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INFLUENCE OF THE MEDIA ON THE CRIMINAL JUSTICE SYSTEM OF NSW

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INTRODUCTION

Thank you for the invitation to address this conference. I did so in 2004, 2006 and 2011 – so it's probably time to do so again, but on a different topic.

In 2003, while Director of Public Prosecutions, I was invited to speak at an international conference on a subject closely related to today's. The title I was given (by the late John Phillips, former Chief Justice of Victoria) was "My Love Affair with John Laws and Alan Jones". That took some explaining to an international audience.

I prepared a paper for the conference. As it happened I became unable to attend to deliver it, but it was published anyway. If you wait long enough, everything old becomes new again and so I am recycling some of it here. As I do, I notice that really not a lot has fundamentally changed in 14 years.

I will skip most of the introduction, because I had to explain who John Laws (aka the Golden Tonsils) and Alan Jones (the Parrot – and other things) and their ilk were and what they did in NSW. You know that they are radio broadcasters of the talkback commentary variety with large but limited audiences. Laws has been in the game for over 60 years and Jones for over 30 years. Now a new generation has emerged around the country – Ray Hadley and his kind. They wield disproportionate power over politicians and other public policy makers – and they hate, to differing degrees, independent statutory officers such as Directors of Public Prosecutions who speak out objectively on issues in criminal justice. That is where we made contact in the old days, on the public airwaves. It was usually not head to head (although I still dine out on a particular broadcast with Jones and I did prosecute Laws for breaching the confidentiality of the jury) – we tended to talk about, rather than to, each other. And usually not in very flattering terms.

The topic I have been given at this conference is the influence of the media on the criminal justice system in NSW. The media and the criminal justice process both deal with conflict and often sensation. Crime is inherently conflictual and the adversarial

process creates a contest. Most crime is pretty mundane, but some of it is, or can be made, sensational. The media love contest and sensation, because it sells and they can take sides, if they choose. Stories can be spun very profitably.

In this paper I am not examining media influence in individual cases – I am talking about the system of criminal justice in NSW. To talk about cases might lead me into the case of Cardinal Pell and that would be a bottomless swamp.

To put this topic in its proper context I need first to say something about government (of which the criminal justice system is an essential part) and about the media generally. It is often helpful to go back to first principles in order to establish the ground rules for discussion and it is easy to lose sight of them in the heat of argument or in the hands of manipulators. It will also help us to see how far short of perfection we have fallen in trying to strike the right balances.

HOW GOVERNMENT OPERATES

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”. It protects us. It is essential and it gathers in other principles such as human rights and the independence of the judiciary. 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 whom the media often claim to represent.

We apply the rule of law in a way that recognises 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 and equal arms of government.

The doctrine of the separation of powers probably originated in ancient Athens, but in its modern form was articulated by the French writer Montesquieu in 1748. Seventeen years later (in 1765 – and still before European settlement in Australia) 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]

Those 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 criminal context, but it is salutary to take an example from the United Kingdom that was reported in February 2003. It has many resonances for Australia. It is not strictly a criminal case, but the parallels are there.

The High Court in London upheld applications made by six asylum seekers, challenging the implementation of a new government policy that was contrary to UK human rights law. The Home Secretary, David Blunkett, 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 are 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. Then it cannot be *“overridden by challenge through the courts”*.

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, no and no!

Nothing has changed, it seems, in the intervening 14 years. There was another example of this sort of behaviour earlier this year when the High Court in Britain held that the Brexit decision to leave the EU had to be debated in Parliament (a decision upheld in the Supreme Court). The Daily Mail newspaper showed a photograph of the judges on its front page with the description *“Enemies of the People”*. Others described the Judges as being *“out of touch”*.

Does that sort of ignorant populist tabloid reaction matter?

An Anglican Bishop told BBC Radio 4's Sunday program, shortly after the Daily Mail's publication, that it certainly did matter. He said: *“The press don't just reflect the public discourse, they also shape it. The last time we saw things like the photographs of judges on the front page of a newspaper described as enemies of the people is in places like Nazi Germany, in Zimbabwe and places like that.”* This time it happened in England in 2017.

