

Community participation in criminal justice



*Excerpt from an address by the Chief Justice of NSW,
Tom Bathurst,
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(T)here is a matter that has caused me increasing concern this past year.

I have been custodian of the Supreme Court of New South Wales for eight short months. This time has been filled with a wealth of new experiences and challenges. Of particular impression upon me has been my time sitting in the Court of Criminal Appeal. I have come to greatly respect the fundamental role the wider community plays in our criminal justice system.

Members of the lay community participate in criminal justice as a matter of course: as witnesses, complainants, accused and remanded. But in these roles they act as individuals. Their experiences and actions are not reflections of the collective social consciousness.

When I speak of the community as a participant in the criminal justice system, therefore, I am referring to two roles in particular. First, to the active role of the jury – to assemble as a tribunal of 12 and pronounce judgment as a unanimous or near unanimous whole, on an individual accused of breaching our legal codes. Second, I refer to the passive role the community plays as an observer of the legal system, whose trust is essential to its legitimacy.

My concern is that the criminal justice system is currently experiencing a crisis of confidence.¹ Community trust in the criminal justice system is eroding. Much of this distrust is fuelled by misinformation that is propagated by sections of the media who prefer to inflame rather than inform, and by politics that encourages fear mongering rather than educated debate.

¹ Indermaur and Roberts, 'Confidence in the Criminal Justice System' (Trends and Issues in Crime and Criminal Justice No 387, Australian Institute of Criminology, November 2009) 1.

Instead of complaining about media bias and political propaganda – which, my predecessor reminded me, will achieve about as much as complaining about the weather – tonight I want to draw attention to the essential role that the community plays in our criminal justice system, and to the responsibility that we as a legal community have to support it.

In an international survey of public confidence in national criminal justice systems, Australia ranked 27th... of 36 countries.² Only 35 per cent of us have confidence in our criminal justice system. And while nearly three quarters of us trust in the police, less than one third trust in the courts. Our confidence has also steadily declined over the last 15 years.³

We are not alone in these low numbers. The people of Estonia, Croatia, Russia and Slovakia all report a similar lack of confidence in their criminal justice systems.

However in the jurisdictions we are used to being compared with, such as the United Kingdom, Canada and Ireland, public confidence is much higher. At least 50 per cent of people in those countries have a high level of trust in their criminal justice systems. It may provide some consolation, if not a great deal, that we at least outrank the United States.⁴

Surveys show that most people in NSW trust that the rights of the accused are respected, that the accused are treated fairly, and that we effectively bring wrongdoers to justice.⁵ Why then is there so little confidence in the criminal justice system as a whole? **It is because of a misguided perception that the legal community is soft on crime and out of touch with community expectations.**

I say “misguided” perception for a number of reasons:

First, public perceptions of crime rates are highly skewed. Most people believe that property crime has increased in recent years. In fact, it has decreased. Almost everyone grossly overestimates the amount of crime that involves violence or threats of violence, and equally underestimates the conviction rate for violent crimes.⁶

Second, surveys have demonstrated that sixty-six per cent of people in New South Wales believe sentences are too lenient.⁷ However, most people tend to think of extreme examples of serious crimes, like rape, murder and armed robbery, when questioned about

² Roberts, 'Public Confidence in Criminal Justice in Canada: a Comparative and Contextual Analysis' (2007) 49(2) *Canadian Journal of Criminology and Criminal Justice* 153, 167.

³ Above n 1.

⁴ Above n 2.

⁵ Jones, Weatherburn and McFarlane, 'Public confidence in the NSW criminal justice system' (Crime and Justice Bulletin No 118, NSW Bureau of Crime Statistics and Research, August 2008) 1.

⁶ Ibid 5-6.

⁷ Ibid.

sentencing in general terms.⁸ When members of the public are given detailed information about a specific crime and the background of the offender, a completely different trend emerges.

A groundbreaking 2010 study used jurors to investigate what informed members of the public really think about sentences.⁹ Before their trials, jurors were asked about sentencing in general terms, and most said they thought sentences were too lenient. However, after sitting through the trial and sentencing submissions, they were asked to give an appropriate sentence for the offender. Most gave more lenient sentences than the judge, and 90 per cent thought the judge's sentence was within a fair range.

The study shows that when people are given the facts, most think judges get it right.

A third reason I say public perceptions are misguided, is that it is not at all correct to say that judges are out of touch with the expectations of the wider community. While I do not claim to be on the cutting edge of popular culture – *I do not tweet, blog, krump, or LOL. For those of you who do not know what I am referring to by krump, look it up on YouTube. It will cause you to LOL. You all know that means laugh out loud* – I can say that there are few people as in touch with the realities faced by victims, accused and convicted as are the judges of the criminal courts. They are in the thick of it every single day. And most juries agree when asked at the end of their trial, that the judge presiding over it seemed in touch with community expectations.¹⁰

So public perceptions are wrong. Or at least, they change dramatically when ignorance is replaced with information. But is this really a problem? As long as policy makers are guided by sound research and experience, and judges continue to exercise independent decision making, why does it matter that sections of the media propagate paranoia about crime rates, and make short shrift of the truth to sell a story

It matters because of the fundamental tenet that justice needs not only to be done, but also to be seen to be done. This is not just for the sake of the frail judicial ego, but is necessary to maintaining the rule of law.

