

## **KERFERD ORATION**

### **SENTENCING: PUBLIC PERCEPTIONS, THE REALITY AND THEIR SOCIAL IMPLICATIONS**

**BEECHWORTH SUNDAY 31 JULY 2011**

**Without fear, favour, affection or ill-will. To judges and magistrates, these or similar words are the fulcrum around which their job revolves. They were spoken by George Kerferd when, in 1886, he took his oath of office as a judge. Every Victorian judicial officer appointed before and since has taken that oath or made that affirmation.**

**The judicial oath or affirmation of office is intended to be a constant reminder to those who sit in the courts that they must apply the law with strict impartiality. That is one of the bases upon which the rule of law (a notion to which I shall return) depends. In other words, judges and magistrates must be influenced by nothing but the law, their conscience, and the evidence called by the parties in the case. Whether presiding over a criminal or civil trial or hearing; pronouncing judgment at the conclusion of civil litigation; or sentencing an offender - in each instance, bias and prejudice**

are to be consciously avoided, as is every influence except those which are made known to the parties. The prosecutor in a criminal case, the accused in the dock, and the parties to civil litigation - all must be confident that the person on the bench will be influenced only by that about which all involved in the proceedings have been made aware; and about which, being fully informed, they have the right to make submissions.

The right to be heard, a right fundamental to any system which strives to deliver justice, is bereft of reality unless those with that right are aware of the considerations which will have an impact on the decision-making process, and are given a meaningful opportunity to address them.

A legal establishment which is open to corruption is the opposite of one in which the right to be heard is given proper recognition. But the right to be heard goes way beyond the certainty that the judicial officer has not been bribed. Those who appear in the courts are also entitled to be secure in the knowledge that the judge or magistrate will not be influenced by the fact that one of the parties may be more powerful or more influential than the other. The power of the powerful, among whom may be the watching media, must be neutralised at the courthouse door, so that all who

**enter do so as equals. It must not matter to the court that, for example, one party to the case is the government and the other a citizen without means; that one is a large and wealthy corporation and the other a battling sole trader; or that one is the Crown and the other an accused from nowhere. All those who have an interest in court proceedings, including criminals about to be sentenced, should have confidence that the judge or magistrate will not bow to the will of the powerful, or bend with the shifting winds of community sentiment.**

**The expectation that justice will be done without fear or favour, affection or ill-will is deeply embedded in contemporary Australian culture. This includes the notion that those accused of committing offences should not be tried, convicted and punished by a lynch mob. Nor should they be tried, convicted and punished by the media. The fact that the media, or some sections of it, might have strong views, vigorously expressed, about the appropriate punishment for a convicted offender, must not influence the magistrate, the jury or the judge. It is safe to say that the Australian public is firmly against either trial or punishment by the media.**

**That in any case would be anathema in any society which values the rule of law. The subject of this Oration is sentencing, not the rule of law. Nevertheless, all sentencing decisions are made in a context which demands that the rule of law be observed. It is therefore appropriate that I say a little about it.**

**Law and order is one thing - necessary, but often enforced with excessive efficiency by totalitarian regimes. The rule of law is another. Both are important.**

**No democracy can exist without the rule of law. It is one of the finest products of humanity's social conscience. For present purposes, I define it as having its foundation in laws made by a body freely and fairly elected by universal franchise; and with those laws being not only readily accessible, but also binding alike on both governments and citizens, the powerful and the weak. The rule of law constrains the exercise of power by ensuring that all such exercise conforms with the limitations placed upon it by the law. Another essential element in the definition is that the laws be enforced impartially by an independent and properly qualified judiciary; a judiciary which is absolutely free of corruption and which is assisted in its work by an**

**independent legal profession. The rule of law and law and order can and should walk together.**

**The widespread misuse of power is the cause of much economic and social distress. Because the rule of law restrains that misuse, so that power can only be wielded responsibly and in accordance with law, it is a precondition to almost everything we seek from the privilege of living in a society which values decency and civic virtue.**

