

## JUDGES SHOULD SPEAK OUT!

Andrew Boe<sup>1</sup>

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An assessment of the development of 'rules' surrounding judges speaking extra-judicially<sup>2</sup> reveals that there has been a growing trend for judges to do so and that this has been regarded as necessary and received positively despite some occasions when it has been quite spectacularly problematic. The latter has been rare however some ill-chosen judicial remarks<sup>3</sup> have properly attracted as much disdain. The fact that some judges have spoken unwisely if not foolishly should not be the litmus test for whether or not judges should speak extra-judicially rather, these instances should be seen as lessons needed to be learned.

A full discussion on these issues was undertaken at the Fifth Judicial Conference of Australia on 9 April 2000. The papers presented by Chief Justice Doyle (SA)<sup>4</sup> and Court of Appeal Presidents McMurdo (Qld)<sup>5</sup> and Mason (NSW)<sup>6</sup> include detailed treatment of *'the Kilmuir Rules'*,<sup>7</sup> and assess some recent instances of judges speaking extra-judicially. In particular the papers referred to by McMurdo P cover a wide discussion by many eminent judges and other commentators. Judge Skoien's paper at this discussion also covers some of these matters.

There are three matters that I would highlight as to why judges *should* speak out and in fact do so often:

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- 1 The author is a lawyer in private practice in Brisbane principally in the areas of criminal and administrative law. He is a contributor to [LiNK](#) – a website that publishes papers on human rights and criminal justice issues. This note has been prepared for a short presentation at a seminar convened by the Bar Association (Qld) in the Banco Court on 30 October 2002. The assistance of Paula Morreau is acknowledged.
  - 2 That is speaking outside of the courtroom setting either in writing or orally.
  - 3 E.g. *"When a woman says 'no', she sometimes means 'yes'"*.
  - 4 **Should Judges Speak Out**, 9 April 2000
  - 5 **Should Judges Speak out or Shut Up?** This paper was originally presented at the Fifth Judicial Conference, 9 April 2000. Part of it was delivered to the [Brisbane Institute](#) in October 2001.
  - 6 **Judges, Royal Commissions and the Separation of Powers**, 9 April 2000
  - 7 Thomas JA, *Judicial Ethics in Australia*, 2<sup>nd</sup> Ed, 1997, 307-308  
*"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.  
. . . 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.  
(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."*

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[Boe Callaghan](#)

1. Judges have been trained to gather evidence and decide issues and are experienced in verbal and written communication. They participate in and otherwise examine many issues that concern or should concern the community including for example indigenous issues, police conduct and misconduct, criminal justice developments, government decision making, gender issues, race issues etc. Judges are well placed to usefully contribute to many social debates that are necessary for an informed democracy.
2. Judges are independent. In essence they enjoy life tenure. Although they are salaried by government, judges are not usually beholden, nor should they be. The best judges are the most fiercely independent, not just of other people and institutions, but from each other.<sup>8</sup> These days most journalists (including those at the ABC) and academics could not boast of this degree of independence. Independent assessment of the available evidence on matters flagellated in public discussion would greatly assist the community in resolving difficult issues.
3. Protection of the 'rule of law' is of paramount concern to the judges. The rules which have restrained judges from speaking are in place to 'protect' the judiciary. When however, the judiciary or a judge, or more importantly the administration of justice (or 'rule of law') is under public attack, whether with or without foundation, it may be necessary for the judges to speak. The public would benefit from a reasoned response. The judiciary is the third arm of government and is ultimately responsible to the people. If public confidence in the judiciary is diminished and the 'rule of law' is challenged, then the Court and the judges have a duty to address and repair this damage.<sup>9</sup> This has become especially necessary in the federal sphere where the Commonwealth Attorney-General has set the precedent of refusing to do what his predecessors generally if not invariably had always done. The protection of the 'rule of law' is thus now a function that the Courts must embrace. Public discussion is sometimes necessary to preserve public confidence. Sometimes there is a potential for great injustice if judges do not speak out publicly when they should.<sup>10</sup> Sometimes what might need to be said cannot properly be expressed or adequately published in a judgment or journal article.

The challenge for the judicial community collectively and judges individually is to not become too pre-occupied with the promulgation of justifications for why judges should or should not speak extra-judicially. Many judges, if not all of them, in fact already do. Most remain reluctant. This happens at conferences, Bar

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<sup>8</sup> See Gleeson CJ *The State of the Judicature* (2002) 76 ALJ 22 at 28; *"The Council of Chief Justices has no authority to impose prescriptive standards upon judges, who are independent, not only of government, but of each other."*

<sup>9</sup> McMurdo P, page 6.

