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SHOULD JUDGES SPEAK OUT OR SHUT UP?[Ä]

Hon Justice Margaret McMurdo[Y]

This question, always a tricky one for judges, has become of wider community interest following recent criticism of Justice Kirby for his comments about inadequate funding of public secondary education and magistrate Ms O'Shane for her statement that "a lot of" women manufacture sexual allegations. We all tend to think a judge who speaks out was right to do so if we agree with the sentiments expressed; if not the judge should have shut up! But like life and truth, the answer, if there is one, to the question posed in the title to this address, is not so simple.

One view of the judiciary during the early part of the 20th century was that judicial appointment brings with it substantial retirement from the world and a degree of public and social isolation so that the judge could not be said to be compromised.[1]

In 1955, the Director-General of the BBC suggested to the Lord Chancellor, Lord Kilmuir, that senior judges participate in radio programs about great judges of the past. The Lord Chancellor's response became known as "the Kilmuir Rules" and provided guidance to English and other common law judges as to if and when they should speak publicly outside the courtroom. In essence he refused the BBC request because of:

> "the importance of keeping the Judiciary … insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism. It would moreover, be inappropriate for the judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment: and in no circumstances, of course, should a Judge take a fee in connection with a broadcast.

⊗ This address is based in part on my paper "Should Judges Speak Out" delivered at the Fifth Judicial Conference of Australia Colloquium, 9 April 2000.

Ψ President, Court of Appeal, Supreme Court of Queensland.

1 Thomas JA, *Judicial Ethics in Australia*, 2nd ed, 1997, 93-94.

> . . . as a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or to appear on television. . . . there may be occasions, for example charitable appeals, when no exception could be taken to a broadcast by a Judge. . . . if Judges are approached by the broadcasting authorities with a request to take part in a broadcast on some special occasion, the Judge concerned ought to consult the Lord Chancellor who would always be ready to express his opinion on the particular request.
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> (This) . . . is subject to the important qualification that . . . the Lord Chancellor has no sort of disciplinary jurisdiction over Her Majesty's Judges, each of whom, if asked to broadcast, would have to decide for himself whether he considered it compatible with his office to accept."[2]

I forgive Lord Kilmuir his exclusive use of the male pronoun for in 1955 there were no women judges in either England or Australia. That was the year that Anthony Eden replaced the 80 year old Winston Churchill as British Prime Minister; the Cold War hotted up with the USSR; South Vietnam was proclaimed a republic; Annigoni painted his classic portrait of the cloaked, beautiful young Elizabeth II; Vladimir Nabakov wrote *Lolita* and Lawrence Olivier produced and starred in his classic film adaptation of Shakespeare's "*Richard III*".

There has been enormous social change since 1955 and this has been reflected in the judiciary.

By 1984 Lord Kilmuir would have noted with Orwellian horror a divergence of opinion amongst Australian judges as to whether communication with the public through the media was appropriate. Journalist Robert Thomson, in his book *The Judges*[3] records that he wrote to 150 judges that year seeking interviews. Significantly, eight heads of jurisdiction and fifty judges agreed to participate. Mr Thomson notes:

> "The judges who did agree to be interviewed self-evidently disagree with the code of silence implicit in the judicial code of ethics. Of those, some came out part of the way, and were happy to be interviewed as long as their oral statements could not be sourced to them … . A proportion were prepared to be interviewed and identified. The view of the interviewed judges was that media contact was not necessarily wrong, but controversy must be avoided."

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[2] Thomas JA, op cit, fn 1, 307-308.

[3] Allen & Unwin, 1988, 25-29.

All seven High Court judges declined to be interviewed.

But a decade later, in 1995, ABC's *Four Corners* secured an interview with the retiring Chief Justice of the High Court of Australia, Sir Anthony Mason. Since then other serving High Court judges have been interviewed by the ABC about their lives and the general nature of their work as High Court judges.