**The right and duty to punish those who offend against the criminal law is confined to the courts as the judicial arm of government. Much, but by no means all, of the media, is very interested in the administration of the criminal law, and sentencing in particular. That interest is reflected in news stories about the sentence which a court has imposed on a convicted offender, and in commentary about sentencing in general. These stories and commentaries are often intended to carry a message to the community, and to the courts. That message is that the courts are too lenient. My task in this Oration is to justify the conclusion that, as a generalised statement, this message is wrong. And because as a sweeping proposition it cannot be justified, the courts cannot give heed to it while at the same time complying with their absolute duty to act in accordance with the rule of law.**

**In other words, the media, or at least some segments of it, are demanding that judges and magistrates adopt a general position on sentencing which judicial officers must reject if they are to uphold the oath or affirmation of their office.**

**This is a convenient point at which to introduce the central arguments of the 2011 Kerferd Oration. The first is that both the media and the courts constitute essential elements in any democratic society. Secondly, media reports play a critical role in the development of public opinion on sentencing.<sup>1</sup> Thirdly, media reporting tends to choose stories, and aspects of stories, selectively - their aim often being to entertain rather than inform.<sup>2</sup> Fourthly, the result is a portrayal of sentencing practice which is “grossly inaccurate”.<sup>3</sup> Fifthly, this contributes significantly to a misinformed public. And finally, the fact that these false conclusions are propounded, sometimes fiercely, by some powerful elements in the media, and find a ready audience, must not deflect the courts from their duty to apply the law without fear or favour, affection or ill-will.**

**I do not want to give the impression that there is, over sentencing, a battle between infallible courts and fallible**

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<sup>1</sup> *Myths and Misconceptions*, Sentencing Advisory Council of Victoria, July 2006, 15.

<sup>2</sup> *Myths and Misconceptions*, Sentencing Advisory Council of Victoria, July 2006, 15.

<sup>3</sup> *More Myths and Misconceptions*, Sentencing Advisory Council of Victoria, September 2008, 5.

**media. Being run by humans, neither is perfect. There is, however, an element of Greek tragedy about the position in which the courts and the media both find themselves. Each is forced by its circumstances to face the other off, with neither having the flexibility necessary to reach a satisfactory working compromise.**

**This proposition requires explanation. Each side sees itself as acting for, and the other in some respects as acting against, the best interests of democracy. Some in the media say that unless the courts get tougher on crime by punishing criminals much more severely than at present, they will never earn the public's trust; and trust in the courts, they rightly assert, is essential in a democratic and civilised society. For their part, the judiciary complain about segments of the media which, we judicial officers believe, unjustifiably exploit news and commentary about sentencing in ways which devalue the deterrent effects of punishment, undermine confidence in the courts, and do a disservice to democratic governance.**

**From my own experience of a professional lifetime working in or as an advocate before Australian courts, I can certainly say that they are not infallible. I can, however, say with**

**equal certainty that, with a minute number of exceptions, the Australian judiciary has always been incorruptible.**

**For its part, the media sees itself, correctly, as the guardian of the people's right to know. As Thomas Jefferson wrote, liberty cannot be protected but by the freedom of the press. It is the media's job to observe the exercise of power, and to expose impropriety and inadequacy in that exercise. The courts exercise power. Judicial officers are themselves bound by the law, both as members of a society governed by law, and by the oath or affirmation of office. So the courts are very much fair game for media scrutiny.**

**If the media detect wrongdoing in the way the courts administer justice, it is the media's duty to bring it to light. I have no doubt that the media, or at least that segment of it which takes a particular interest in sentencing, sees its role as the protector of society against the evils of crime; as the voice of the people in expressing the community's concern about the extent of criminal activity; and as an advocate on behalf of the people for those measures which best prevent it. These are measures which, if this segment of the media is correct, the courts are failing to adopt.**

