

## **TABLOID JUSTICE?**

**Nicholas Cowdery AM QC**  
Director of Public Prosecutions, NSW

---

*“It is right and necessary that the media report on crime and punishment and generate public debate. In doing so, they also have a responsibility to report the truth to ensure that debate is fully informed. We acknowledge that court documents can be bulky and difficult to understand, which does not translate well with the news media’s need to present clear, timely and interesting stories. However, stories on sentencing are often scant on detail to the point of inaccuracy, and fail to present a balanced picture. This can slant public opinion unfairly, and create unwarranted fear by suggesting that crime is out of control, and that the courts continually flout public opinion by imposing excessively lenient sentences. In this way, while claiming to reflect public opinion, the media are in fact creating it, with no realistic or accurate basis. This can feed into the legislative and policy process, since no policy maker wants to be seen as unresponsive to public views, or as soft on crime.”*

“Sentencing and Juries”, NSW Law Reform Commission,  
Issues Paper No. 27, June 2006, par 3.20

---

### **INTRODUCTION**

It is not an accident that a question mark follows the title of this session, because “tabloid justice” is an oxymoron. If it is meant to ask the question whether tabloid justice can be achieved, then the answer is a resounding, unequivocal, unconditional “no”!

Justice is expansive and comprehensive in nature. It requires the acknowledgement of often contradictory considerations, tolerance, understanding and, at times, the application of mercy. “Tabloid” is a description applied to all publication media (print and electronic) that publish material in tabloid [from “tablet”] or compressed form. There are good reasons why justice cannot be compressed into tablet, pellet or even capsule form and it would seem that there are good reasons why tabloid media cannot do justice to justice (even if they wanted to).

I shall attempt to deal with this from the point of view of principle and practice. I leave it to others to illustrate my thesis by examples from real life – mine is the dry part of the session.

In what follows, I am attempting to draw out the following four propositions and messages.

1. Justice is a complex and fragile beast that depends upon (*inter alia*):
  - (a) the proper operation of the rule of law;
  - (b) the separation of powers;
  - (c) an independent and uncorrupted judiciary.
2. Tabloid media reporting is necessarily incomplete and probably required to entertain – but it need not be inaccurate and it need not undermine the institutions of society. Much reporting of criminal justice – and of sentencing in particular – has these features.
3. Politicians do not need to react instantaneously and automatically to every provocation thrown up by the tabloid media (but they will probably continue to do so).
4. All of us need to read and listen critically, to spread the truth about events whenever we get the opportunity and to defend the legitimate processes we have and which have been developed over centuries of trial and error. We should heed the lessons of history.

Some may ask, putting all that to one side: does it really matter what the tabloids do? First, all that cannot be put to one side – they are significant matters for consideration, at least. Secondly, I think it is important to note what the tabloids do because, ultimately, it goes to the very heart of our government. For that reason I am going to address briefly:

- 1. our system of government in some pertinent respects, including the separation of powers and the rule of law;
- 2. the phenomenon of crime;
- 3. the judiciary and particularly the sentencing task;
- 4. the involvement of politicians;
- 5. the nature of the media in its involvement in our business, the criminal law; and
- 6. some lessons we have learnt and should remember in order to deal with matters in a proper and principled way.

It is easy to lose sight of principles in the heat of argument or in the hands of manipulators. Addressing them now may provide a context for later discussion; but it also helps us to see how far short of perfection we have fallen.

## 1. GOVERNMENT – SEPARATION OF POWERS – THE RULE OF LAW

We have a Westminster system of government by representative democracy. We adhere to the rule of law – what I prefer to call the “just rule of law”, although that description is falling out of favour. It protects us. It is essential. In 1866, just after the American Civil War, Justice Davis of the Supreme Court of the United States, writing for the Court in *Ex Parte Milligan*, 71 US 2, 119 said:

*“By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.”*

Scope for tyranny rests not just with rulers – there can be tyranny of the masses or of their self-appointed spokespersons.