In the United Kingdom, when Lord Mackay became Lord Chancellor in 1987, he stated the Kilmuir Rules should be abolished.[4] Indeed, so far have United Kingdom judges now moved from the Kilmuir Rules that the Lord Chancellor's Department Press Office issues them with a 75 page booklet *The Media. A Guide for Judges* which

- encourages judges to report false or unfair reporting or harassment to the Press Complaints Commission or the Broadcasting Standards Commission or to demand corrections from the media as appropriate.
- advises that serious mis-reporting should be immediately notified to the presiding judge or head of division so that consideration can be given as to whether the Press Office should issue a statement.
- gives advice on handling "door stepping", the practice where reporters call out questions as you enter or leave a building or car.
- gives helpful tips on participating in interviews: look at the interviewer, not at the camera; accept the offer of powder for your face and sit on your jacket tail to prevent unsightly bunching of the jacket at the neck and shoulders.
- gives other useful advice including what action to take if you consider you have been seriously libelled by the media.

The issue of a judge's right to speak out has been considered at international level. On 4 July 1988, the Basic Principles on Independence of the Judiciary were adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders and includes the following:

> "**Freedom of Expression and Association**
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> 8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens,

[4] Thomas JA, op cit, fn 1, 104; the Kilmuir Rules were invoked as recently as 1985: see "Extra-Judicial Utterances", New Law Journal, Vol 136, No 6243 February 28, 1986, 177-178.

> entitled to freedom of expression, belief, association and assembly, provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

Similar sentiments are contained in the Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia region.[5]

A major reason for the modern relaxation of the Kilmuir Rules' recommendation for judicial silence is that the once rare public criticism of judges has become commonplace and the traditional defence of judges by Attorneys-General has become rare. If judges are unfairly publicly attacked, they may no longer be able to look to the Attorney-General for support.

In England and Wales and some other Commonwealth countries, the role of the Attorney-General is restricted to legal advice to the government, representing the government in court, exercising ultimate control over major prosecutions and discharging special legal functions of the Sovereign. In England and Wales the Attorney-General does not have ministerial responsibility for a government department and has not been a member of Cabinet since 1928, with ministerial responsibility for the administration of justice vesting in the Lord Chancellor and the Home Secretary, both of whom are members of Cabinet.[6]

In Australia, however, the Attorney-General has always been a member of Cabinet and often holds other portfolios. The Attorney-General in Australia, therefore, exercises executive and political power and additionally makes decisions in the exercise of an independent judgment, for example, whether or not to prosecute criminal cases; to institute and prosecute proceedings to vindicate public rights or to enforce the law; or to present *ex officio* indictments.[7] The Attorney-General also has the critically important role in government of political guardian of the administration of justice which includes responsibility for

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5 See especially paras 5 and 8.

6 Hon L J King AC, QC, *The Attorney-General, Politics and the Judiciary*, 74 ALJ 444, 445-446, an edited version of a paper delivered to the 4th Annual Colloquium of the Judicial Conference of Australia, Melbourne, 13 November 1999.

7 *Barton v The Queen* (1980) 147 CLR 75.

law reform, the funding of the courts and the judicial system;[8] many understandably argue this includes the defence of judges and the judicial system against unfair criticism.

Sir Anthony Mason, after unprecedented attacks upon members of the judiciary and especially the High Court following the *Wik* decision, said that on occasions the Attorney "should respond to irresponsible criticisms which threaten to undermine public confidence in the judiciary".[9]

The current Federal Attorney-General, Mr Daryl Williams takes a different view, contending that:

> "… such a view ignores the contemporary role of an Attorney-General and ignores the real risk of a conflict between the interests of the judiciary and the executive interests of the government of which the Attorney-General is a member. Attorneys-General, as members of governments, are politicians. An Attorney-General cannot simply abandon this role and expect to stand as an entirely independent defender of the judiciary. In fact, it has never been clearly articulated or accepted that Australian Attorneys-General do have such a duty. Arguments that an Attorney-General should defend the judiciary and has an obligation to do so is an outmoded notion which derives from a different British tradition. … As I have consistently stated, it would seem to me more in keeping with the independence of the judiciary from the executive arm of government that the judiciary should not ordinarily rely on the Attorney-General to represent or defend it in public debate."