**So the different stands are taken; and each side is restricted in its ability to meet the other half way. Sentencing, presented in the way it usually is by that part of the media interested in the topic, sells newspapers, and has the public watching television news or listening to the radio. If it were presented in the way the courts would like it to be, the audience would shrink, and the media would be at a commercial disadvantage. On the other hand, the media, or at least a part of it, tries for its commercial advantage to impose upon the courts a sentencing regime which - so the best evidence indicates - would, if adopted, be fundamentally flawed. For all that the media continues to assert to the contrary, research which by reason of its rigour and consistency the courts must accept, demonstrates that increasingly harsh punishments do not result in decreasing levels of crime; that a general threat of imprisonment has little deterrent value; that about half of those who go to prison are back again within two years; and that the public, when appropriately informed about the considerations which go into the sentencing process and about the alternatives to imprisonment, are no more in favour of harsh penalties than the judges.**

**No civilised system of justice can tolerate the punishment of offenders on the basis of false precepts propounded by a**

**powerful media. It follows that, while being astute to correct particular instances of unjustified leniency, the judiciary is in duty bound to sentence without regard to media claims that the public demands harsher punishments across the board.**

**The social implications of these conflicting and probably irreconcilable forces are a matter for concern. It is this that I wish to explore today.**

**I have in this Oration based my central arguments on the work of the Sentencing Advisory Council of Victoria. It is an independent statutory body established in 2004 to allow properly informed public opinion to be taken into account in the sentencing process; to provide advice, education and information to the community, the judiciary and the government on sentencing issues; to promote consistency in sentencing; and to facilitate the dissemination of up-to-date and accurate sentencing data. The Chair of the Council is Professor Arie Freiberg, the Dean of Law at Monash University, and one of Australia's foremost lawyers and criminologists. The Council staff include other highly and relevantly qualified experts. Their expertise, which is employed daily in what they do, entitles their opinions to be**

**given particular respect. Other like bodies exist in jurisdictions outside Victoria.**

**Before I develop my central themes, it may be helpful if I give a brief description of the sentencing process.**

**Judges and magistrates often identify sentencing as the most demanding and difficult part of a generally demanding job. Sentence is pronounced after a hearing known as a “plea” during which a convicted offender presents his or her plea in mitigation of penalty. The prosecution is also given the opportunity to make submissions or call evidence, or both. Victim impact statements, which are in writing, are commonly before the court at this time, and sometimes a victim will give oral evidence about the effect the crime has had.**

**In Victoria, legislation - the *Sentencing Act* - prescribes the only purposes for which sentences may be imposed. I mention them in abbreviated form. There are six, though the sixth is a combination of any of the others. The first is to impose just punishment. The second is to deter the offender and others from a repetition of the crime. The third is to assist the offender’s rehabilitation. The fourth is to**

denounce the criminal conduct. And the fifth is to protect the community.

The *Sentencing Act* also prescribes those things to which the court must have regard. One is the maximum penalty. Another is current sentencing practices. A third is the nature and gravity of the offence. The impact of the crime on, and the personal circumstances of, any victim are two more. The sentencing judge must also have regard to the presence of any aggravating or mitigating circumstances.

I mentioned current sentencing practices as being included in that list. Such practices are relevant because, if offenders are to be dealt with justly, their sentences must be comparable with other sentences imposed on other offenders who have committed similar offences in similar circumstances. So the Victorian judiciary is furnished with relevant statistics maintained by the Sentencing Advisory Council without which sentencing trends could not be ascertained. At the same time, no case is exactly comparable with any other, since no two offences and no two offenders are exactly the same. The sentencing judge or magistrate must therefore make comparisons in circumstances in which comparisons cannot be made with exactitude.

**Other difficulties in reaching an appropriate sentence abound. Unlike the media, the judiciary cannot escape them. Consider for a moment those statutorily prescribed purposes and considerations. Some point in one direction, others in the opposite. A mitigating circumstance is the opposite of an aggravating circumstance. Yet it is unusual if both are not present. And if both are present, both must be somehow accommodated.**

**How is the judge or magistrate to give proper weight to each of a number of factors when regard must be had to all of them even though they might be opposites? Not by adding a year's imprisonment for this aggravating factor, and taking off six months for that mitigating consideration; but by a process of synthesis. Pluses and minuses all go into the mix, and the judge or magistrate takes responsibility for the final result. Reasonable minds will differ about what weight should be given to one factor, and what weight to another. It follows that there can be no single absolutely correct sentence. There is instead for any particular offender a range of possible sentences each of which might properly be imposed on him or her. If the sentence handed down is within that range, it cannot be successfully appealed.**