Prime Minister May did not take the David Blunkett line, but refused to criticise the publications saying only: *“I believe in and value the independence of our judiciary; I also value the freedom of our press...Both underpin our democracy and they're important.”* But surely while they are not mutually exclusive, there must be a balance in the way both are exercised. The independence of the judiciary is exercised subject to the law – the freedom of the press must be subject to responsible reporting and commentary with recognition of the status and functions of the institutions of society – and their value.

In some jurisdictions around the world publications of those kinds would constitute criminal offences based on improper influence upon the judiciary and “scandalising” the judiciary. Regardless of that, such conduct can operate in all places to undermine public confidence in the judiciary which is essential to its proper operation.

And let us not get into Trump’s America with “fake news” and “alternative facts” and the “so-called judge” who ruled adversely against his second travel ban Executive Order!

But we do see similar things in Australia, especially in the context of criminal sentencing to which I refer below.

At the end of her term as President of the NSW Bar Association in 2001, Ruth McColl SC (now Justice McColl of the NSW Court of Appeal) 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 – 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.

HOW THE MEDIA OPERATE

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 19th Century, of course. Is journalism in the early 21st Century any different – or better? Or have the public media, or sections of it at least, developed and refined their role to one not of keeping us in touch with the ignorance of the community, but of maintaining the ignorance of the community? And is it done 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 concerns 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 and shrinking, being intended (as it must be) for consumers with attention spans greater than ten seconds. (Those with shorter spans have been conditioned further by social media.) Most radio, most television and the tabloid press are principally concerned with entertaining us by telling us stories and generating conflict which in turn broadens the audience and sells advertising. (It is called “tabloid” for a reason... like a tablet, something small and easily swallowed.) Their pitch is to the emotions, rather than the intellect and there is a vast quantity of it. The Australian researcher and social commentator Hugh Mackay identified aspects of the problem in an article some years ago:

“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. Things have only become worse with the widespread modern use of texting and social media.

In the information age, however, the media recognise that even serious matters do need to be included in what they publish, so they try to do even that 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 AIIA 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.”

And it still is. And it applies to the way crime and criminal justice are portrayed.

In most important, serious issues there are at least two points of view. Journalists and especially commentators are adept at identifying the opposite ends of the spectrum of views that might apply to any matter, simplifying them (often by omitting relevant material, especially if it is complicating), removing the middle ground and erecting an adversarial framework of conflict from the extremes. 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, a victim), then so much the better. Naturally this can apply readily to criminal justice. Consequently, information of relevance and maybe even of interest to us, but in which there is no facile conflict, may never be published. (Even the vast proportion of the thousands of criminal cases heard in NSW each year – cases of inherent conflict – are never reported publicly. Indeed, court reporting by the media generally in Australia is in a poor state, even the reporting of very important decisions.)

Conflict sells. 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 identify the gaps in fact or logic. And of course, sales attract advertising and other forms of support. (Yes, I fear that ultimately it is all down to dollars.) It may be conceded that journalists are news reporters and not historians; but commentators have no excuses (and we do retain a decreasing number of very good ones).

The worst practitioners of this form of comment are the talkback radio entertainers (speaking of dollars), 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 in 1999: *“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* underscored 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 and it is often in the interests of the media 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 2001 oration, with stunning political prescience:

“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 may be a peculiarly New South Welsh phenomenon in Australia. This is not the time to explore the reasons for that; but it is allowed to flourish by the diminution of an effective balancing force at the quality end. There are moderate voices able to be heard above the din – but one has to listen for them. We have lost a

giant in this regard with the death this year of Mark Colvin of the ABC. I think a part of the problem is the sheer unwillingness of many sections of the media to report any good news. For example, there are successes in some crime prevention and treatment initiatives – but the public rarely gets to hear about them (and the politicians seem to ignore them). Such reports happen so infrequently that we can remember almost every occasion. Their absence also contributes to the warped view the community forms of criminal justice.