Mr Williams nevertheless acknowledges:

> "… that where sustained political attacks occur that are capable of undermining public confidence in the judiciary it would be proper and may be incumbent upon an Attorney-General to intervene."[10]

Perhaps the difference between the Mason and Williams view is one of emphasis rather than principle; nevertheless the effect of Mr Williams' stance is to minimise

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8 Hon L J King, op cit, fn 6, 454.

9 Hon A. Mason, *No Place in a Modern Democratic Society for a Supine Judiciary*, (1997) 35 (11) Law Soc J, 51.

10 Williams, *Judicial Independence* (1998) 36 (3) Law Soc J, 50-51; Williams expressed similar sentiments in opening the Fifth Judicial Conference of Australia Colloquium, Uluru, 7-9 April 2001.

the role of the Attorney-General in defending the courts and judiciary from misinformed attack.[11]

Chief Justice Brennan, like his predecessor, saw the judiciary and the public as entitled to look to the Attorney-General to explain publicly the nature of the judicial process and repel attacks on the reputation of the judiciary based on grounds irrelevant to the application of the rule of law; the Attorney should explain that the courts must apply the law whatever the consequences; the facts of each case, not policy considerations, govern the exercise of judicial discretions, including sentencing, which are dutifully exercised by judges without any political agenda. Sir Gerard accepted nevertheless that "[t]he judiciary … no longer expects the Attorney-General to defend its reputation … ."[12]

Sir Gerard's successor, Chief Justice Gleeson, has recently acknowledged that from time to time it will be necessary for Chief Justices to respond to criticism of judgments or judges when response is necessary and the Attorney-General does not respond.[13]

Another significant reason for judges to communicate with the public by speaking or writing extra-judicially is to foster confidence in the courts by ensuring the community understands the role of the judiciary as an essential arm of democratic government and the role of judges in administering justice according to law. Public confidence in and understanding of the judiciary, even when judges make unpopular decisions, is the essence of what Chief Justice Gleeson refers to as judicial legitimacy.[14] I am not suggesting judges neglect their core duties to join the lecture circuit or, dare I say, become media tarts. We are far too busy judging! Chief Justice Gleeson wisely cautions that true public confidence must be earned by the regular work of judges in the court room. Judges perform publicly in the hearing of cases and in the publication of reasons. This is our greatest opportunity to communicate courteously and rationally with court users and the public. Similarly, Thomas JA, in his important work *Judicial*

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11 Hon L J King, op cit, fn 6, 457.

12 Brennan, *The State of the Judicature*, (1998) 72 ALJ 33.

13 Henderson I “Gleeson vows to defend Judges”, *The Australian*, 25 June 2001.

14 Gleeson, *Judicial Legitimacy*, Australian Bar Association Conference, New York, July 2000.

Ethics in Australia[15], emphasises that judges earn respect in the court room and this is best fostered by fuller and fairer reporting of court decisions.[16]

But is this enough? Should judges do more to publicly explain the judicial system through speeches, media interviews and articles? Some would answer "no", arguing that for a judge to discuss the judicial function is to emphasise the individual personality, the very thing the legal process and court dress aim to diminish.[17]

Whilst conscious of that danger and appreciating that judicial legitimacy is best and primarily maintained by judges publicly performing their core function, the delivery of timely justice according to law, I believe the community can only benefit from judges who make the time to enhance public understanding of the role of the judiciary and the courts. This is done primarily by heads of jurisdiction through useful extra-judicial speaking and writing but other energetic judicial officers can also assist by taking part in activities such as addressing school and community groups or perhaps in granting a media interview whilst on circuit.

Any doubts about the need for judges to better communicate with the public are quickly dispelled by the judge jokes from the *Penguin Book of Australian Jokes*.[18] The section commences with:
"What do you call a bigot in a wig?
Answer: Your Honour."

The penultimate joke is:
"What do you call fifty sexist, racist judges stuck at the bottom of the ocean?
Answer: A bloody good start."

In between are jokes like:
"What is black and angry and going nowhere?
Answer: An Aboriginal Australian expecting a fair trial."

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15 2nd ed, LBC Information Services, 1997, 107.
16 Thomas JA, op cit, fn 1.
17 Dawson, *Judges and the Media*, University of New South Wales Law Journal, 1987, Vol No 1, 17-18.
18 Adams and Newell, *Penguin Book of Australian Jokes*, Penguin Books Australia, 1994, 273-276.