We apply the rule of law in a way that recognises and depends upon the separation of powers – between the legislature (that makes the law, by and large), the executive (which manages the functions of the state) and the judiciary (which administers justice by adjudicating disputes and imposing penalties – and occasionally also makes law). These are not optional arrangements – these are the three separate, fundamental and essential arms of government in our system and their separation, even if qualified in practice, provides a foundation for our governance.

There are very sound reasons why those who make the rules should not be the enforcers as well. The origins of the modern doctrine of the separation of powers are usually attributed to the French statesman, politician and writer Montesquieu who wrote in 1748:

*“Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge would have the force of an oppressor.*

*All would be lost if the same man or the same body of principal men, either of nobles or of the people, exercised these powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.”*

Seventeen years later in 1765 the English jurist Blackstone wrote of the reasons for the separation of the administration of justice from the other two branches:

*“Were [the administration of justice] joined with the legislative [power], the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions and not by any fundamental principles of law: which the legislators may depart from, yet judges are bound to observe.*

*Were it [ie. the administration of justice] joined with the executive, this union might soon be an overbalance for the legislative ... Nothing is more to be*

*avoided in a free constitution than uniting the provinces of a judge and a minister of state.* [emphasis added]

These propositions, formulated before the English settlement of Australia, in my view are beyond argument. The High Court seemed to think so, too, in *Kable v The Director of Public Prosecutions for New South Wales* (1997) 189 CLR 51.

Blackstone's final words are significant because the consequences may be more than just an overbalance for the legislature; yet uniting the provinces of a judge and a minister is precisely what sections of the media and even some politicians constantly try to do.

I shall come back to that later in the Australian context, but it is salutary to take an example from the United Kingdom that was reported in February 2003 – nothing to do with the criminal law, far away and long ago, but in the birthplace of our legal system. It has many resonances for Australia.

The High Court in London had upheld applications made by six asylum seekers, challenging the implementation in legislation of a new government policy that was held to be contrary to UK human rights law. The Home Secretary, whose legislation had been set aside, attacked judges for (it was reported) undermining attempts to stem the influx of asylum seekers. He is reported to have said that the judgment sent out the wrong message: *“There's a climate of instability and insecurity, and that's a very dangerous moment”*. He warned judges that they were in danger of damaging democracy. He said: *“If public policy can always be overridden by challenge through the courts, then democracy itself is under threat”*.

No, Mr Blunkett, the courts and the judges were not threatening democracy. All that is required for legitimate public policy to be implemented is for it to be enacted in legislation that is legally valid.

The tabloid media took up the cry with its usual alacrity and lack of restraint. One headline said: *“So what have our judges got against Britain?”* and the story continued: *“Britain's unaccountable and unelected judges are openly, and with increasing arrogance and perversity, usurping the role of Parliament”*. No, they were not. And we see similar things in Australia in the context of criminal justice (and the use of similar terminology) which demonstrate a deep disregard for the proper operation of the rule of law.

At the end of her term as President of the NSW Bar Association in 2001, Ruth McColl SC sounded a timely warning for us all. In her final column in the Bar's monthly newsletter she wrote:

*“Lawyers tend to take these core values [ie. the rule of law and democratic principles] for granted. We work with the rule of law every day. We should not lose sight of the fact that the rule of law is not as concrete and ever-present a phenomenon to some members of the community as it is to us. At times, the transient, but regrettably politically significant, influence of opinion polls can push the rule of law to one side and allow pragmatism to prevail over principle.”*

It matters not that the motives of the policy makers may be honourable. Justice Brandeis in 1928 warned in *Olmstead v United States*, 277 US 438, 479:

*“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”*

In the run-up to an election (the ultimate opinion poll), which we are experiencing now in New South Wales, the risk of this happening is magnified; and it is fuelled by the media. Lawyers, at least – but the community generally – must be on guard against it.