The media is hooked on sensationalism. Strong 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 to those who are not directly involved. Often the journalistic impact is manufactured.

- A “shock horror” report is made that asbestos has been found in an old school building. Frankly, I would be surprised if asbestos could not be found in an old school building.
- An hysterical report is made that a child has died or been mistreated while the Department of Community Services (DoCS) was not immediately on hand. Again, DoCS cannot be everywhere and such tragedies will happen (whoever may be the head of DoCS or the Minister at the time).
- A spread appears on emergency patients in ambulances or public hospitals having to wait for attention, or worse. Be thankful they were not seeking treatment in a developing country – or even in some parts of the UK.
- A report is made in terms of outrage that a defendant on bail or a released former prisoner has committed another criminal offence. It is bound to happen. It is a part of life. That’s what criminals have always done and it should not surprise us at all, especially with the paucity of outlay on reform and rehabilitation.

An examination of the circumstances of such events demonstrates just how common and ordinary they are; nevertheless, the media discourages critical analysis. It often omits relevant facts. It ignores competing hypotheses, especially where they might explain away a dramatic story.

SOCIAL MEDIA

Social media have added a new dimension to the problem. It is one thing to have statements made on public platforms with identifiable authors and publishers who may be held to account.

It is quite another to have statements of all kinds (verbal and/or pictorial), often defamatory and offensive, made on privately accessible social media platforms with which consumers engage at a deeply personal level, by unidentified authors and unaccountable publishers.

These influences may be felt by jurors and by other participants in the criminal justice process, such as police, victims and even some lawyers. So that media influence can be pernicious but strong and lawyers need to be aware of it.

MEDIA INFLUENCE

I think we have reached the stage where both public and social media may influence law enforcement and adjudication – even, perhaps, sentencing. We may not be able to discover, especially with social media, what that influence is and how it operates. It is insidious. It is concerning.

POLITICAL INVOLVEMENT

There is usually a secondary motive for sensational reports by the media, especially but not only at election time. The media wish to attract the attention and involvement of politicians and identify with one brand or another.

One of the fictions on which our democratic system is based is that politicians are representatives of the public – of the constituents who elect them. It is a sometimes useful fiction, but a fiction nevertheless. (Just look at the processes for nomination of major party candidates in electorates. Just look at how they act after their election. Look at where their loyalties lie when they are tested. Look at situations where the constituency and the member hold a view that the member refuses to implement – eg Malcolm Turnbull and his electorate and same sex marriage.) In truth, in our society the executive, by and large, controls the legislature and the executive acts in response to a mixture of party political policies and bureaucratic ambition. It is at its worst when it does not have effective parliamentary opposition. It would be a disaster if the judiciary were impotent or had its independence compromised.

The media, especially talkback radio (and particularly Ray Hadley in this state), have become vital in the strategies of politicians. They involve themselves in reporting by the media and take their cues from what is published – a feedback loop is created. On its face that may not be a wholly bad thing. 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) are not generally reflecting the concerns of the community at all – it is not a representative voice. Rather, in general terms, they are selectively identifying issues that might make sensational stories, pruning them of detail, avoiding careful analysis, promoting only supporting expressions of opinion from their particular, limited, demographic and serving them up to the consumers as conflict with entertainment value. Any side benefit to the community is usually accidental.

Politicians enter the loop with the media and both contribute to and take from that loop – it becomes self-reinforcing. When they do so, they are not entering into informed debate (unless they have stumbled into the quality end of the media). They are usually entering a highly charged emotional outpouring fuelled by unrepresentative and uninformed points of view promoted for their immediate entertainment value. Politicians make commitments to the process and also take away from it impressions based on selectively chosen material and emotionally directed declarations. They also sometimes make commitments to action – instantly – in a way that they hope will attract votes at the next election. On that basis policy is made – and sometimes even law. Even criminal law.