And "Why is an Australian judge like Halley's Comet?
Answer: Because they've both spun out of touch with the real world."

Or "Why did the judge stop his wife plugging in the iron?
Answer: Because he couldn't cope with a woman being close to power."

We judges do not find them very amusing !
Professor Stephen Parker's AIJA Report *Courts and the Public*,[19] in a rather more rational way, highlights the need for better judicial communication with the public.

My Court facilitates full and fair reporting of decisions by publishing, on the Internet, reserved judgments and *ex tempore* judgments in matters of public interest on the day of delivery, providing ready access to judgments for the profession, the media and the public and by preparing judgment summaries in significant cases. Many courts, including mine, provide information pamphlets to court users, especially unrepresented litigants, and facilitate school visits to courts, information days and so on. Most jurisdictions use community liaison officers to assist in this function for the demands of a heavy judicial workload do not leave time for public relations work and nor are we judges appropriately trained. Indeed, our mistrust of the media tends to exacerbate the inevitable, indeed necessary, tension between it and the judiciary. Regrettably, the Queensland court system is the only comparable one in Australia not to have been provided by government with a community liaison officer.

Additionally, it is generally agreed that judges have wide licence to speak and write on matters which involve the administration of justice and the rule of law, to advocate measures conducive to its maintenance and improvement and to oppose policies which undermine it. It is on this basis that many judges have publicly opposed issues such as mandatory sentencing.

Despite the 1955 Kilmuir Rules, few Australian judges would today feel obliged to refuse a request to participate in a radio or television program about great judges from the past or a host of other issues, though many would still decline the

invitation. Of those who accept, most would first discuss the invitation with their head of jurisdiction and would generally, consistent with the Kilmuir Rules, refuse any fee or donate it to a respected charity to avoid any suggestion of compromise. Judges who do speak out should be cautious to observe the following principles.

First, a judge should not engage in public discussion about a case which the judge is hearing or in which the judge has delivered judgment. A case is heard and decided upon the material before the judge in open court; the judge gives public reasons for the decision which is usually subject to an appeal process. Public discussion by the judge risks the appearance of involvement of extraneous considerations and may obfuscate the judicial reasoning process. The reporting of misrepresented facts can, if necessary, be publicly corrected by the Attorney-General or the head of jurisdiction.

Second, if speaking or writing extra-judicially, judges must be cautious not to breach the doctrine of the separation of powers. In Australia, the judiciary is not elected and it is for the legislature to enunciate policy and the legislative means to achieve it. The judiciary's role includes the interpretation of laws passed by parliament and it is essential to a working democracy that the legislature respect judicial independence. In return, the judiciary must respect and be seen to respect, the autonomy of the legislature and executive. It would be quite wrong, for example, for a judge to be a member of a political party or to publicly support a political candidate.

Third, judges' public pronouncements must not lead to a perception of bias or lack of impartiality which could require judges to withdraw from cases. This is especially problematic in country areas where the provision of a substitute magistrate or judge can be costly and inconvenient.

It is interesting to consider the application of these principles to well known examples of extra-judicial statements or judicial silence.

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[19] Parker, *Courts and the Public*, AIJA, 1998.

Mr Justice Thomas Berger of the Supreme Court of British Columbia in November 1981 publicly criticised two features of the constitutional accord reached between Prime Minister Trudeau and the Premiers of nine provinces, namely the failure to guarantee native rights and the denial to Quebec of a veto over constitutional change. Public outcry resulted in a committee of investigation into his comments. The committee delivered a unanimous report which concluded that although Mr Justice Berger's conduct warranted removal from office, such a severe sanction should not be invoked because the standards of judicial propriety had not previously been enunciated. The committee's report was released to the press and just over a year later Mr Justice Berger resigned.