**Even the range, however, does not have boundaries marked with shining lights. And when considering where those boundaries lie in the particular case, the judge or magistrate will not as a rule consider the differing positions of sentencing advisory bodies on the one hand and the media on the other. But sometimes the mind is distracted by an image of a headline shouting outrage. What must be resisted on those occasions is the temptation to impose a harsher penalty than the judge or magistrate thinks appropriate for fear of adverse media and public reaction.**

**The temptation is real. Take the case of a criminal offence committed by a leading member of a minority group who has assisted quietly but effectively within his minority to help its members assimilate; but who, unknown to others, has been the subject of constant bullying by someone of influence in the mainstream community. The person being bullied reacts with a punch. The bully falls, hits his head, and by unfortunate chance, dies. The media are outraged. The offender is convicted of manslaughter. During the trial, it emerges that the dead man is a pretty unpleasant person, though his family say (probably truthfully) that they are devastated by his death. The mitigating circumstances are otherwise powerfully in favour of the offender. The appropriate approach to sentencing this man is a degree of**

**leniency. Do you as the judge sentence accordingly; or do you sentence to please those who write headlines?**

**Those media interests with which, for the purposes of this Oration, I am concerned, do not labour under the need, which is an absolute necessity for a sentencing judge, to put the mitigating circumstances into the scale. They have the luxury of looking only at the aggravating factors, while at the same time also sparing their audience the trouble which comes from examining both sides of the picture.**

**The contentions about sentencing which much of the media propound are straightforward. Lenient sentences, according to these segments of the media, do not prevent crime. They encourage it. Except for very minor offences, and with some discrimination if the offender is a mere youth, terms of imprisonment of proper length are the answer. Imprisonment prevents crime in at least two ways. It puts the offender out of harm's way, and it deters others from following the offender's example.**

**This message resonates with the public. Most of us would prefer life without any crime, and none of us want to be victims of crime. Tough sentences are often seen as the way to go. Anything else is seen as judicial weakness, and as the**

**failure of a remote judiciary to understand the society which it is supposed to serve.**

**Judicial remoteness and weakness is a theme which appears with regularity in some media quarters. A distant and irresolute Australian judiciary is pictured as too readily succumbing to smart defence lawyers who play them on a break. Inadequate sentences are the result.**

**A striking but not isolated example of the exposition of this theme comes from the *Sydney Sunday Telegraph* of 19 June 2011 (last month). One headline dominated the only story which appeared on the front page. The headline read: **GET OUT OF JAIL, FREE**. Beneath that, in much smaller but still large print, the headline continued: “Steal a car, rob someone, walk away”. On another page was another headline covering the same story. It read: “Criminals get away with blue murder”.**

**Headlines have an important effect on the readers’ perception of the substance of the article. In the case of the *Sunday Telegraph* of 19 June, the perception created by the headline matched the text which followed. The story began:**

*Thugs, thieves, drug dealers, dangerous drivers and other serious, violent criminals are routinely walking*

*away from courts without serving any time in prison. Nine out of 10 criminals guilty of offences that could lock them up for two years get nothing more than a slap on the wrist. An investigation by the Sunday Telegraph has revealed the shocking leniency of our courts. Thousands of offenders convicted of the most despicable crimes – serious assault, sexual offences, robbery, burglary and drug trafficking – convince judges and magistrates to let them back into society without significant punishment. The figures have infuriated police and victim-support groups.*

**This investigation was designed to sell the *Sunday Telegraph*. It admirably met that objective. Stories which create fear and distrust attract readers. By not giving all the facts necessary satisfy the public's right to know, the newspaper unjustifiably fuelled those emotional responses. In this and other ways, the 19 June edition of the *Sunday Telegraph* reveals more about the standards sometimes adopted by the press than it does about sentencing in NSW.**

**Indeed, the article and its accompanying editorial are vulnerable to criticism at innumerable points. I begin with one. They both rely only on their emotional impact. The reader is not told, for example, what the newspaper means**

by “a slap on the wrist”. It seems to include all punishments except imprisonment. Yet there exist stiff alternatives to prison, and some of these have much more potential for rehabilitation. They are also far less expensive. I interpolate to say that my visit yesterday to the facility in Beechworth demonstrated what an impressive operation is being conducted there and I congratulate its management for involving the prisoners as constructively as they are with the Beechworth community.

