I am honoured to have been invited to deliver the Sir Richard Blackburn Lecture for 2012, the 20th of the annual lectures instituted by the Law Society in recognition of the great contributions made to the law here and elsewhere by the first Chief Justice of the Supreme Court of the Australian Capital Territory. Sir Richard was also one of the foundation judges of the Federal Court of Australia.

It is a pleasure for me to deliver this lecture here in Canberra in a jurisdiction with which I have been associated professionally, as counsel and then as a judge, for nearly 40 years. I am conscious too of the close relationship between the Supreme Court of this Territory and the Federal Court of Australia, a relationship that began with the establishment of the Federal Court in 1976. I would add that the Chief Justices of the two courts have always enjoyed a close and friendly association and I am honoured by the presence here today of the Chief Justice, the Honorable Terry Higgins, and the former Chief Justice, the Honorable Jeffrey Miles, as well as other members of the Supreme Court.

The title to my lecture “The Courts and the Community” was suggested by the original theme for this year’s Law Week in the ACT. The theme has now changed to the broader one of “Law and Justice in the Community” of which, however, the relationship between the courts and the community is a vital part. So I have kept to the title I first chose and I will focus on just one aspect of that relationship: communication.

Although relationships have many aspects, communication is surely at the heart of most if not all of them. Certainly it is one the core elements of the relationship between the courts and the community.

I should acknowledge that the title I have chosen is that also chosen by Sir Richard Blackburn for the first of these lectures and that he too addressed, amongst other topics, aspects of communication between the courts and the public.

But when Sir Richard spoke about communication between the courts and the public in 1986 he was speaking in a different era. It was still the era of the typewriter, the landline and hard copy. Even fax machines were still new and expensive, and mobile telephones were a glamorous novelty which, in today’s money, cost thousands of dollars. The embryonic internet was unknown to the world at large and formed no part of our culture. Even ten years ago the embracing phenomenon of social media was unknown. One type of social media, twittering, was unknown even five years ago.

Obviously enough, the world of communication of twenty five, ten or even five years ago has gone forever. And we can expect the era of change to continue.

A question I aim to address in this lecture is whether the courts have been as successful as they might have been in taking advantage of the opportunities for better communication between the
courts and the community that the revolution in information technology has offered. At one level the answer to this question is “Yes” but at another level the answer, I have to say, is “Generally, no.”

But before turning to technology and to what I suggest are opportunities that are still waiting to be taken, I want to draw attention to areas of communication in which progress has indeed been made.

First of all, let us consider direct communication with members of the public who have reason to be in the courts: the people who come into our courthouses as litigants, victims, witnesses, family and friends of the parties, and others with more general interests. Courts are, I think, much more attentive to their needs than they once were. And I believe that, in this area of communication, it is now appreciated that in communicating with the public the most important people of all are those who do the front-line work: court attendants and counter clerks. They may not be senior within the court hierarchy but they are vital.

The improvements in the way court staff now interact with the public was brought to my mind recently by a newspaper article about a murder trial in the Supreme Court of Victoria. The trial was held many years after the victim – a young woman – had disappeared without trace and the article focused upon the experience of her parents. At the end of a very long trial the verdict was “not guilty”. In a full-page article that provoked many reflections upon law and justice, one sentence captured my particular attention. The mother of the victim said that it had been a terrible experience. But, she said “The court staff were wonderful”. (She also had high praise for the journalists who covered the case – a circumstance that the writer, a male crime reporter of great experience, attributed to a change in the gender and age of court reporters.)

A recent development that encourages courts to be concerned about the interactions between the public and the courts has been embraced enthusiastically by some courts in Australia, including the Federal and Family Courts and the Supreme Court of Victoria. This is the Court Excellence Framework, a product of the International Consortium for Court Excellence. This is a consortium of organisations in several countries, including our own Australasian Institute of Judicial Administration which has as one of its goals “the development of a framework of values, concepts and tools that courts worldwide can use to assess and improve the quality and administration of justice.” One of the purposes of the Court Excellence Framework, relevant to our present topic, is to provide courts with a resource for assessing their performance against criteria of excellence in various fields, including communication with the public. The Framework, which is available at www.courtexcellence.com was released at a Forum held in Sydney in September 2008 and its adoption, particularly with regard to self-assessment and feedback from the public, is surely a powerful indicator of change.

I should also mention that the Framework has been adopted by courts in countries of civil law traditions too. Notably, the courts of Indonesia have adopted it. I mention Indonesia specifically because of the close associations between the Federal and Family Courts and the courts of Indonesia in their program of ongoing reform.