## 2. CRIME

This audience knows all about crime. Criminals may be likened to flies. (It was once claimed that China had eliminated flies, but the visitor is still well advised to take along some repellent. Claims by politicians and their media allies of similar capabilities in relation to criminals should be treated with the same caution.)

Flies breed in the messier and more untidy parts of our environments. They are annoying to have around: some are merely unpleasant, some are dangerous, some can produce fatal effects. We can deter them to some extent and reduce the risk of their annoying us – we can even remove some of them. (They are not generally susceptible to re-training.) For the most part we just screen, spray or brush them away and get on with life. So it is with criminals (without the spray); and anyone who pretends we can do otherwise is deluded.

Ever since humankind came together and made rules for living in a community there have been rule breakers. There always will be – it is human nature. The most that any of us can do – as with flies – is to keep their activities within generally tolerable limits by the range of options available to us: prevention, detection, deterrence, isolation, punishment and reform. It is important to realise that the criminal justice system – with its functions of investigation, adjudication and correction – is extremely limited in its capacity to regulate human conduct and whenever we hear claims to the contrary by politicians and the media we must be sceptical. For example, there is no evidence at all that increases in prescribed or even imposed penalties for specific offences reduce the incidence of that type of crime. The greatest deterrent is the fear of detection. The criminal justice system can really only operate as a sort of undertaker – cleaning up as best it can after the criminal event; but it cannot stop the event from happening.

In our society general rules (laws) are made by Parliament – the legislature. Many more rules – the ones which impose more detailed requirements on us – are made by other, less exalted, bodies. We are deluged constantly by regulations, for example – subordinate legislation (regulations) made usually by anonymous bureaucrats.

The rules which collectively are known as the criminal law are enforced by the criminal justice system, in which the players are usually the police (and other investigative and regulatory agencies), prosecutors, defence representatives, judicial officers and the prisons and services associated with what is called, optimistically, “corrections”.

Centuries ago people relied on self-help. If someone was wronged by another, personal retribution was exacted. This was likely to become chaotic and in England (whence came our legal system) the fiction developed that any breach of the peace, any lawless conduct, was a breach of the monarch’s peace and laws. The responsibility for exacting retribution and dealing with the situation generally was taken over by the state. It now acts through the players I have just mentioned. In particular, judges now decide when and what penalties are to be imposed – not individuals who are wronged or groups of their friends.

For sound reasons, therefore, the adjudication of guilt and sentencing (being governed by principles of law and being the outcome of the exercise of judgment based on the facts and circumstances of individual cases) belongs with the judiciary and not with the legislature or, worse, the mob. It is the legislature’s job to make and change the principles to be applied if that is desired by the community it represents and the judiciary’s job to interpret, sometimes to develop, and to enforce them.

These are basic and constant features of our application of the rule of law, often ignored or shouldered aside in the tabloid media’s pursuit of headlines.

### 3. THE JUDICIARY

Contrary to tabloid dogma, judges do not live in ivory towers (even if they once did – or some of them did). These days they are male and female, educated at all kinds of institutions and with a diverse range of experience and interests. They live in ordinary dwellings, they move about unescorted in the community (some even travelling by bus or train), they vote, read newspapers and magazines, listen to the radio, watch television, explore the Internet, play sport (well, some do), suffer the family misfortunes of a fair cross-section of society and – probably most importantly and often overlooked – host a constant parade of all kinds of humans through their courts every working day, watching, listening and learning. They are constantly exposed to life. Their work is done in public and (with very few exceptions) is instantly examinable by anyone and therefore utterly transparent. They are accountable in that way and by the mechanism of appeal for every decision made.

To say that judges or magistrates are unaware of or out of touch with the community and its needs and desires is mischievous rubbish of the tabloid media and politician kind. In their work they must respond to the community of which they are part. Last month, just a few weeks after his swearing in as Chief Magistrate for NSW, Graeme Henson told the Sydney Morning Herald this about the magistrates:

*“They’re all members of society; they don’t live in a closet, brought out at 9.30 every Monday morning. They reflect ... the general views and attitudes of society, as much as they must be necessarily constrained by the law itself.*

*People forget, when they look at particular outcomes, that the law has to be applied to the circumstances that confront a particular judge or magistrate at a time. It can't be ignored."*

When judges sentence, for example, they must have regard to the law as prescribed by the legislature and as interpreted and applied (and sometimes made) by superior courts. They do not simply replace the mob and a tendency to do so would be a likely result if they were to be popularly elected.