Some have argued that Mr Justice Berger was treated unfairly; judicial comment on constitutional matters is legitimate because the constitutional structure defines the duties and powers of all branches of government; judges have a unique perspective on constitutional issues which cannot be represented by the legislature alone.[20]

It seems to me Mr Justice Berger was entitled as a citizen, judge and lawyer to contribute to the debate on constitutional issues whilst it was the subject of community consultation. His error was in criticising the final form of the accord after its approval by the legislatures; this understandably transgressed the doctrine of the separation of powers.

Closer to home, Justice Kirby, in his address earlier this year on the occasion of his receipt of an honorary doctorate from the University of South Australia, supported a more generous allocation of the education budget for public schools. This view was shared by the federal Opposition although Justice Kirby did not mention Opposition policy in his speech. The Prime Minister, the federal Attorney-General and others criticised the judge for involving himself in a partisan political debate. The Opposition supported Justice Kirby, noting that judges were in a good position to comment on social issues; a Labor government would be prepared to listen to reasoned debate on social equity issues, but cautioned: "If a

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[20] *The Limits to Judges Free speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger*, Jeremy Webber, McGill Law Journal, 1984, Vol 29, No 3, 369, 388.

member of the judiciary came out and attacked a specific government program, there may certainly be questions as to whether that was appropriate."[21]

Justice Kirby's response was to issue the following statement:

> "It is a matter for regret that the Attorney-General has proved so quick to criticise a member of the judiciary mistakenly when in the past he has proved so slow to come to the defence of the judiciary, as his predecessors did."

To my knowledge, no judicial officer was publicly critical of Justice Kirby's address. In the view of New York Senior Judge Jack B Weinstein, judges can express "[o]n matters of more general interest, in a neutral setting such as a law school, bar association, or house of worship, any view on any subject no matter how controversial – abortion, family or community values, drug abuse or welfare reform … ."[22]

There can be no comparison between Justice Kirby's comments and those of Mr Justice Berger. I am far from persuaded that Justice Kirby's comments breached the doctrine of separation of powers; in context, his comments about desirable trends for the funding of secondary education in Australia were not inappropriate at a ceremony conferring university degrees; his address contained no overt political references, was not made during an election campaign, was apparently well-researched, and provided a useful intellectual contribution to the important social issue of education funding in Australia. The incident does well illustrate, however, the tightrope to be walked by judges who speak out.

Concern for the administration of justice would have permitted judges in Nazi Germany to speak out individually or collectively against the removal from the bench of hundreds of their Jewish colleagues, but they did not.

I acknowledge that it is comparatively easy for Australian judges to speak out, for unlike many of our international colleagues we are not at any real risk of personal or financial penalty. I recognise that it is unfair to criticise those judges in less fortunate countries who do not speak out because of the risk to their career or

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21 Haslem, B "PM's attack on Kirby a first", *The Age*, 02 May 2001

22 Weinstein SJ, *Judicature*, Vol 77, No 6, May-June 1994, 322, 327.

personal safety or that of those close to them. The concept of judicial decision-making within a framework of wickedly unjust laws is a judicial nightmare and hopefully one Australian judges will never have to face.

South African judges between 1948 and 1993 were not so fortunate when the legislature passed laws which negated fundamental human rights. To criticise was to offend the doctrine of the separation of powers; to remain silent was to be part of the unjust government. The majority of South African judges under the apartheid system said nothing when some members of the police force blatantly abused the administration of justice and the rule of law by mistreating and torturing suspects; it seems they were comforted in that decision by the Kilmuir Rules.

Western Australian Supreme Court judge and expatriate South African, Justice Ipp, reports that from the late 1980s, some South African judges did speak out and made an enormous difference "… the informed view in South Africa today is that experience has taught that most judges are the guardians and custodians of the administration of justice and of human rights generally. They are duty bound to protect and warn society against laws which are fundamentally inimical to a democratic society."[23]

These days, our thoughts are with the Zimbabwean judges in their ongoing battle with the legislature to maintain judicial independence and the rule of law. It is hoped that the large number of recent appointments to the Zimbabwean Court will be independent and true to their judicial oaths, despite the apparent contrary expectations of President Mugabe and his supporters.

Whilst a judge can speak out about matters affecting the administration of justice and the rule of law, wide concepts which touch upon human rights, ultimately if a judge is not prepared to enforce a statute lawfully passed by the legislature, then, consistent with the judicial oath, the judge must resign, even if very vocally and whilst highlighting the unjust law.

