it will always exhibit the frailties of the human condition. But our system is a sound one, and those who administer it are competent and honest. The system is fallible, but no system will be perfect.

The Australian public does not fully understand this, and some would not accept my conclusion. But, I suggest, the fact that our system is fundamentally sound in this respect is sufficiently non-controversial for me to move on to other matters. Even if you disagree with me, it is still worth considering other aspects of our criminal justice system.

The issue that I wish to address is the way in which we deal with the community when we administer criminal justice. In Australia do we administer criminal justice in a manner that reflects the fact that the courts and the legal profession serve the community? Or do we administer it in a manner that reflects an assumption that our power as judges and our skills as lawyers are such that we can treat the Australian public as serving us?

Some would express the issue that I address by asking, "Do we have a service charter and if we do, what is it?" At the last conference conducted by the Judicial Conference of Australia, at Uluru, Chief Justice Gleeson of the High Court of Australia spoke about "A changing judiciary". In the course of his paper he said that the judiciary does have a service charter. That charter is:

> "... to do right by all manner of people, without fear or favour, affection or ill-will."

Consistently with what Gleeson CJ said, the "Mission Statement" of the United States Court of Appeals for the Ninth Circuit states: "The mission of the Ninth Circuit Court of Appeals is to provide an impartial forum for the just and prompt resolution of cases through the uniform and coherent application of the Constitution and the laws of the United States of America."

I agree with what Gleeson CJ said, but I suggest that it is worthwhile directing one's attention to the manner in which the courts do right to all Australians, and more generally to the manner in which the criminal law is administered. The manner in which we administer justice will affect the public attitude to the criminal justice system. Public confidence in a sound system could be diminished by the manner in which the system relates to the community. And so I pose the question whether the manner in which criminal justice is administered reflects the attitude of a system that serves the Australian community, or a system that is giving it a serve?

This question is being asked in other legal systems. In an article "Modernising Courts or Courting Modernisation?" (*The International Journal of Public Sector Management*, Vol 13 No 5, 2000 pp 390-416) Professor Raine comments on changes in the manner in which the courts of England have begun to focus on the concept of service. He refers to a program to improve courthouses, then continues (at 396):

> "Quite as important as physical infrastructure, however, so far as 'doing it better' was concerned, was the new concern with customer care that simultaneously began to transform the way courts presented and conduct themselves, and which followed the general pattern of priorities in public service consumerism."

I found it interesting that his article canvasses many of the issues that I propose to raise.

In answering this question we must not ignore the principles on which our system of justice rests. We must also keep our feet on the ground.

When I refer to the principles on which the system rests, I refer in particular to the fact that judges administer the law. They are not there to please. Judges have to make decisions that will be resented or resisted. Judges have to apply laws that some people in the community do not respect or accept. I refer also to the independence and impartiality of the judiciary. These requirements, and the formality that attends the

administration of justice, sometimes require behaviour by members of the judiciary that to some Australians will at times suggest self-importance, or perhaps a lack of understanding of the human side of the law. I refer also to the need to do justice. Justice cannot always be equated with the most efficient way of deciding a dispute.

It would be wrong in principle to answer the question that I have posed on the basis that the courts and the criminal justice system are a service industry, and should operate according to a service charter. They are not there to please or to be popular. But that does not mean that our attitudes, and the way in which we conduct ourselves, do not matter.

As to keeping our feet on the ground, we also need to bear in mind that efficient and effective justice requires prompt despatch of the work of the criminal courts. It requires the parties to follow established rules for court procedure. It requires us to bear in mind that judicial and legal skills are particular to the task, and neither judges nor lawyers can be all things to all men. It requires us to bear in mind that the administration of justice is costly.

As Professor Raine said (at 398) in his article:

> "Undoubtedly there is an important place continuing 'the civilisation' of the courts and for 'doing it better'. But it is important that, in their eagerness to modernise to achieve greater user satisfaction and to extend consumer choice, the courts do not under estimate the risk of such a strategy to their reputation for authoritative adjudication between conflicting interests."

This is an important cautionary note.

Subject to being mindful of the principles on which the system of criminal justice is based, and being practical about what can be achieved, what would we look for in deciding if the criminal justice system is serving the community, or is giving it a serve?