Sentencing is probably the most contentious activity undertaken by the judiciary – it is also the most difficult. Justice Eames of the Victorian Supreme Court, in a speech to the Melbourne Press Club Annual Conference on 25 August 2006, said:

*"No judge or magistrate I have known has taken sentencing lightly. Judges and magistrates appreciate the powerful emotions and the conflicting perspectives which accompany any criminal case. They are very conscious of the many conflicting sentencing considerations which both statutes and common law dictate they take into account. Far from the judiciary being insensitive to victims, they are acutely aware of the trauma of crime, but they must conscientiously consider the position of the convicted person, too. Sentencing is easy if you have regard only to denunciation and revenge, but that is not justice, and that is why sentencing decisions are made by independent persons acting without emotionalism, and applying recognised sentencing principles."*

On 10 May 2006 Chief Justice Spigelman of NSW said in an address to the Parole Authorities Conference:

*"As is the case with respect to the task judges face when they come to sentence a convicted criminal, what is involved [in making parole decisions] is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. These tasks – whether sentencing or release on parole – involve a difficult process of weighing and balancing such matters. Long experience has established that such tasks are best done by independent, impartial and experienced persons, who are not subject to the transient rages and enthusiasms that attend the so frequently ill informed, or partly informed, public debate on such matters."*

#### 4. POLITICIANS

A fiction on which our democratic system is based is that politicians are representatives of the public – of the constituencies who elected them. It is a useful fiction; but a fiction, nevertheless. (Just look at the processes for nomination of major party candidates in electorates. Look at the backgrounds of the successful nominees. Look at how they act after their election and where their loyalties lie when they are tested.) In truth, in our society the executive controls the legislature and the executive is the product of a mixture of party politics and bureaucratic ambition. In our society the entire process is fundamentally media-driven.

Nevertheless, politicians often rely on the fiction when for other purposes it becomes useful to criticise judges, other public officials or parts of the executive (or – but rarely – private citizens).

The criticism of judges of which politicians are so fond cannot always be made in Parliament. Article 9 of the *Bill of Rights 1689* – which is law in NSW – prevents the freedom of speech and debates and proceedings in Parliament from being impeached in any court. A sort of *quid pro quo* has developed: that the ability to criticise a judge in Parliament (in the absence of a specific motion) is severely limited.

So if criticism of the judges and their conduct cannot be made in sufficiently pointed or bellicose terms in Parliament, it must be made outside. How can that be sustained? Who can the politicians get to support, or even to do, their dirty work? On what pretext can the politicians base their reactions?

## 5. MEDIA

Enter the media and specifically the tabloids and talkback radio “entertainers”.

It was Oscar Wilde who said, famously:

*“By giving us the opinions of the uneducated, modern journalism keeps us in touch with the ignorance of the community”.*

He was speaking of the modernity of the late 19<sup>th</sup> Century, of course, but his remark applies equally to journalism in the early 21<sup>st</sup> Century. Have the public media, or sections of it at least, developed and refined their role to one of not just reporting, but maintaining the ignorance of the community? And do they now do it, not by giving us the opinions of the uneducated in society, but by giving us their own, directly or indirectly? And for what purposes? How do they connect with the politicians? Does it matter?