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[23] Ipp AJA's Memorandum to Mason P's paper "Should Judges Speak Out?", Judicial Conference of Australia Colloquium, Uluru, 9 April 2001.

A topical example of a judge speaking out on matters concerning the administration of justice was the Northern Territory's Justice Angel at an admission ceremony on 6 February this year. He spoke against political inter-meddling in the independence of the legal profession when former Chief Minister and Attorney-General Burke (he held both positions) refused to appoint as Queen's Counsel, John Tippett, the President of the Northern Territory Law Society, despite the positive recommendation of both the Chief Justice and the Northern Territory Bar Association. Justice Angel referred to the history of discord between the Northern Territory government and Mr Tippett, an outspoken critic of mandatory sentencing and counsel for the Aboriginal Legal Service in its case challenging the propriety of the terms of appointment of the Chief Magistrate. Justice Angel commented:

> "… You may legitimately ask 'when should judges speak out'? The circumstances when judges should speak out publicly undoubtedly include circumstances when the rule of law and the independence of the legal profession and of the judiciary are, or may be, put at risk. After all, judges are sworn to uphold the rule of law. So I speak today … because I deem it in the public interest to do so.
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> The rule of law is never at risk in a healthy democracy."[24]

New South Wales Magistrate Ms O'Shane, an aboriginal judicial officer, is not shy to speak out, especially on indigenous and women's issues. In June this year she participated in a television interview on the ABC's *Lateline* about the publication in *The Age* of allegations that ATSIC Chair Geoff Clark raped four women between 1971 and 1983, well before his appointment to ATSIC. The transcript of the interview reveals that her primary concern was that *The Age* had abused the administration of justice; Ms O'Shane claimed the allegations were "tabloid sleaze" and "trial by media" and emphasised that these allegations should be dealt with by the criminal justice system.

It is useful to briefly outline the facts surrounding *The Age* publication. Clark was charged with sexual offences involving one complainant, but a Victorian magistrate dismissed those charges in November 2000. The Office of Public Prosecutions also chose not to indict him on those charges. In June this year,

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[24] Angel J, Admission Ceremony Transcript of Proceeding, 6 February 2001.

The Age published the allegations of that complainant and the further unrelated allegations of three others, two of whom had made statements to police which the police determined not to pursue without further information, and one of whom did not make a complaint to police. *The Age* did not treat the complainants' versions as claims or allegations but as established facts; indeed an *Age* editorial commented '*The Age* is confident the women are telling the truth."[25] Clark announced that for various pragmatic reasons he would not issue defamation proceedings. Both the Prime Minister and the Opposition Leader stated their preparedness to continue to work with Clark as Chair of ATSIC. A debate worthy of its own lecture ensued as to whether Clark should resign or stand down from ATSIC and whether publication of the allegations was abusive trial by media or effective investigative journalism. Ms O'Shane strongly held the former view and entered that controversy when she took part in the interview; her purpose was plainly to convey the injustice of pursuing these allegations in the media instead of in the criminal justice system. No fair complaint can be made of her on that basis but the following exchange occurred:

TONY JONES: "… Now, do you question these women's motives in coming forward as they have?

PAT O'SHANE: Let's face it, Tony, people have all sorts of motives in raising these kinds of allegations a long time after the event. I think that – I would have to be one of the strongest feminists you'd come across, and I don't resile from my very strong feminist position on these sorts of issues.

TONY JONES: I guess that's what surprises me in what you're saying Pat O'Shane, that you seem to have no sympathy for these women.

PAT O'SHANE: Tony, I can only tell you on the basis of my experience that people will raise allegations for all sorts of motives, including some exceedingly base motives, and *I can tell you on the basis of my experience that a lot of women manufacture a lot of stories against men*.
…" *(my emphasis)*

A furore broke out over these comments. Members of the community were understandably concerned that such words from a high profile indigenous female judicial officer would discourage women, especially indigenous women, from making genuine complaints of sexual assault. According to press reports,[26] the New South Wales Attorney-General, Opposition Leader, and Chief Magistrate all called for a Judicial Commission investigation into Ms O'Shane. Because any such investigation as far as practicable takes place in private, I have not been able to ascertain the outcome of any complaint to the Judicial Commission, or even whether a complaint was made. [27]

The New South Wales Chief Magistrate was also reported to be considering banning Ms O'Shane from hearing rape and domestic violence cases because of her "foolish" comments,[28] apparently because of the possibility of perceived bias.