The intangible quality that gives the rule of law security in some nations, and none in others, has to do with community trust and expectations. The rule of law is one of six World Governance Indicators used to measure the quality of a country's governance. It is defined as "*the extent to which agents have confidence in and abide by the rules of*

⁸ Indermaur, 'Public Perceptions of Sentencing in Perth, Western Australia' (1987) 20 *Australian and New Zealand Journal of Criminology*, 163-183.

⁹ Warner et al, 'Public Judgment on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Trends and Issues in Crime and Criminal Justice No 407, Australian Institute of Criminology, February 2011).

¹⁰ Warner et al, 'Jury Sentencing Survey' (Grant Funded Report, Criminology Research Council, April 2010) 68.

society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence".¹¹

Therefore, public confidence in our courts and criminal justice system is not only necessary to the maintenance of the rule of law, but to the quality and perception of our governance structures.

In the popular consciousness, criminal justice often represents the entire legal system. Faith in it is likely to be determinative of faith in the whole. People will not strike bargains or trade if they fear their commercial rights will not be upheld. They will not invest in development and infrastructure if they worry their property rights will be easily violated. Therefore, while the rule of law and sound governance are the foundations of a free and stable society, they are also essential to a prosperous one.

Perception matters. So how can we improve it?

It is unsurprising that those who have the least amount confidence in our system, also have the least information about it. They are the most likely to overestimate crime rates and underestimate conviction rates. They are also the most likely to draw their information from sources like talkback radio. Those who have more accurate knowledge, on the other hand, have the most confidence in the criminal justice system, and tend to draw their information from broadsheet newspapers, government publications, and educational institutions.¹²

It turns out that the only group whose confidence in the system doesn't increase with knowledge is the elderly. Apparently a certain amount of crotchiness just comes with age.

For the majority, at least, increased confidence will come from better information. There is little we can do about talkback radio and tabloid journalists trading on the demand for shock and scandal, but there are things we can do as members of the legal community to improve the public's knowledge.

First, we can participate in the debates about crime and sentencing reform that occur at all levels of society. The Law Reform Commission is currently reviewing the *Crimes (Sentencing and Procedure) Act*. Many in this room have participated in the reform process, and this is to be commended.

¹¹ Kaufmann, Kraay and Mastruzzi 'Governance Matters VI: Governance Indicators for 1996-2006' (Policy Research Working Paper No 4280, World Bank, July 2007), 4.

¹² Above n 5, 12.

However, we should not forget that the discussions occurring in classrooms, on editorials and blogs, and even over talkback radio, are just as important in shaping public opinion and confidence in our justice system. Reasonable minds will differ as to the reforms we need, but we will remain true to our profession by participating in these debates and insuring they are kept informed and accurate.

Second, those working in government and policy should continue the open and transparent dissemination of information, making it as accessible and relevant to the broader community as possible. We have outstanding information services in NSW. The Bureau of Crime Research and Statistics and the Judicial Information Research System are but two. Service like the Department of Attorney General & Justice's Lawlink and LawAccess are also invaluable. We should support and advance these services in every way.

Third, judges and those who work in criminal court administration should strive to use plain and accessible language, particularly in judgments and remarks on sentence.

Finally, a very great deal may also be done through the jury.

Juries are an essential part of our participatory democracy and of the trust the wider community places not only in the criminal justice system, but also in the ability of the legal system generally to protect each individual's rights, family and property. Just as the judge and court in a jury trial act as ambassadors for the whole of the justice system, so each juror becomes an ambassador for the courts within the community.

Approximately 200,000 people had some interaction with the NSW jury system last year, by being placed on the jury roll, summoned for service, or empanelled.¹³ Studies show that confidence levels are higher in people who have had recent contact with the courts or justice departments, and highest in those who have actually participated in court processes or hearings as jury members. The experience of sitting on a jury has been shown to improve an individual's confidence in the criminal justice system significantly, and almost universally.¹⁴

...Finally, returning to the issue of sentencing, the simple gesture of inviting jurors to stay and watch sentencing proceedings has been shown to significantly improve jurors' experience and trust in the criminal justice system.¹⁵ Many jurors report that it validates their experience, and the "justness" of the verdict they reached. This will often be impossible when sentencing occurs at a later time, but to the extent it can be achieved, it is desirable.

¹³ Source: Office of the Sheriff of New South Wales.

¹⁴ O'Brien et al, 'Factors Affecting Juror Satisfaction and Confidence in New South Wales, Victoria and South Australia' (Trends and Issues in Crime and Criminal Justice No 354, Australian Institute of Criminology, April 2008) 1, 4-5.

¹⁵ Above n 19, 334-336.

Many other suggestions of ways to improve the jury process and confidence in the criminal justice system have been made, and should be investigated. I suggest that the proposals most likely to succeed are those that trust in *people* – in the members of the community and the jury – to be intelligent, diligent and fair.

It is our responsibility to improve their chances by enlivening debate, and insuring that the information we distribute is accurate, relevant and accessible. Otherwise, we have little right to expect trust in a system that excludes the voice of the community it is meant to represent and protect.

ENDS excerpt

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