A relatively small part of the media does concern itself with providing us with accurate information and informed (and explained) opinion. This might be termed the “quality” end of the media – and it is very small, being intended (as it must be) for consumers with attention spans greater than ten seconds and who do not need to have stories told in pictures. In a speech to the NSW Bar Association last year Michael Pelly, then the Sydney Morning Herald legal correspondent (and now the Commonwealth Attorney-General’s media advisor) said:

*“We are all in the business of storytelling. Yes, we must inform, but we must also entertain. And when we entertain we must do it in a compelling way. We must get to the point quickly and do it in a way that will make someone read on. People don’t have to read us. Or listen to us. They can move on to the next item, turn the channel or shift the dial. They might decide an issue is too complex – or they can’t relate to the subject matter. If they feel remote they will turn away.*

*That is why 80 per cent of readers don't get past the first five paragraphs. That's right – four out of every five readers only take in about 180 words."*

[That quotation contains 125 words.]

Most radio, most television and the tabloid press are principally concerned with entertaining us. Their pitch is to the emotions, rather than the intellect – and it must be administered in tablets because we do not make time for chewing.

In an article in the *Melbourne Age* on 22 August 2006 John Lloyd, a contributing editor for the *London Financial Times* wrote:

*"A large danger for the news media is that, because they must now compete with the entertainment industries, they are succeeding in turning politics and the description of public life into entertainment."*

The Australian social researcher and commentator Hugh Mackay identified aspects of the problem:

*"The 'entertain me!' syndrome violates our values. The more stories we hear, the less each one matters and the more we run the risk of reducing our capacity to interpret and judge. Our moral clarity is dulled by the sheer volume of media messages to which we are exposed. The quantity of media content becomes a distraction from its quality."*

He referred also to the shortening of our attention spans by the media offering us summaries of everything without details; to the effect on our vocabularies; and to the fostering of an adversarial approach to life. Such is the tabloid effect. (One prominent example is "the war on terror/ism.")

In the information age, however, the media recognise that even serious matters must be included somehow in what they publish, so they try to do it in a way that they interpret as entertaining. How? Sometimes by introducing humour – but more often by introducing conflict accompanied by dramatic illustration. Justice Kirby in the Eleventh AIJA Oration in Judicial Administration delivered on 22 June 2001 described the way the public media operate.

*"Their employees generally work under the most severe deadlines. Dense prose is uncongenial and off-putting. Complex issues have to be summarised, synthesised and, if possible, personalised. Those who do not play by these rules will have their stories spiked and ignored. That is just the way it is."*

In most important, serious issues there are usually at least two points of view. Journalists and especially commentators are adept at identifying the opposing ends of the spectrum of views that might apply to any matter, simplifying them (often by omitting relevant material, especially if it is complicating or inconvenient) and erecting an adversarial framework of conflict. Often it is done, as Justice Kirby observed, by pitting personalities against each other. If the promoter of one view can be portrayed as a "baddie" and the other as a "goodie" (or, even better, an innocent victim), then so much the better. Consequently, information of relevance and maybe

even of interest to the audience, but in which there is no facile conflict, may never be published. (The vast proportion of the tens of thousands of criminal cases heard in Australia each year – cases of inherent conflict – are never reported publicly. Indeed, court reporting generally in the public media in Australia is in a woeful state, even the reporting of very important decisions.)

The media most often become engaged in the day-to-day criminal justice process through the reporting of an individual case in which something odd has happened, or the reporting of the conduct of a person who has done something odd. Even then they play a sort of “con” game: they pretend to know what they are talking about and purport to be able to express it in a few words. Ordinary cases proceed without much attention at all.

In July 2006 the Victorian Sentencing Advisory Council published a report entitled “Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing”. In it Dr Karen Gelb said:

*“Newspaper portrayals of crime stories do not provide a complete and accurate picture of the issue. Papers report selectively, choosing stories, and aspects of stories, with the aim of entertaining, more than informing. They tend to focus on unusual, dramatic and violent crime stories, in the process painting a picture of crime for the community that overestimates the prevalence of crime in general and of violent crime in particular. Thus, public concerns about crime typically reflect crime as depicted in the media, rather than trends in the actual crime rate. The news media also provide little systematic information about the sentencing process or its underlying principles.”*

Many research findings (eg. by the NSW Bureau of Crime Statistics and Research) support that view. Conflict sells and if it can be tableted, so much the better – more of it can be included in one edition of the publication and support more advertisements.