I propose to focus mainly on matters that are under the control of the courts and to a lesser extent on things under the control of the legal profession, or things at least able to be influenced by the courts and the profession. I will confine my attention to the role of judges and lawyers, although at times what I say will touch on the activities of others. I will give more attention to the role of judges than to lawyers, reflecting my present role. I propose to ignore the substantive content of the law, and the fundamentals of the legal system. And, as you will realise, I confine my attention to the criminal justice system.

I propose to answer the question that is implicit in the title of my paper, by identifying some targets that should be the targets of a system of criminal justice that claims to serve the public. Not all of them are equally important, but each of them is important. In relation to some of them, performance cannot really be measured, but an informed observer can still make a worthwhile assessment. I will offer a brief assessment of our performance against each target, but you can make your own assessment, and I encourage you to do so. My main object is to encourage you to think about this aspect of the criminal justice system, to identify appropriate targets or measures and to reflect on the performance of the criminal justice system in your place of practice.

There is not time in this paper for me to suggest how shortfalls against the targets should be remedied. That is something for which the judiciary, the profession and the government each have a responsibility. I will be satisfied if I succeed in encouraging you to reflect on the performance of the criminal justice system in your own place of practice.

An accessible system of justice

A system of criminal justice cannot serve people unless it is truly accessible to them. A system that is not accessible closes the doors of the court to those who cannot get access.

The cost of legal services, and to a lesser extent court costs, are a real barrier to access to the Australian criminal justice system. Legal aid provides access to the poor and to the relatively poor. The willingness of the legal profession to provide services free of charge or at reduced rates provides access to many Australians, poor and not so poor, at least for the more serious matters. But for those in the middle, cost is a real problem, and cost is a real problem for the poor in relation to less serious matters when legal aid is less likely to be available.

Cost is a real barrier to access to the criminal justice system. The responsibility for this is not ours alone. Governments have a responsibility here, and it is one which they are reluctant to accept fully. As I said at the outset, there is not time for me to come up with solutions. But we must admit that the performance of our system in this respect falls well short of what, on any objective assessment, is desirable.

Accessibility includes matters such as the location of registries, the location of courts and of skilled lawyers. Judges and lawyers, like many essential services in Australia, are fairly centralised. Only the Magistrates Courts are widespread through Australia. The vast majority of barristers are located in capital cities, and I suspect that most of the highly skilled criminal solicitors are also. In this respect our system does not perform well, but in fairness it must be acknowledged that the trend towards centralisation of essential services is found in all aspects of Australian life.

Another aspect of accessibility is the ability of minorities, of people from outside the predominant culture, of people from non-English speaking backgrounds to overcome obstacles of language, of culture and of attitudes that may impede them

gaining access to the system of justice. Accessibility also includes the ability of people who are physically and mentally impaired to make use of the system of criminal justice. A system that does not address the difficulties encountered by such people is not accessible to them. A good many Australians fall within these categories. There has been a big improvement in this respect during my time in the law, although a lot remains to be done. A lot of attention is given to the needs of the physically impaired, and increasingly attention is being paid to the needs of those who are intellectually impaired. We are all much more aware of cultural and social barriers to access to the criminal justice system but a lot remains to be done to overcome them. However, in this respect I think that achievement against the target is reasonably good.

Overall, I regret to say that in relation to the target of accessibility, the performance of our system falls noticeably short of what one would wish for. We must acknowledge this and accept do everything that can be done to remedy it.

An effective judiciary

It goes without saying that our system requires a competent, independent and honest judiciary to administer justice. Australia has that. In this respect our standards are high, and the community is well served.

But more is needed.

The judiciary needs to understand the community to which it administers justice. I think it does. The community must have confidence in its judiciary. Again, I think it does. But this confidence is not something to be taken for granted, and is at risk of

being eroded by the public's inadequate knowledge and understanding of the judicial system. The traditional approach has been to rely on the fact that our judgments are there to be read, and the doors of the court are open to such of the public as wish to come and observe. In this way we are open to scrutiny, and we believe that those who observe our work will have confidence in us. This approach no longer suffices. To maintain and to enhance community confidence we have to re-think the way in which we inform the community about what we do, and why we do it. Otherwise ignorance about our work will erode community confidence.

To serve the Australian community, the judiciary must enhance community confidence. It must take active measures, using such resources as it has, to inform the community about its work.

The same is true of the legal profession. It also needs the community's confidence to function effectively. It needs to inform the community about its role.