The media also pitches itself into the desire of politicians to appear “tough on crime” – much better, I suggest, that they be “smart on crime”. (The NSW government is now going with “tough and smart on crime”.) Headlines appear that bear little relationship in substance to the information sought to be conveyed. Statistics are regularly selectively chosen and cynically massaged.

The problems we face are shared in other jurisdictions, including the UK. For a general global summary of the situation I can do no better than quote a past President of the International Society for the Reform of Criminal Law, the eminent London barrister, the late Michael Hill QC, writing in the Society’s journal *The Reformer* some years ago.

“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 [to them]. 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.”

The media most often becomes 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 instantly digestible words.

PENAL POPULISM

In an article published in 2015¹, Dr Julia Quilter of the University of Wollongong argued that not all penal populism is bad, that citizen engagement in criminal justice policy development can be progressive and beneficial. She was writing of the aftermath of the killing of Thomas Kelly and measures taken to reform the alcohol culture of inner city areas like Kings Cross.

Only a year before², however, Dr Quilter had forcefully demonstrated that the criminal law response to Kelly's death, the creation of the new offences under sections 25A and 25B of the *Crimes Act* 1900, was an “*example of criminal law 'reform' that is devoid of principle, produces a lack of coherence in the criminal law and, in its operation, is unlikely to deliver on the promise of effective crime prevention in relation to alcohol-fuelled violence*”. Of course, the creation of these offences was directly influenced by the media campaigns that followed Kelly's death and the agitation of his parents and others for “something to be done” to prevent such things happening again.

(A fuller account of events following Thomas Kelly's death is set out in **ANNEXURE A** to this paper.)

The aftermath of the Kelly case really shows how the media can very dramatically and significantly affect the criminal law in NSW – and not only the criminal core of laws that can be promoted. So the answer to the question posed for this paper, whether or not the media can influence the criminal law in NSW, is a clear “yes”.

Dr Quilter set out five flaws in the legislation:

- 1. The speed with which the offence was announced and passed, in the context of an intense media and public campaign, reflected a classic knee-jerk 'law and order' response with all the related pitfalls of poor drafting, lack of coherence and operational difficulty;*
- 2. The adoption of an 'assault causing death' offence represents an example of 'policy transfer' from the Code jurisdictions in Australia to the common law States without proper 'translation';*
- 3. The failure to give principled consideration to how the new offences relate to the hierarchy of existing fatality crimes in NSW contributes to a lack of coherence in the criminal law and undermines the principles of 'fair labelling';*
- 4. The offence definition is complex, confusing and exemplifies the vice of 'particularism' in criminal law drafting; and*
- 5. The framing of the offence is likely to lead to operational difficulties which will, in turn, lead to community disappointment as the high expectations for real action on 'one punch' deaths will not be met.”*

¹ Quilter, J. (2015). Populism and criminal justice policy: an Australian case study of non-punitive responses to alcohol-related violence. *Australian and New Zealand Journal of Criminology*, 48 (1), p24-52.

² J. Quilter, 'One-punch laws, mandatory minimums and 'alcohol-fuelled' as an aggravating factor: implications for NSW criminal law' (2014) 3 (1) *International Journal for Crime, Justice and Social Democracy* 81-106.

These are the product of impetuous conduct by the legislature, goaded by the media. Political punitive penal populism has been reinforced yet again.

The problems will be left to be resolved by the courts and lawyers – and law enforcement. So far (as I understand) there has been only one conviction for an offence against section 25A and 25B has not been invoked.

STRATEGIES

So what can be done about all this? As DPP I enjoyed a large measure of independence in my operations and security of tenure in my position. Not every CEO and not every lawyer has those advantages (or carries the burdens that they impose).

If government refuses to consult before making laws, there is not a great deal of influence anyone can have on the lawmaking aspect of this issue. Practical manifestations may be addressed, however.