People are prone to react emotionally, rather than intellectually, to their entertainment. They are usually not tempted to analyse the information they are given and to try to track down the gaps in fact or logic. It might be conceded that journalists are news reporters and not historians; but they should tell the whole story and commentators have no valid excuses.

In its Adjudication No. 1300 in September 2005, the Australian Press Council said:

*“... the Press Council draws the attention of all newspapers to the need to maintain confidence in the courts and the rule of law in their presentation of court-related matters. The exercise of the newspaper’s right to scrutinise does not give it carte blanche to report on the activities of a court in any manner it likes. Like any other entity in society, the courts are entitled to be reported in a fair and balanced manner, and in a manner that accords with the Statement of Principles of the Press Council.”*

As Justice Eames said in his speech to the Melbourne Press Club [see above]:

*“Intemperate and unbalanced attacks on the judiciary can create a false impression of a failed legal system. Such a picture is at odds with the reality and threatens the stability and independence of the legal system. It is a picture very easily painted in simplistic media campaigns.”*

For the criminal justice system to operate legitimately and effectively, as an aspect of the judicial arm of government, it must enjoy the confidence of the majority of the community. That is at risk if unbalanced and incomplete reporting is given too much credence.

The worst practitioners of this form of comment are the talkback radio entertainers who often have their own, frequently hidden but not undiscernible, motives for what they say. Two things should be said about these people. The first came from John Laws at the time of the “cash for comment” hearings: *“I’m not a journalist and I don’t pretend to be a journalist. I’m an entertainer ... there isn’t a hook for ethics.”* His conviction for an offence under the *Jury Act (NSW)* underscores that proposition.

The second actually came earlier in the form of masterly understatement and keen prescience from the former Australian Broadcasting Tribunal in 1990: *“Talkback encourages robust debate on issues by people who are not fully informed.”*

The latter comment could apply to the media more broadly. It is often in the interests of the media generally and talkback in particular to keep their consumers in a state of ignorance – that better enables the manipulation of opinion and its misrepresentation. Justice Kirby referred to this in his oration:

*“There is a shocking ignorance about civics in Australia. It borders on a deep national malaise. It has taken the centenary of our Constitution to demonstrate this most clearly. We must learn from our mistakes. A nation that does not know and cherish its institutions squanders its heritage. It lies vulnerable to ignorance and extremism, to prejudice and populist over-simplifications.”*

Talkback terrorism seems to be a peculiarly New South Welsh phenomenon in Australia (there being only pale imitations in some other States). This is not the time to explore the reasons for that; but it is allowed to flourish by the absence of an effective balancing force at the quality end and by the credence given to it by politicians. There are moderate voices occasionally able to be heard above the din, but one has to listen for them. I think a large part of the problem is the sheer unwillingness of many sections of the media to report any good news, coupled with the need to tabletise everything. For example, there are successes in some crime prevention initiatives – but the public rarely gets to hear about them.

The media is hooked on sensationalism. Strong, sharp and short images (be they pictorial or verbal, moving or still) are preferred wherever available, because they make an impact. They grab attention. Most of life, however, is fairly predictable and undramatic – dull and ordinary, mundane and routine, and of little interest to those who are not directly involved.

The talkback “entertainers” assiduously develop their own personae – their own celebrity – their own brands – and gather their own fans or consumers from many sections of the community. They are concerned first and foremost to maximise their own income (sometimes by means that do not stand up to close scrutiny – cf. the “cash for comment” affair). Their second priority is to maximise the income of their employers. While pursuing these objectives (and no doubt to assist their achievement) they also like to be seen to be influential in public policy making – it enhances their status in some quarters and no doubt increases their earning power. They do that by intensifying their relationship with their consumers, whom they manipulate to these ends. They encourage the formation of particular attitudes in their talkers and their listeners or reinforce existing views. Their consumers include the ordinary public, but also the policy makers themselves – the politicians.