The system must have a judiciary in which the community has a stake. Australians would not accept a system of justice run by a class or cast in which they believed they had no stake. For many Australians, the judiciary are recognisably from the same community. That gives those Australians a sense of a stake in the judiciary. But some parts of the community are under-represented in the judiciary. This is something that needs to be watched, as Australia becomes more diverse. I am not suggesting that the membership of the judiciary is, or should be representative of, the make up of Australian society. I do not accept that notion. But if parts of the community think that they have no stake in the process, their confidence will be tested. We need to show that we understand the point of view of those who might feel excluded, and we must administer justice in a manner that gives them a chance to put their case in a way that they will regard as fair, subject always to the proviso that we cannot compromise basic principles. A system that really serves its community will

work at this, and will recognise the importance of demonstrating that it listens to those who might feel excluded.

The system must have judges and lawyers who conduct proceedings efficiently, fairly and politely. By and large our system is efficient and fair. But the way in which judges and magistrates and lawyers conduct themselves is important. The judiciary must recognise that people who pass through the courts, as litigants or witnesses or just spectators, are not being granted a favour by judges and the legal profession, but are exercising their rights, assisting the administration of justice, or observing the administration of justice as a matter of right. From the occasional complaint I receive, from things members of the legal profession tell me, and from things I pick up at times in the community, my impression is that there are a few judges and magistrates whose treatment of people is at times unsatisfactory. Sometimes it is merely bad temper and impatience, and at times most of us are subject to that. At times things I hear about reflect an attitude that the system should function in a way that suits the judge or magistrate concerned, rather than an attitude that the judge or magistrate is serving the community. The number of judges and magistrates who treat people poorly is few, but there are enough such incidents to cause concern. At present, our system provides no effective way of dealing with this problem. The manner in which lawyers treat people is equally important, although we all recognise that our adversarial system at times requires lawyers to act in a manner that may discomfort people.

A judicial system that is concerned with the manner in which it dispenses justice, and how it treats people, will have a strong commitment to the continuing education of the judiciary. I mean education in the broadest sense. Such education is not confined to black letter law, but embraces all the practical skills that a working judge or magistrate needs in the courtroom, case management, communication skills and the like. In this respect the performance of our system is not adequate. Valiant efforts are made by committed judges and magistrates to provide continuing judicial education,

but there is not a strong enough commitment to continuing education across the system. This is largely due to a lack of resources. At this stage only New South Wales has an established institution, funded as such, with the function of providing judicial education. Our tradition has been that the forensic process keeps the judiciary up to date, aided by reading judgments and by the corrective effect of the appellate process. I doubt whether this was ever enough, but I am confident that today more is required. Common sense tells us that a judicial officer can continue on automatic pilot, learning little new and changing less, without any great difficulty. Unless judges and magistrates are exposed to good quality education, and urged to avail themselves of it, the system will suffer from having in it judges and magistrates whose skills are not kept up to the mark.

Australia's Attorneys-General are shortly to consider whether to establish and to support a national Judicial College. If they do, they will be remedying a significant defect in our system.

I believe that we should go further. We now understand how important communication skills are in a discipline like the law. We also know that in the past no training was provided in this area. Lawyers were left to pick up communication skills as they went. My impression is that not much training is provided in this area even now. I am sure that all here have seen examples of judges, magistrates and practitioners whose communication skills are not high. I am using communication skills in the very broadest sense here, to include the way in which the judiciary and lawyers deal with people, and the way in which they impart information to them. I believe that some system of performance review should be established, which would help judges and magistrates improve this vital aspect of their work, and help them serve the community better in this respect.

An effective legal profession

A competent and upright legal profession is as essential to the common law system of justice as is a competent and upright judiciary.

Australia is well served in this respect. The academic training of lawyers is of a high standard. The practical training is good, but there is some cause for concern, mainly because of the difficulty of providing sufficient practical training to the large numbers of people coming into the profession. Practical training requires substantial resources. A system that aims to serve the community will ensure that new entrants to the profession are fully trained to take their place in the profession. I doubt whether the legal profession as a whole is doing as much as it could or should in this respect. I suspect that much of the burden is borne by a relatively small part of the profession.

As with the judiciary, I doubt whether our professional training and, by and large, the approach to practice of the legal profession, is as strongly founded on an attitude of service as it should be. I am not talking here about legal skills, or ethical obligations. I am referring again to the attitude that clients and others involved with the legal profession have been done a favour, rather than the attitude that the profession serves them by helping them exercise their legal rights and by involving them in the legal process. Sometimes I see indications that the legal profession regards the legal system as its domain, and acts as if access and involvement of others is not as of right, but by favour. This shows through in certain ways. Many complaints about lawyers stem from poor communication with the client and others about what the lawyer is doing, and a failure to explain fully and realistically what the client's position is. I hear such complaints not only from clients, but from others, such as witnesses who are brought to court complaining that their convenience did not receive reasonable consideration and that their part in the process was not adequately explained to them. I think that a system committed to the service of the Australian public would ensure that more

emphasis was placed on professional training on the treatment of clients and others with whom lawyers deal.