On the prosecution side: in my time as DPP commonly a crisis occurred when a prisoner was sentenced to a penalty that someone – often the victim or victim’s family – regarded as inadequate. A media commentator would pick it up – early morning radio first (usually), including a political response, followed by press and television. Along the line the Attorney General would ask for a report on the matter and maybe ask for consideration of an appeal. A report was obtained from the lawyer involved in the matter. At least one and usually two or more other senior lawyers would report on the prospects of success for an appeal. I then made a decision. If there was an appeal, that was the end of the current crisis, so far as the prosecutor was concerned – the appeal proceedings could then be observed. If there was not, usually an Opposition politician demanded that the Attorney General exercise his residual power to appeal. He had my report by then and almost always (with two exceptions with disastrous consequences for the Attorney General) refused to intervene, citing the independence of the DPP and the responsibilities of that office. There would be a bit more muttering all round and the crisis fizzled out. Sometimes the media even lost interest when I said that I would look at the matter and they never reported the result.

Sometimes the problem was the acquittal of someone who probably should have been convicted. There is nothing a DPP can usually do about that.

Sometimes the problem was the perceived failure of a prosecutor to keep a victim informed about developments in a case, especially where it became a plea of guilty to a lesser charge than that laid by the police with a “watered down” statement of facts – and sometimes in such cases the prosecutor could have done more.

What is to be done in such circumstances to meet the media influence? There are a few rules.

- 1 Do not panic. On its face and at first blush, the story may reflect very adversely on the agency; but there will always be more to it than has been reported.

- 2 Do not play the media game. They do not know all about the subject and they cannot express its nature in a few words. Do not attempt to do so, either, although keep in mind the short attention span of the reader, listener or watcher.
- 3 Do not be sucked into the kind of response that the media is seeking – the sort of response that will identify more sources of possible conflict and enable even more outrageous assertions to be made.
- 4 Be selective and economical in dealings with the media. Do not respond to everything and refuse requests from time to time.
- 5 Control the discussion. Don't be afraid to interrupt or to adopt the politicians' trick of sidestepping a question and providing the answer to a question that you would rather have been asked. Volunteer information only if it assists.
- 6 Set the pace of your response. Do not follow the media lead on timing or apparent enthusiasm. Take time to think (without appearing evasive).
- 7 If it is a sensible thing to do, say that you do not know the answer to a question.

There are a few rules, too, about what to say – about the content.

- 1 Take time to discover all about the matter. Ensure that you know more about it than your interrogator (and that this remains the case at the end of the discussion). Provide information that is accurate.
- 2 Tell the truth. (If that is not practicable, then say nothing. Indeed, sometimes it is advisable to take the approach that if you cannot say anything to improve the situation, then say nothing at all – a bit like an accused considering whether or not to give evidence.)
- 3 Have an eye to the broader political implications of the discussion.
- 4 Be relevant and to the point – economical in responses, unless some purpose is served by being a little more discursive.
- 5 Be firm – and, if necessary, persistent.

If all this is done, I believe that there will be a greater chance that censure, if it comes, will be soundly based and perhaps, therefore, appropriate – and it must be in the interests of the community generally for that to occur.

Of course, the best strategy of all is to ensure that everything is done correctly in the first place and that there is no proper basis for criticism at all. Or just hope that other news takes priority on the day.

CONCLUSION

The media does influence the criminal justice system in NSW and individuals play parts on all sides. One can influence only one's input and responses to media reports, but one can do that proactively and reactively. The media can influence the making of criminal laws, their implementation by police and the courts and the public's perception of what is being done in its interests. The media change over time and, to an extent, others must adapt. In adapting and responding all must maintain support for basic principles that have served us well for centuries.

ANNEXURE A

AN EXAMPLE OF LAWMAKING

Just after 10pm on Saturday 7 July 2012, 18-year-old Thomas Kelly and a friend alighted from a taxi and walked in Victoria Street, Kings Cross. He was punched, rendered unconscious, fell and hit his head and two nights later died from brain injuries received (when his parents authorised the turning off of his life support system). The young man who hit him, Kieran Loveridge, was arrested 11 days after the attack and on 4 November 2013 was sentenced (for manslaughter and four other assaults that night, to all of which he had pleaded guilty on 18 June 2013) to imprisonment for 7 years and 2 months with a 5 years and 2 months non-parole period. Six years of the head sentence and four years of the non-parole period were attributable to the manslaughter, the rest to the assaults; but the sentence was thereafter incorrectly blandly reported as a four year sentence (implying that it was the head sentence). That misinformation fed into the campaign that then began.