Ms O'Shane was entitled as a judicial officer to participate in the interview to discuss issues involving the administration of justice but her response that "on the basis of my experience … a lot of women manufacture a lot of stories against men" was infelicitous. Every sensible person realises that sometimes people, whether male or female, give false evidence in court about a whole range of matters; but Ms O'Shane's answer in context could discourage women, especially indigenous women, from making genuine complaints. But that does not necessarily equate to judicial bias warranting her withdrawal from hearing a case. This requires a fair-minded lay observer to reasonably apprehend that the judicial officer might not bring an impartial mind to the case before him or her. I doubt that, in context, the comments of Ms O'Shane, an experienced and compassionate judicial officer, whose decisions and extra-judicial statements demonstrate her feminism, could be regarded as judicial bias against female complainants so as to preclude her from hearing rape and domestic violence cases. Any application to disqualify her from sitting on a particular case would, of course, need to be considered on its own facts.

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25 *The Age*, 15 June 2001, p 14.

26 Herald Sun, 18 June 2001, p 9.

27 *Judicial Officers Act* 1986 (NSW), ss 23, 24, 36, 37.

28 Weekend Australian, 16 June 2001, p 1.

In the end the Clark/O'Shane furore developed into a worthwhile community discussion on potential solutions to the scourge of endemic violence against women and children in indigenous communities, a topic about which all decent Australians share corporate concern.

Voltaire-like, I support the right of judges to speak out within the framework I have outlined, even when I cringe at their extra-judicial wisdom and sincerely wish they had shut up. [29] I am certainly not advocating a stampede of Judge Joes and Judys competing for media ratings and public popularity as they spruik their views on each day's headlines. Participation in a media interview is voluntarily creating a situation outside the judge's control, a frightening prospect to us control-freak judges; one carelessly chosen phrase or word could cause offence. This is possible even in a prepared address or article and I hope I survive this one unscathed! Another danger is that if judges speak freely on every topical issue, their voices will have less weight when they speak out on matters of real significance.

Chief Justice Gleeson, with his customary articulate wisdom, reminds judges to exercise caution in speaking out:

> "Like other members of the community, individual judges will, on occasion, disapprove of some of the laws enacted by Parliament. Provided their capacity to administer the law impartially is not compromised, they are free to criticise the law, and to propose change. In fact, judges regularly point out defects in the law, and make proposals for law reform. … Impartiality is a condition upon which judges are invested with authority. Judges are accorded a measure of respect, and weight is given to what they have to say, upon the faith of an understanding by the community that to be judicial is to be impartial. Judges, as citizens, have a right of free speech, and there may be circumstances in which they have a duty to speak out against what they regard as injustice. But to deploy judicial authority in support of a cause risks undermining the foundation upon which such authority rests."[30]

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29 See the comments of Mason, *Judges, Royal Commissioners and the Separation of Powers (A Reply to Athol Moffitt)*, NSW Bench and Bar Dinner, 2000, where his Honour analyses the criticism of Justice James Wood's stirring address in a Uniting Church in which Justice Wood stated his views on laws then the subject of vigorous contest between the major political parties in New South Wales and pleaded for judges of conscience to come forth to take a stand against unjust laws*:* Wood, *"Matters of Principle – A Reflection on the Judicial Conscience*", Address, Uniting Church, Ashfield, 14 November 1999.