A particular problem, to my mind, is an attitude to case management on the part of a profession, that rests on the assumption that cases will move through the system at a pace dictated mainly by the readiness and availability of the lawyer. I suggest that one of the problems with our present case flow management is that the legal profession does not accept a shared commitment with the judiciary to dispose of cases in the least time consistent with the interests of justice. In saying this I recognise that in my own time in the profession we did not fully appreciate how the quality of justice erodes with the passage of time, and how costs increase the longer a case remains in the system. These things are now understood. But it seems to me that there is still lacking a thorough commitment to moving cases through the system as quickly as practicable. The profession does not see this as a basic responsibility that they share with the judiciary.

An effective jury system

The involvement of the community in the administration of criminal justice through the jury is a fundamental feature of our system. The jury system has a number of benefits. The involvement of the community in the administration of justice should enhance confidence in the administration of justice. The jury enables community standards to be brought to bear on the administration of justice. The presence of a jury forces us to explain the law in terms intelligible to the community, and this is a corrective against over complication of the law. The jury system comes at a cost. It

costs money to administer the jury system, and trials move a little more slowly than they would without a jury. But the cost is worthwhile.

A system that really serves the people will have a strong commitment to the role of the jury. That does not mean that such a system will not contemplate changes. For example, trial by judge alone, at the election of the defendant, is probably a reasonable choice in certain circumstances. But we need to be very careful not to erode the central place of the jury. However, I think that this system is falling down in two respects that could damage the role of the jury in the longer term.

Jury directions are getting longer and more complex. Some of this may be due to a lack of confidence in the common sense of jurors, and some of it may be due to a misguided belief that explaining everything in more and more detail will produce more reliable verdicts. Increasingly complex criminal legislation plays its part, because some of this legislation is drafted in a manner that ignores the fact that it has to be explained to and applied by a jury. I think that we are also witnessing an undesirable aspect of the increasing role of appellate courts in the criminal law. I have no doubt that appellate courts have rooted out some past practices that deserve to be rooted out. But I suggest that appellate courts are, at times, putting too much faith in more, and more detailed instructions, to juries. There is no doubt that appellate courts are playing a much more greater role in the criminal law than in the past. A glance at the index of any general series of law reports will show the substantial increase in the number of criminal appeals in the last thirty years.

We may be hampering the jury system by burdening jurors with charges that are counterproductive in their detail. We are giving jurors an amount of information that cannot be absorbed.

I also believe that we are being too cautious in our approach to communication to juries. Not much has changed in the last century or two. The process is still one in which witnesses, lawyers and judges speak to a jury, the jury taking such handwritten notes as they think appropriate. We make very little use of modern aids to communication. We have not paid a great deal of attention to the latest learning about means of communicating information.

A system committed to service its community will value the role of the jury very highly. Our system does this, but I believe that in practice it deals with the jury in a way that does not fully reflect the belief that it professes.

Proper treatment of court users

Court users come in many forms. They may be an accused, the victim, a witness, a solicitor, a spectator, a journalist.

Our tradition is one in which, by and large, they were left to fend for themselves, unless participants in the trial process itself. Things are changing, because the community no longer accept this.

Society now recognises the importance of support services of victims. We recognise that court staff at the court and in the registry should be friendly and helpful, that adequate information should be available about the legal process, that people coming to court should be told what to expect, that court premises should provide adequate facilities for people who come there, that people should be treated helpfully and courteously when they come to court and so on.

A courthouse and its registry are not a department store, or a government department providing a service. But we can learn something from each of these

activities. From the retail trade we can learn that how people are treated is important, and will affect their perception of the process. From government departments, and many large businesses, we can take note of the significant effort often made to explain what they do and the service they provide.

A person who leaves court feeling badly treated, is likely to have a poor impression of the administration of justice, regardless of the quality of the decision ultimately reached. I do not mean here a witness whose testimony was rejected, or that sort of thing. I mean, for example, a person who was kept waiting, in uncomfortable circumstances, without any adequate explanation, and was never thanked for coming to court to present his or her testimony. A system that serves the community will be concerned to ensure that participants do understand the process in which they are involved, and to ensure that participants are treated with appropriate courtesy and consideration.