Thomas Kelly had not had a big night out, it was just after 10pm, he was not intoxicated, he and Loveridge were complete strangers, Loveridge was intoxicated with alcohol and drugs (which did not become public knowledge until the Statement of Agreed Facts became public in September 2013) and seemed intent on hitting as many young men as he could get away with. Police did not regard this crime as an extension of general alcohol and law and order problems in Kings Cross with which they had been grappling for some time – it was a random and isolated event in the street and liquor fuelled problems in and outside bars in Kings Cross presented different problems.

That said, however, this kind of offence is not uncommon. It was reported that the Kelly death was the 15th one punch death in Sydney in the past 6 years and almost as a footnote in one ABC report about the Kelly case there was news of another such attack near the Queensland border in country NSW. When I was DPP I estimate that I dealt with about two a year on average through 16 ½ years.

Reaction to the Kelly attack was swift, even if not focused specifically on that case of 7 July 2012. At first the reaction was interpreted as a positive application of progressive populism – but that was not to last. Within days the Sydney Lord Mayor put forward an eight steps plan for a safer Kings Cross. On 12 July 2012 the Sydney Morning Herald launched its “Safer Sydney” campaign. On 17 July 2012 a public forum for a “Safer Sydney” at Sydney Town Hall attracted over 600 people. On 18 July 2012 the Government directed an audit of late trading licensed premises in Kings Cross. A Coalition of Concerned Emergency Services Workers campaigned for “Last Drinks”. On 26 July 2012 News Ltd launched its “Real Heroes Walk Away” campaign. From August 2012 various measures were taken by the Government to tighten alcohol regulation and availability, especially on licences in the Kings Cross area. On 18 September 2012 the Premier announced a ten-point plan for “cleaning up the Cross”.

Loveridge pleaded guilty and was sentenced on 4 November 2013 (to a head sentence of 7 years with a minimum term of 5 years and 2 months for the totality of the offences). The Sydney Morning Herald headlined it as: *“Four years for a life: Kelly*

family's outrage". Four years had been the minimum term for the manslaughter offence, with six years as the head sentence. The use of the words "*for a life*" was another deception – sentencing is not a market where periods of imprisonment are some sort of payment, matched with consequences of action on a defined scale.

The alcohol initiatives continued, but the punitive, penal political populism began. Thomas Kelly's family, later supported by the families of two other young men (Michael McEwen who was assaulted at Bondi on 14 December 2013 and Daniel Christie, killed in similar circumstances to Thomas Kelly and in almost the same place on New Year's Eve 2013/14), were dissatisfied with the sentence and started an online petition for more severe penalties for offences of assault committed by intoxicated offenders. It was reported to have gathered 23,000 signatures (including the Prime Minister and Leader of the Opposition) when it was presented to the Government. It also attracted the attention of the media which ran at full steam with the stories over a lengthy period.

Against the background of the Kelly family petition, two things happened. First, the DPP (having been asked by the Attorney General on 8 November 2013 to consider an appeal) decided to appeal against the inadequacy of the sentence on Loveridge and to request of the Court of Criminal Appeal a guideline sentencing judgment for that kind of manslaughter (this was announced on 14 November 2013); and secondly, on 12 November 2013 the Attorney General at the time announced that he would introduce a new offence of "one punch death", similar to Western Australian legislation but with a maximum penalty of 20 years imprisonment (double the WA maximum).

It must be asked why the government was not prepared to wait for the process of criminal justice to run its course – for the Court of Criminal Appeal to deal with the matter in public and to make its publicly explained decision as to whether the initial sentence was right or wrong – and to deal with the question of a guideline judgment.