30 Gleeson, *Judicial Legitimacy*, Australian Bar Association Conference, New York, 2 July 2000, 3.

It will often be prudent for judges to avoid entering controversies which do not directly involve the administration of justice and the rule of law, or the independence of the judiciary or public confidence in it; even then the response may best be made by the Attorney-General or the head of jurisdiction. If individual judges speak out on contemporary issues, conflicting views may be expressed by other members of the judiciary and this could detract from public confidence in the courts.[31]

The standing in which the judiciary as a whole is held may be demeaned by judges who speak out immoderately; they may be seen as activists, mavericks, publicity or promotion seekers or creatures that feed on the cult of personality[32] and is it right that the private views of individuals who happen to be judges or retired judges be enhanced by their judicial office? Whilst judges commonly express views on legal matters, questions of law reform or matters dealing with the administration of justice in the presentation of papers to law conferences or in law journals, Thomas JA[33] warns that the role of the judge educator must not cloak partisan agendas or diminish public respect or confidence in the judiciary.[34]

The examples given earlier demonstrate plainly enough that controversy often follows judges who speak out; with apologies to Simon and Garfunkel, the Kilmuir judicial sounds of silence can sometimes be sweet. Inevitably, there will be grey areas where there is a divergence of judicial and community opinion as to whether it was right for the judge to speak out on a particular matter. Judges who do speak out must gird their loins for such criticism. No wonder so many elect to preserve their reputation for wisdom and impartiality by dignified silence.

It is difficult to find consensus even amongst judges who speak out about judges speaking out! For example, Mason P suggests judges should not publicly criticise the fitness of a colleague appointed to the same bench;[35] but

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31 The Hon John Doyle, Chief Justice of South Australia *Should the Judges Speak Out?*, Fifth Judicial Conference of Australia Colloquium, 9 April 2001, p 10-12.

32 *Judicial Conduct*, Hon Mr Justice Thomas, Supreme Court Judges Conference, 1988, 12.

33 Thomas JA, op cit, fn 1, 103.

34 Ibid, 103.

35 Mason P, op cit, fn 9, 12-13.

Davies JA[36] questions, without answering, if, in the view of those capable of making an informed objective judgment, a government appoints a judge who is not appropriately qualified by intellect and training, should judges who know that and who are pre-eminently those capable of making that informed, objective judgment, then speak out? Courts avoid answering hypotheticals and every case will turn on its own facts, but the appointment of judges relates directly to the administration of justice; it seems to me that, at least if there were reliable evidence the judge was corruptly appointed, then judges would have not only a right but a duty to speak out against the appointment..

I conclude by reaffirming that extra-judicial statements are at the discretion of each judicial officer, and inevitably different judicial officers will take different approaches. On Monday this week Chief Justice Gleeson foreshadowed that Judges and Magistrates will soon be consulted on a set of guidelines as to their conduct inside and outside the courtroom[37]. In the meantime the following suggestions may be helpful.

- Judges, like other citizens, are entitled to freedom of expression, belief, association and assembly, consistent with their duties; they must exercise caution and restraint to always preserve the dignity of their office and the impartiality and independence of the judiciary, observing the doctrine of the separation of powers.
- It is desirable for judges to publicly explain the role of the judiciary as an essential part of democratic government and its practical role in the community.
- Judges' best opportunity to communicate with the public is through courteous and efficient performance in the court room and the timely dispensing of justice according to law. Every effort should be made to assist and encourage fuller and fairer reporting of court decisions.
- Judges should not speak about their pending or completed cases but the Attorney-General or a head of jurisdiction may correct misreported facts.

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36 Davies JA, *Judicial Reticence*, 1998, 8 JJA, 88.

37 ABC Radio *A.M.* Monday, October 15 2001, 8.26 a.m.

- Judges concerned about the propriety of speaking or writing extra-judicially, should consult with their head of jurisdiction and would ordinarily consider doing so before taking part in a media interview.
- It may be necessary for an Attorney-General or a head of jurisdiction to publicly respond to criticism of a judge, judges or the judiciary.

Judges who make extra-judicial statements must remember the onerous responsibilities and duties of their office and have eyes wide open to the effect of potential controversy, not just personally but on the whole judicial system. Within that framework, there is room for judges to make measured, informed, and rational contribution to the discussion of contemporary social issues, especially those involving the role of the judiciary in government and within the community, law reform, the administration of justice and the maintenance of the rule of law. Whilst recognising the golden value of judicial silence, there may be times when the judge who speaks out performs a priceless service to the community.