<sup>10</sup> A most obvious example is silence of the judges of Nazi Germany. A controversial local example is the issue of mandatory minimum sentences. Another is the status of Australians in detention in Guantanamo Bay. The scholarly discussion on the latter by Federal Court Justice Weinberg is a necessary and important addition to the discussion: <http://www.crimbarvic.org.au/weinberg.html>

Dinners, Law Schools, Law Journal publications etc and indeed the Chief Justice (Qld) has taken a welcome approach to the perspectives pages of the *Courier-Mail* to seek to better inform the public on important justice issues.<sup>11</sup> Indeed on some issues, particularly those concerning the professional ethics of the profession, the moral guidance of the judiciary has been sorely missing until recently.<sup>12</sup>

Rather, the discussion should be about how 'speaking extra-judicially' can most effectively be done. Such a discussion should attempt to produce some 'tips' so that judges do not create unforeseen difficulties for themselves. These 'tips' might include:

1. **Understand the medium.** If you only have a 20 second grab on T.V. available, a carefully written judgment will not feature on it, especially if there is no visual footage. If thought appropriate an accurate 'idiot' summary – not a press release – of the judgment can be very useful.<sup>13</sup> An “*off the record*” discussion with the news editors to explain the judgment can also be useful if not necessary. Point them to the contact points for qualified commentators who will be able to speak “*on the record*” if that was appropriate.<sup>14</sup> If a feature article is to be published then a detailed written document may be more appropriate than a rambling interview where context may cause problems.
2. **Understand the message.** Consider what it is that you wish to communicate. For example, if you are going to speak at a conference about gender bias, not only should you ensure that your argument is cogent, you ought look at how your publication will be viewed. A controversial statement concerning gender coming from a judge will attract attention. The test is whether it will promote respect for the argument or diminish it. More importantly, an assessment needs to be made of whether your involvement in the discussion could adversely affect the credibility of other judges or the judiciary as a whole. If there is room for doubt, collegiate discussion is useful, as well as consultation of the head of jurisdiction. It remains in the end a decision for the individual judge. If anything that is to be said will permit arguments of bias against you then some circumspection should of course be shown. If you are hoping to be humorous then make sure that it is not at someone's expense. If you are saying something

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<sup>11</sup> Criminal justice explanations, insurance litigation issues etc.

<sup>12</sup> Media discussion and Law Society investigation into fee charging practices of some solicitors' firms in personal injuries litigation.

<sup>13</sup> The Federal Court has adopted this approach in controversial cases. See for example the decisions in the *Tampa* crisis. The case summaries written for and published on the [High Court website](#) is another example.

<sup>14</sup> Judges have to decide whether the need for a proper and accurate publication outweighs the perceived inappropriateness (which is not seen by the writer) of a judge talking to a journalist. Judges must realise that many journalists and editors *will* understand them and that a publication of some sorts will be occurring in any event and surely an accurate publication is more desirable than one that is not.

that lacks wisdom or is motivated by self-interest then that will be readily apparent.<sup>15</sup> If, however, you are contributing to a necessary and important discussion then your skills will be well received.

3. **Understand the messenger.** The workings of the Courier-Mail or any other media organisation is no different from the workings of the Court system. It is a 'machine like' process undertaken by human agents. Some are brilliant; others are lazy and stupid. Some are honest; others are dishonest. Choose your messenger and engage. When necessary speak "*off the record*" after ascertaining what that means to the particular journalist.<sup>16</sup> Be serious and generally you will be respected. If you can get your point across to the journalist then that is half of your problem out of the way. Attempt to build a trusting relationship but with due appropriateness and care.
4. **Have a strategy for misinterpretation.** It is likely that sometimes your message will not be as you might have wished. This will have occurred because you have either misunderstood the medium or the message or mis-communicated with your messenger. Sometimes the best response when this occurs is to do nothing other than to remember to be more careful next time.<sup>17</sup> There is no point getting apoplectic about matters over which you have no control. A short but not churlish retort may be necessary.
5. **Lose your fear.** Judges like most lawyers lack confidence in doing things that they have not done before. Speaking to the media is not difficult, just different. Most journalists *can* be reasoned with. The public medium is only problematic if one is not prepared for all of the exigencies. If done carefully, honestly, motivated by the right reasons and mindful of the privileged position that judicial officers enjoy then the community gains from the contribution. Remember however that you are unlikely to be as good on your first press engagement as you will be on your next.

In sum, judges *should* speak extra-judicially about matters which are within their expertise after a reasoned consideration of the impact of doing so. The community gains from intelligent discussion. The maintenance of the 'rule of law' relies upon an intelligent and transparent appreciation of the administration of justice. However, judges should only speak when they are sufficiently qualified to do so and after a cynical analysis of how their contribution will be seen. Today's news is tomorrow's 'fish 'n chips' wrapping so do not think

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<sup>15</sup> Retired judges and retiring senior silks have to be careful to not appear to be merely mischievous when they speak on controversial matters due to the fact that they are quite immune from responsibility for their utterances. They have lost their independence and judicial authority or "legitimacy" in a real sense once they leave the bench. [See generally Gleeson CJ, [Judicial Legitimacy](#), Australian Bar Association Conference, New York, July 2002]

<sup>16</sup> To some journalists this might mean that what you are saying is completely said in confidence, i.e. cannot be whispered to anyone else or published, whilst others will regard it as something which can be published but not attributable to you.

<sup>17</sup> You might consider covertly but lawfully taping your next conversation. The best advice has to be: "*if you do not want it printed, don't say it*": source Glynn SC.

that engaging with the media is likely to bring much reward other than criticism. At least criticism is a burden already well associated with judicial life. And if mere criticism deterred people, including judges, from saying what sometimes needs to be said then we are not fostering a healthy democracy or maintaining the 'rule of law'.

Andrew Boe  
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