The application for a guideline sentencing judgment was refused, but the appeal was upheld and Loveridge's total sentence was increased to a head sentence of 13 years and 8 months with a minimum term of 10 years and 2 months.

But the government pressed further. After the Premier returned from summer holidays, on 21 January 2014 in a Media Release he announced 16 "alcohol and drug fuelled violence initiatives". Five of them concerned the criminal law, the rest being directed at regulatory and social measures addressing the supply and consumption of alcohol in central Sydney. The criminal law initiatives included increased maximum penalties and new mandatory minimum penalties for nine offences (including assault police, affray and sexual assault) and the new so-called one punch death offence (the first NSW legislation on homicide in over half a century – since infanticide was legislated in 1951).

It should be noted that this was no longer the Attorney General's initiative – this was now driven by the Premier and his Department, supported by the then Police Minister. It seems that Criminal Law Review (which used to be within the Department of Attorney General and Justice, as it used to be – then Police and Justice – now Justice) was largely sidelined. A wide range of experienced criminal lawyers, associations of lawyers and human rights defenders and many legal academics shuddered and many

voiced their legitimate concerns. Criminal justice agencies (including Corrections) and Treasury began calculating the potential cost. Behind the scenes, judges were fearful of the implications.

On 30 January 2014 Parliament enacted sections 25A and 25B of the *Crimes Act 1900* which came into effect on 31 January 2014 (the next day, a Friday – expressly in time for that weekend). It is described as a “one punch law”, but that is wrong. The offence created is committed if any person, anywhere, assaults another person by intentionally hitting (any number of times) the other person with any part of the person’s body or with an object held by the person and the assault causes the death of the other person. The maximum penalty is 20 years imprisonment. There is an aggravated form of the offence, committed if the offender is 18 years or older, without a significant cognitive impairment and intoxicated (by alcohol and/or illicit drugs). The maximum penalty for that offence is 25 years and there is a mandatory minimum penalty of 8 years imprisonment (cf. section 25B).

It must be remembered also that the minimum penalty for any criminal offence is reserved for offences at the bottom of the scale of severity for that offence, so almost all minimum sentences imposed for the aggravated offence must, it seems, turn out to be more than 8 years.

It might also be noted that 25 years imprisonment is also the maximum penalty prescribed for manslaughter (cf. section 24), so the two versions of this offence sit uneasily in the hierarchy of homicide offences. It might also be noted that while the inspiration for this offence was said to be the WA provision, the need seen for it in that Criminal Code State is not reflected in NSW – “accident” is not the defence in NSW that it is in WA.

It might also be noted that in sections 25A and 25B a higher penalty must be imposed upon an offender who is intoxicated than upon one who is stone cold sober when he sets about the hitting. That is just ridiculous.

The Premier returned to the rest of his Media Release of 21 January 2014 on 26 February 2014 with the *Crimes Amendment (Intoxication) Bill 2014*. This Bill sought to:

- amend the section 25A offence (enacted only four weeks earlier) by: making it assault by simply intentionally hitting; defining “hits”; requiring the aggravated offence to be committed in public; and omitting the defence subsections, including significant cognitive impairment;
- define intoxication;
- add 12 new offences of assault (while intoxicated, in public and/or in company);
- prescribe 6 new mandatory minimum sentences (but not for assault police, affray or sexual assault which were in the original Bill).

On 6 March 2014 the Bill was passed by the Legislative Assembly. On 19 March 2014 the Legislative Council substantially amended it (in effect seeking to create an equivalent of the Victorian offence of gross violence and a mandatory minimum sentence, but with discretion preserved to the court for special reasons). On 20 March

2014 the Legislative Assembly rejected the amendments. On 26 March 2014 the Legislative Council refused to budge.

In due course (to cut this long story short), we ended up with a new offence of killing by hitting.

[I wrote a piece for The Big Smoke Australia that addressed the issues raised by the Kelly case that are relevant to the topic of this paper and I commend it to you: <http://thebigsmoke.com.au/2013/11/10/two-sides-seeming-injustice-sentence/>]