Therefore, while one party to a talkback conversation (the host) puts emphasis on the provision, for profit and influence, of directed entertainment pitched at the level of emotion, the other party (and often listeners) may be misled into thinking that it is a serious, rational and principled discussion of some enduring importance. The politicians, of course, fuel these exchanges and react to them for reasons that have everything to do with their own prospects for re-election. We could ignore all this, were it not for the fact that serious policy is formed on the basis of this deception and that goes to the heart of the way in which we are governed.

Talkback radio has now become vital in the strategies of politicians, both State and Federal. In 1997 the Prime Minister even argued that talkback hosts set the political agenda. In NSW the government’s media advisors monitor Alan Jones’ early morning program and are required to respond to any problem raised before he goes off air at (I believe) 9.00 am. But Jones commands less than 15% of the listening public in that time slot and his audience demographic is already conservative in its views – so why are the politicians so sensitive to his preaching to the converted? It is not logical. Politicians make commitments to action – instantly – in a way that they hope will attract votes at the next election. So the influence of the shock jocks is great – and they ARE appropriately so named.

All of this, cloaked in emotional rhetoric, preys on people’s insecurities and the disconnectedness many members of the community feel from the public decision making process. It trades on irrationally based fear. It is cheap and easy to produce. The most obtuse journalist – even “entertainer” – is capable of grasping the ideas behind these stories and there are plenty of precedents in the files to be plagiarised. (Some stories are even seasonal.) It makes the story-tellers seem tough (which, they think, is a better public image than that of a caring, sensitive, thoughtful and questioning commentator) and it makes them seem brave, not afraid to level a broadside at the institutions of society in a very non-conservative fashion.

These stories create an inaccurate – sometimes completely false – perception in the minds of the public about what the criminal justice system is, how it operates, just what it is capable of achieving and how it should be going about its tasks. They therefore construct a completely unsuitable base from which to criticise judges and from which to develop policies for law reform. They prompt unwise, knee-jerk reaction by law-makers, especially in the area of sentencing law. These are the real dangers. They do not contribute to the attainment of justice in any real sense.

In his “Message from the President” in the June 2001 issue of *The Reformer* (the journal of the International Society for the Reform of Criminal Law), the late Michael Hill QC of London, then President of the Society, said this:

*“Under the social contract between state and individual the latter surrenders to the former the right, and, perhaps, the power to exact penalties upon those who do him/her harm and, in return, expects to receive from the former the freedom to live an unthreatened life within the limits of the social consensus and the law. As politicians and citizens move further and further apart, the politicians seek ever more stridently to tap into what they call ‘public opinion’. Whether the opinion they aim at is genuinely that of the public and not merely an echo of the tabloid screech is not important. For the politicians, there is no difference. There is nothing very difficult in recognising that if citizens feel unable to live within their own society without threat or fear, law and order becomes a totem for the politicians.*

*And, so, the criminal law, its enforcement, the administration of criminal justice, the penal system become the stuff of party politics. Slogans such as ‘tough on crime and tough on the causes of crime’ ring through the chattering classes and pound at the remainder of society through the media. The statistics of crime are massaged to show that the government of the day has or has not been successful in ‘returning the streets to the residents’. No government in any jurisdiction of which I have any experience shows any sign of stepping back from the puerile superficiality of the debate to think beyond giving the state and its agents increasing powers and visiting punishment of increasing severity upon those defendants who actually emerge from investigation and trial as convicted criminals. The fallacies have been known to us all for decades.”*

As Jeff Shaw QC, the former Attorney General of NSW once said (just before he retired from the post and from Parliament): “*Law and order is an easy thing for politicians to push*”.

## 6. LESSONS

With what can we resist all this? One answer lies in the word: “independence”.

The police do react to (and provoke) the media from time to time in ways that they think are accommodating and beneficial for them, but often to their detriment in the longer term.