We have a lot of work to do here. The work has to be done by court staff, by the judiciary and by the profession. The community is quite critical of us in this respect. We are improving, but the judiciary and the profession in particular need to focus much more on the needs and rights of those involved in the process.

A system whose rationale is justice and fairness should treat people as well as it can.

Adjusting to change

A system that is committed to serving society will make sure that it adjusts appropriately (I emphasise appropriately, and I am not suggesting unthinking change) to changes in society. Such a system will identify matters that it no longer handles well, and will endeavour to adjust accordingly.

Much of what I have said so far has been about recognising changes in society and the environment in which courts operate, that call for a changed response from the courts. We must be alert to change, and consider what response if any that calls for from us. Information technology is an obvious example. Developments in information technology call for the transformation of many of our processes, and from a move away from a paper based system. In this respect we are in the same position as any large business. If we resist change, we will marginalise ourselves.

Recording and reporting on our work

Governments have an obligation to provide the funds required for an effective system for the administration of justice. Such a system must be funded to meet the needs and reasonable expectations of the community. Governments can be reluctant to do this at times. There are no votes in courts. The legal system has to compete for funding with other claims on public money. We need to explain to governments the sort of community expectations that we should be able to meet, and we need to make a proper case for the funding to do so.

To make out a case for funding, we have to provide adequate statistics about the workload of the courts and appropriate information about the courts. The measurement of the work of courts is a discipline still in its infancy. Figures from State to State are not comparable, and much of the data collected in particular States is of questionable reliability.

A system that aims to serve its community will collect the statistics and information about the performance of the system that will enable it, to the extent that one can tell from statistics, to determine where the performance of the system is falling down, and to take remedial action. I am referring here mainly to statistics that will

identify where unacceptable delay is occurring, and where workloads are building up in a way that call for additional judicial resources. A system that aims to serve the community will also ensure that it reports on its performance to governments in a manner that will support the funding that is required to enable the system to meet community expectations. A system that fails to make an appropriate case for the required funding is not really meeting the needs of the community, because it is failing to do all that it reasonably can to secure the necessary resources. Of course, there is a limit to what those involved in the criminal justice system can do. If governments will not provide the required funding, the criminal justice system cannot be blamed.

A system that serves the community will also avoid the danger of purporting to measure justice by measuring outputs. It will resist any suggestion that one can do that. Courts in particular must be mindful that the setting of performance targets can make it easy to ignore important things that cannot be quantified. And in the area of the administration of justice, the information that is provided by measuring performance against quantifiable targets is limited. As we well know, some aspects of justice are completely unquantifiable.

A system that serves the public will, therefore, keep itself adequately informed about its caseload, about how long it is taking to dispose of it, and will report to the government and to the public about these matters. But such a system will not forget that things like this that can be measured and reported are only one part of the picture.

Communicating with the community

Courts and a criminal justice system committed to serve the community will, I suggest, put considerable importance on informing the community about their work. After all, if we are performing a function that is an essential part of the structure of our

society, and that is at the heart of the wellbeing of the society, we should want the community to know about our work.

In this respect the system has not performed well in the past. I have touched on this already. We have left it almost entirely to others to tell the community about the work of the Courts and the working of the criminal justice system. We have not seen it as our obligation to provide the community with information, as distinct from allowing the community to come and find out.

With advances in technology there are now available to us means to communicate much more widely with the community than ever before. And Courts are beginning to take steps to make better use of the media to communicate with the community. The legal profession is also making efforts in this direction. But, as in other areas, I believe that our criminal justice system has not yet fully faced up to this issue, and to the importance for community confidence of improving communication with the community, and to the point that the community has a right to be well informed about the criminal justice system, and that we have a part to play in informing the community.

The courts and the profession cannot do this alone. We need to persuade governments of their obligation to do much more in this regard.

Conclusions

I have distinguished between the soundness and reliability of the criminal justice system, and the manner in which it relates to the community and deals with those who encounter it. I have argued that in this respect, serving the community has a different meaning from the meaning it has when we decide cases and apply the law. I have argued that we can identify targets or standards that are indicative of an attitude of

service, and we can measure our performance against them, even though they will usually be qualitative. Our system is changing, is serving the community, but has plenty of room for improvement.