According to the Productivity Commission, each prisoner cost Victorians almost \$88,000 in 2009-10. By contrast, the cost of supervising an offender on a community corrections order was just under \$7,000 a year. Productivity Commission figures also show that 41.5% of the prisoners released in 2007-08, but only 19.9% of offenders discharged from community corrections orders during that period, were either returned to prison or received a new community corrections sentence within two years.<sup>4</sup>

It is entirely to be expected that the *Sunday Telegraph* article announced that the statistics uncovered in the newspaper’s investigation “have infuriated police and victim support groups.” Both have a legitimate interest in those statistics.

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<sup>4</sup> Alternatives to Imprisonment: Community Views in Victoria, Sentencing Advisory Council, March 2011, 2.

**Both are entitled to have their reaction to them put into the public domain. I fully understand, for example, how members of the police are sometimes disappointed with a sentence following a conviction which has been the result of very skilful police work, but which as they perceive things, does not produce a sentencing outcome which they regard as satisfactory.**

**But while the opinions of victims and police are important, so are those of the experts. We are not told whether the NSW Sentencing Council was asked for its opinion. We can legitimately suspect that it was not or, if approached, did not give an answer which the *Sunday Telegraph* wished to reveal. If these suspicions are wrong, the *Sunday Telegraph* has itself to blame for not making the true position clear.**

**The article goes on to make the bald and at that point unqualified claim that “thugs who bash people or sexually assault women likewise have almost no chance of serving any time.” This startling statement is likely to make a big impression on the reader’s mind. It is an impression which may or may not be erased by the article’s later revelation that 71% of those who bash people and are convicted of serious assault go to jail. The journalist does not explain how that is consistent with those who bash people having**

**almost no chance of doing time. Or how that fits the headline GET OUT OF JAIL, FREE.**

**What the article in fact says is that 29% of those guilty of serious assault “walked free”. The balancing fact, that 71% were incarcerated, was a necessary implication; but it was not explicitly mentioned. If you read the article carefully, you would also realise that “walked free” in fact meant receiving a suspended sentence, or a bond, or being required to do community service. The reader is left with no idea about what these punishments involved, or the circumstances in which they were imposed, except that according to the *Sunday Telegraph* they amount to no more than a slap on the wrist. In short, it is impossible on the basis of the article to judge whether the leniency of NSW courts can with reason be described as “shocking”, or whether those said to be “infuriated” were justified in their reaction. But the readers of the article were not expected to apply reason to the task.**

**An editorial accompanied the article. It described the investigation about which the article was written as revealing *shockingly low imprisonment rates for convicted crooks with a whopping 27% of criminals avoiding jail*. This was in spite of being found guilty of such offences as drug**

trafficking, sexual assault and violent robbery. The editorial then pictured helpless prosecutors and police being outsmarted by devious and clever defence lawyers, who also pull the wool over feeble judicial eyes. It says:

*At any local [that is, magistrates'] court you'll see prosecutors and police confronted by defence lawyers who know all the tricks for dodging jail, and magistrates letting it happen. ... The Sunday Telegraph is ... calling for ... a genuine attempt by our judiciary to use prison for its real purpose – as a deterrent.*

This is more unworthy journalism. Not only are NSW magistrates unjustly maligned for “letting it happen”, but the editorial also ignores the fact that the law requires judicial officers to take into account many things in addition to deterrence. Of added significance is the sad irony, completely missed by the *Sunday Telegraph*, that while it is a resolute advocate of deterrence, it informs potential criminals that they will get out of jail free. It thus encourages criminality. In this way the newspaper assists in sabotaging attempts to deter potential offenders. It encourages the very behaviour it proclaims to abhor.