Prosecutors who enjoy independence in decision making do not react in that way. They must remain independent of inappropriate influences from politicians, the media, police and any sectional or individual interest that is not consistent with or able to be correlated with the general public interest. That may be difficult to do in some circumstances, but it must be done if public confidence in the criminal justice process is to be maintained. The outpourings of the media and of politicians, while to be duly noted, are irrelevant to almost all prosecutorial decision making and the noise

makers need to be reminded of that constantly. The threat it poses to prosecutorial independence must be neutralised.

Judges, in an orderly system operating according to the rule of law, are likewise independent; but it can also be tough on a judge to take a course in a matter in the reasonable expectation that it will bring intemperate personal criticism to bear. To bow to the popularly expressed imperative, especially where that could be done without infringing principle too greatly (for example, by pushing up a penalty otherwise considered appropriate just to the lower limit of appellability), must be a temptation for any judge who is anxious to avoid public criticism and the unpleasantness that undoubtedly brings. Fortunately, our judges do resist such temptation.

The media, especially talkback radio in NSW, has become vital in the strategies of politicians. Of course, it is appropriate that they involve themselves in media reporting and take their policy cues from what is published. Politicians should respond to community concerns – but is that what they are really doing? In my view the initial difficulty is that the media (especially talkback radio) is not generally reflecting the concerns of the community at all. Rather, in general terms, they are selectively identifying issues that might make sensational stories, pruning them of detail and inconvenient content, avoiding careful analysis, promoting only supporting expressions of opinion and serving them up to the consumers as conflict with entertainment value. They thereby create, not reflect, community concerns. Any side benefit to the community from this interaction between commentator and politician is usually accidental, but the harm can be real.

The media also pitches itself into the political law and order “auctions” that occur especially at election time. Headlines appear that bear little relationship in substance to the information sought to be conveyed. Statistics are regularly selectively chosen and cynically massaged.

Politicians in the media loop also seize the opportunity to try to create community concerns in areas where supposed “quick fix” solutions have immediate community appeal that can be reflected at the ballot box. The public lust for vengeance is strong – particularly if someone else is exacting revenge on its behalf. It is far easier and cheaper and attractive to the unthinking to build two more prisons than to provide truly comprehensive health care, social support and education of a universally high standard to all members of the community – or any of the other services that contribute to crime prevention.

It is not as if there is even a considered community desire for longer prison sentences for those offenders who are unlucky enough to be caught. People say that they regard the general level of sentencing as too lenient – but surveys in many countries like ours (including one recently in Victoria) have shown time and again that when those same people are given the facts of individual cases and other information provided to the courts, they usually nominate as appropriate more lenient sentences than those that were actually imposed.

Sometimes, however, the quick fixes adopted can be even cheaper than a couple of extra prisons. A few years ago the NSW legislature pretended to introduce mandatory

life sentences for “really bad” murder and drug trafficking in NSW. Those provisions have never been used, other existing laws providing quite adequate scope to sentencing judges to impose life sentences if they think them appropriate – and they do. That was just another example of political “Clayton’s” toughness.

Similarly, not so long ago the maximum penalty for serious sexual assault was increased from 20 years imprisonment to life. It remains to be seen whether or not such sentences are imposed in any cases; but it is worth noting that the maximum penalty for offences of that kind (formerly known as rape) have gone from death up to the 1950s to life imprisonment, to as little as eight years, back up to 20 years and now to life again. Throughout all these changes however (and particularly from the 1950s), the gaol time actually served by offenders has not varied greatly, nor has the incidence of offending.

The impact of the media on political action is sometimes difficult to address. In the longer term, a better-informed constituency may have some impact on the directions taken by its political representatives.

But with a short election cycle and the general attraction of vengeance to the public mind, we are all in for many more “law and order auctions” at election time and lopsided reporting of criminal justice, fuelled by the “shock jocks” of talkback radio and misled by the tabloid media.

Tabloid justice? A bitter pill we probably have to swallow.