We have made progress also in another area that is concerned with the way courts interact with the public they serve – court architecture. Public architecture too is about communication.
In 1986 Sir Richard spoke of his concerns about the facilities offered to juries. Court architecture today places emphasis on providing good facilities for all members of the public, including jurors. The aim today is to create court buildings that embody ideas of light and access. These concepts – ideals too – are now reflected in the Commonwealth’s law courts in each of our State capitals. In Canberra too, the Sir Nigel Bowen building in Childers Street has been modified to provide more light and external views from the principal Federal Court courtrooms. The recently completed renovations of the Law Court’s Building in Sydney have transformed the experience for the public by opening up many of the courtrooms and the public areas to views of Sydney Harbor and Hyde Park. Conscious that I am speaking in the national capital, I should again commend successive governments for sharing these visions of justice and funding them into reality.

So in these and other ways there have been significant improvements in communicating with the public and I think we can be confident that these will continue.

But what of the revolution in information technology and communication that has taken place over the past two decades or so? This has provided the courts with a remarkable and unprecedented opportunity to communicate with the public and, moreover, to do so directly via websites and the many other facilities that the Internet offers. The opportunities continue to expand; for example, at least one superior court is experimenting with the use of social media, in this instance twitter.

Australian courts have been very active in creating websites that make information about the courts and what they do far more accessible than ever before to potential audiences of millions.

While this is commendable, there are however significant constraints and limitations that have not always been addressed in adopting this medium of communication. It quickly becomes evident when searching through court websites, that posting information on the web does not mean that it will be easy to access or that, even if it is readily accessible, it is digestible.

Websites vary greatly their practical accessibility and court websites are no exception. They readily go out of date. Some are – to use a description that is itself probably out of date – “clunky”. Some even proceed on the footing that dial-up is the usual mode of access – hardly an indication of modernity.

It may be said that a judgment is a judgment in whatever form it takes and as the courts have embraced the web their judgments are now readily accessible by the whole world via the internet, and that this is the ultimate in transparency. I would argue, however, that this misses the point, and for two important reasons.

First, consider format. Judgments published to the web without any editorial work in format, headnotes and the like although “accessible” in the sense that they can be accessed, generally present themselves as very cold porridge to the interested member of the public who is not a lawyer. In most instances, even having negotiated the uninviting format, it would be very hard for anyone other than a lawyer with a particular interest in the subject matter, to work out why the court had reached the conclusion that it did. In many instances – and I would suggest most – it would require stamina well beyond that of the informed member of the public. Part of the problem is format, but there is a much great problem of accessibility and it is to this that I now turn.
My point is this: if the courts are to communicate with the public in a way that makes full use of their capacity to reach virtually anyone who might be interested in what they say it is not enough to publish a discourse that is in both length and language accessible only to lawyers and legal scholars. Such a publication remains essentially inaccessible to the wider community.

I suggest that we should acknowledge that there are at least four audiences for every judgment that a judge writes or, more accurately, every judgment that a judge delivers because we should not forget the high value of the ex tempore oral judgment. The courts should communicate with each of these audiences. Each has a serious interest in understanding the reasons for a judicial decision but whilst two of those audiences will understand the language of the law, the other two most likely will not.

Classically, one might say that the most important audience comprises the parties. They need to know why they won or lost, and we should add that the transparency and public nature of a court’s reasons for decision underpins the rule of law. But unless the party is a lawyer, he or she will probably need a lawyer to interpret the reasons. What the non-lawyer party will likely receive is not the judge’s reasons as they were written, or a judge’s summary of the reasons, but an overview of the reasons prepared or interpreted by someone else. This can be seen as an unnecessary gap in communication between the court and its most important audience – the litigants. To remove that gap judgments of any complexity should be accompanied by a summary or should contain a few paragraphs that explain the substance of the reasoning in language that is as plain and understandable as the nature of case will allow.

Another “audience” is the judge. This is because transparency is enhanced and the chance of error reduced if the process of reasoning to a conclusion is in a form that reveals each step and enables close scrutiny by the author and by others. Perhaps a summary of the reasons is not necessary to fulfil these ends but, on the other hand, once the result has been reached it can surely be valuable to see how it looks when stripped to its essentials. The three page outline of argument serves, or should serve, a similar purpose for the advocate.

And then there is the appellate court. I would not argue that there should be a summary for this audience or for the scholarly audience that a judgment may have. That said, however, legal research would surely be more efficient if the cases of possible relevance to a particular question could be readily identified and the irrelevant discarded – a process facilitated by headnotes in traditional law reporting.