There is another point. The article fails to acknowledge research which strongly suggests not only that imprisonment

is a failure as a deterrent, but is a hugely expensive failure. In April this year, two months before the *Sunday Telegraph* editorial, the Sentencing Advisory Council of Victoria published a research paper entitled *Does Imprisonment deter? A Review of the Evidence*. The *Sunday Telegraph* ought to have known where to find it. It is very relevant to the editorial's subject, because it examines the evidence about the extent to which prison reduces crime.

The research paper shows that people are frequently irrational. Even if fully mentally competent, they do not always make decisions that are in their own best interests. Their capacity to make appropriate choices, however, may be - and for those who engage in criminal behaviour often is - further clouded by mental illness, or mental disorder, or the effects of drugs. Indeed, a 2003 report for Corrections Victoria found that two-thirds of all first-time offenders had a history of substance use which was directly related to their offending. This rose to 80% for males and 90% for women sentenced to a second or subsequent incarceration. The lesson is clear. People who have difficulty thinking rationally are difficult to deter.

The research paper concluded that, for a significant number of offenders, imprisonment did not act as a deterrent. This

is evident from the rate of recidivism. According to the Australian Bureau of Statistics, almost half (49%) of all adult prisoners in custody on 30 June last year in Victoria, and 54.6% nationally, had been in prison before. This is consistent with the figures on recidivism released by the Productivity Commission and which I have already mentioned.

Another conclusion drawn in *Does Imprisonment deter?* was that, while increases in the perception of apprehension and punishment have a significant deterrent effect,<sup>5</sup> the threat of imprisonment, although having a small negative effect upon the crime rate, is generally insignificant as a deterrent.<sup>6</sup>

There are, according to *Does Imprisonment Deter?*,<sup>7</sup> a number of reasons why, rather than acting as a deterrent, the experience of prison may result in an increased rate of recidivism. None of them should surprise. Prison can act as a criminal learning environment. It also tends to reinforce the criminal identity of the inmates. Finally, imprisonment may fail to treat the underlying causes of offending behaviour.

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<sup>5</sup> *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council, April 2011, 2.

<sup>6</sup> *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council, April 2001, 17.

<sup>7</sup> *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council, April 2001, 21.

**A particularly significant finding as recorded in the research paper is that, while imprisonment has a small positive effect as a deterrent, *increases* in the severity of punishments do not deter.<sup>8</sup> Most potential offenders will be unaware of any increase, and would not be deterred even if they knew.**

**I make one final point about the *Sunday Telegraph* article, and its 19 June editorial. Each supports the conclusion that confidence in the criminal justice system is lacking. Indeed, according to the Sentencing Advisory Council of Victoria, “public trust and confidence are at critically low levels around the world.”<sup>9</sup>**

**In its research paper entitled *More Myths and Misconceptions*, the Sentencing Advisory Council also stresses that public confidence is necessary for the legitimacy and function of the courts.<sup>10</sup> As an example of the many reasons why, the research paper added that “*victims need to be sufficiently confident in order to report crime in the first***

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<sup>8</sup> *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council, April 2001, 17.

<sup>9</sup> *More Myths and Misconceptions*, Sentencing Advisory Council of Victoria, September 2008, 2.

<sup>10</sup> *More Myths and Misconceptions*, Sentencing Advisory Council of Victoria, September 2008, 2.

*instance; without the co-operation of complainants, witnesses and jurors, prosecutions would not be effective.”<sup>11</sup>*

On this point, the Sentencing Advisory Council and the *Sunday Herald Sun* are in agreement. An editorial in that newspaper of 6 March this year said that *“In a civilised society it is critical that the public has confidence in the judicial system. ... Ultimately, the judiciary has to answer to the public and, unless it meets community expectations, it has little hope of securing the trust and confidence it needs.”*

There can be no doubt of the correctness of these propositions. The question is whether, in the face of media views about sentencing, the courts can retain the confidence of the public consistently with their over-riding duty to do justice without fear or favour, affection or ill-will.

The reason for the lack of trust is explored in two research papers published by that Council. I have already mentioned one. The first, entitled *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* is dated July 2006. It represents the culmination of a year-long project that was designed to examine and critically evaluate the current state of knowledge about public opinion on

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<sup>11</sup> *More Myths and Misconceptions*, Sentencing Advisory Council of Victoria, September 2008, 2.

sentencing, as well as the methodological issues surrounding how public opinion is measured. The second, published in September 2008 and entitled *More Myths and Misconceptions*, reviewed the several studies which were released in the interval. That review confirmed the earlier findings.

According to each of the two *Myths and Misconceptions* papers, the mass media is the primary source of information on crime and justice issues.<sup>12</sup> But its reporting on the subject is neither complete nor accurate. The result is that public misconceptions are rife.<sup>13</sup> This in turn leads to a conclusion of especial importance to the judiciary. It is that the punitive public, a public demanding harsher penalties, exists – but it is a creation of media misinformation. When given details of the considerations which were taken into account by a judge or magistrate in reaching a sentencing decision, public sentencing preferences change. They become very similar to those adopted by the courts.<sup>14</sup>

The first of the two *Myths and Misconceptions* papers puts it this way:

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<sup>12</sup> *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, Sentencing Advisory Council of Victoria, July 2006, 15.

<sup>13</sup> *Myths and Misconceptions*, 13.

<sup>14</sup> *More Myths and Misconceptions*, Sentencing Advisory Council of Victoria, September 2006, 2.

*Newspaper portrayals of crime stories ... 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 ... 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 systemic information about the sentencing process or its underlying principles.*

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*As people are overly influenced by single-case information, people falsely generalise that leniency characterises the entire sentencing process.<sup>15</sup>*

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*[But W]hen people are given more information, their levels of punitiveness drop dramatically.<sup>16</sup>*

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*Public sentencing preferences are actually very similar to those expressed by the judiciary or actually used by the courts.<sup>17</sup>*

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<sup>15</sup> *Myths and Misconceptions*, 15.

<sup>16</sup> *Myths and Misconceptions*, 17.

<sup>17</sup> *Myths and Misconceptions*, vi.

The most recent research on this topic powerfully supports the last two of these propositions. On 10 February 2011, the Federal Minister for Home Affairs and Justice (Brendan O'Connor) released *Public judgment on sentencing: final results from the Tasmanian Jury Sentencing Study*. The study enquired into the reaction of jurors to the sentences imposed following trials in which those jurors had decided whether or not the accused was guilty. It was led by two eminent legal academics, Professor Kate Warner of the Faculty of Law at the University of Tasmania and Dr Julia Davis, a member of the School of Law at the University of South Australia. It was funded by the Criminology Research Council of Australia. It was the first to consult jurors who participated as such in real criminal trials.

The study examined the responses of 698 jurors who between them had participated in 138 such trials. 90% agreed that the sentence handed down following the trial in which they had found the accused guilty was “very” or “fairly” appropriate. 52%, many of whom agreed that the judge’s decision was appropriate, chose a *more* lenient sentence than that which the judge imposed.

The Melbourne *Herald Sun* takes an intense interest in sentencing issues. The Tasmanian jury study is of central importance to an understanding of those issues. It was not until 18 March, however, five weeks after the Minister's press release on 10 February, that the *Herald Sun* informed its readers about it. A single-column article appeared on p.38 of the newspaper's 18 March issue. In the meantime, other media had reported the results of the study, and two letters had been written to the editor by me on behalf of the Judicial Conference of Australia, pointing out how important the study was. Neither letter was acknowledged. As part of Law Week in May, again on behalf of the Judicial Conference of Australia, I sent *The Age* and the *Herald Sun* opinion pieces about the study. The copy to *The Age* was published. The slightly different piece sent to the *Herald Sun* was neither acknowledged nor published.

This experience demonstrates how resistant the media sometimes is to arguments with which it disagrees. Such arguments, even if relevant to a topic about which the media frequently expresses interest, are hidden from the media's audience. A form of censorship is imposed. So much for the public's right to know. The entire media boast that they champion that right. For some, the boast is, on the subject of sentencing, less than sincere.

Consistently with this, segments of the media do not resort to sources of information about sentencing, even though that information is essential to a proper understanding of it. The creation of the Sentencing Advisory Council, and its counterparts in other jurisdictions, should have been a boon to the media. They are independent repositories of reliable information. But nothing spoils a good story about sentencing more than reliable information which indicates that the sentence was appropriate. So, media outlets like the *Herald Sun* turn to outraged victims or outraged victims' representatives or outraged members of the general public when they want a reaction to a sentence they can portray as lenient. The contribution of an academic criminologist, no matter how eminent, would not fill any niche in this reporting. One side of the story, uncontaminated by the other, can get the public's pulse racing. But when both sides are *combined*, the power to shock disappears. Equally significant is that expert opinion would demonstrate that the media cannot speak for the community as a whole.

So some media outlets have self-centred reasons for giving little publicity to the work of bodies such as the Sentencing Advisory Council but for the occasional scathing attack on that work. These considerations seem to explain an editorial

which appeared in the *Herald Sun* on 1 April this year. It concerned a research paper published by the Sentencing Advisory Council in March 2011. The research paper had found that 74% of those surveyed strongly supported increasing alternatives to jail, such as supervision, treatment and community work.

According to *The Herald Sun*, the paper was a joke because “*The sample of 300 Victorians is not enough to get a reliable response and not telling those surveyed that violent crime in Victoria has been rising rapidly makes a nonsense of the report.*”

The *Herald Sun*'s readers were *not* told that the sample of 300 was selected using methodology rigorously designed to produce a margin of error of  $\pm 5.8\%$ , and the 300 were themselves drawn from a similarly selected sample of 1,200, designed to give a margin of error of  $\pm 2.9\%$ . It is true that those questioned were not informed that violent crime has been rising rapidly in Victoria. But that was because the information provided to the participants was Australia-wide.

What more serious conclusions can be drawn from all this? First, courts can and should do what they can to correct misconceptions, but commercial reality in the media world

means that reporting about sentencing is unlikely to change. Those reports will do nothing to inculcate confidence in the administration of criminal justice. Some of their criticisms are, and doubtless will continue to be, justified. The courts should take appropriate note of them. If Parliament were to seek to change sentencing law, the courts will of course give effect to Parliament's will. Any attempt by the judiciary to engender public confidence by falling into line with unjustified media demands would, however, be quite wrong.

For one thing, some in the media will never be satisfied. According to Corrections Victoria, this State's prison population has over the past three decades increased from 1,573 in 1977 to 4,537 in 2010, and over the past 20 years from 69.9 per 100,000 adults in 1990 to 105.5 per 100,000 in 2010. Parliament has created new offences, and increased the maximum penalty for others. Before the results of the Sentencing Advisory Council's research of the past six years became known, the courts themselves were doubtless influenced by the media to move sentences towards the upper confines of the appropriate range. As I have demonstrated, none of this has satisfied the Australian media. It is the same elsewhere. In the US, the prison population is 743 per 100,000 adults, the highest in the developed world. Yet the US is hardly conspicuously safer

than elsewhere, and some US media and politicians still maintain that sentences should be harsher. By contrast, in Japan, there are only 59 prisoners for every 100,000 adults.<sup>18</sup> At the same time, Japan remains a very safe society indeed.

I conclude with another, more important, point. The rule of law cannot survive except by being true to itself, no matter where its immediate advantage might lie. There is an ancient Latin maxim: *Let justice be done, though the heavens fall*. It is not quite as dramatic as that in contemporary Australia. But judicial officers cannot act otherwise than in accordance with their oath or affirmation of office. On the present state of our knowledge about informed public attitudes to sentencing, we cannot, therefore, seek the approval of the general public by pandering to claims that, in general, sentencing is too lenient. Every media executive should be aware of a simple truth. No matter what their media outlets may say about sentencing, every judge and every magistrate in this country will continue to act without fear, favour, affection or ill-will.

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<sup>18</sup> The figures for the US and Japan come from King's College London's World Prison Brief.