But there is also a wider audience – the world at large or, in present terms, the community. This is the audience that the higher courts now make great efforts to reach through their websites and the publication of their reasons, directly or indirectly, on the Internet. This is the audience that only 20 years or so ago, could be reached – in practical terms –only through the news media; and then only indirectly and only if the case was of sufficient interest for it to be reported.

The short point is that this wider audience, which courts now make much effort to reach, is unlikely to have the patience, background or the interest to read and to understand pages of complex legal reasoning which has not been edited or formatted for ease of access on the internet.
I would argue that the potentially huge new audience for the judgments of the courts – the wider community – is really no better off in understanding the work of the courts as revealed by their judgments.

This need not be so. The routine publication of intelligible summaries by final appellate courts such as the High Court of Australia and the Supreme Court of the United Kingdom demonstrates that it is possible to communicate directly with the audience of the wider public using a summary as the style of communication and the Internet as the means.

Other courts also show that this can be done but it is not often done. Mostly, it is the rare exception rather than the general rule. I would argue that this is a missed opportunity of large proportions. Of course, whilst urging reform I must admit my own failure to write summaries as the rule rather than the rare exception.

There is the objection that the work of a judge is heavy enough already without having to produce a summary every time a judgment of potential interest is being delivered. One sometimes hears it said: “Why should a judge spend time making it easier for the press?” The premise is wrong, but it is not only for the press that an intelligible summary should be prepared.

As I have argued, there are other audiences as well who have a strong interest in understanding the judgments of the courts without having them “translated” – and there is the interested public at large who has no translator.

It may also be objected that there are dangers in preparing summaries to be published outside the confines of the judgment. I would accept that there are some such dangers although I think they are more theoretical than real, especially when there is a protocol that the judgment and the summary are published the same time; this was my experience. But the conclusive answer to such arguments is to include a summary in the judgment – a nice choice is whether it should be at the beginning of the end.

I was much taken by a report that came to me recently of a journalist’s reaction to a summary produced by a judge. The journalist was heard to exclaim: “Hey, this is really good!” What the journalist was acknowledging, with surprise, was the good use of the writing/communication skills that are also basic to good journalism: there is a beginning, middle and an end. The writing is direct. The sentences have no more than 25 words and the paragraphs are short. The piece itself is short and directly to the point. The structure and content makes you want to read to the end – and so forth. There should of course not have been any surprise – the surprise was no doubt occasioned by the fact that it was done at all, not in the slightest that it was done well by a writer whose professional life is concerned with words!

It may be apt to reflect here that there are other fields of learning in which the necessary complexity of the subject matter does not prevent appropriate communication with the general public. Take science as an example: there are scientists who take great care to make the essence of their work accessible to the general public and there is a sub-profession of science writing that serves the same end.

So to my basic point again: whilst the dissemination of the judgments of the higher courts by the internet is now routine, and whilst the transparency of the system of justice is thereby enhanced
within the terms of rule of law theory, in practical terms, the courts – with some exceptions – have not actually advanced very much at all in informing the community about the reasons for their decisions. This, I suggest, is a large missed opportunity.

The opportunities that have been missed are of particular concern because, as has been said time and again, confidence in the courts, and an appreciation of their fundamental value to society, should rest upon an informed understanding of what they do.

Before I move to my next topic I want to give just one example of what can legitimately be done by judge to assist public understanding in a civil case of considerable public interest.

The case was heard many years ago at a time when we were beginning to explore the possibility of judgment summaries and, at the same time, television in courts. At one level the matter was a fairly straightforward exercise in judicial review of a federal minister’s decision. At another level it was seen by some in the public as a contest between the values of seagrass beds, dugongs and mangroves on the one hand and property development on the other. The role of the court, of course, had nothing to do with the environmental rights and wrongs of the decision of the minister that was under review. Well, within the 60 seconds or so allowed for any such news item, Justice Sackville, reading from a judgment summary he had prepared, effectively told the viewers of the evening television news precisely what the case was about – judicial review – what the result was, and essentially why he had reached it. It was a fine example of a judge explaining what the law was and how it had been administered. It was, as I recall it, a straightforward explanation of a basic principle of public law, made accessible to a large audience. It can be done.

And now to sentencing: As any listener to talkback radio can tell you, this is an area that arouses strong passions. The fact that crime and sentencing are very popular talkback radio topics suggests that strong passions make for good (and if not good, at least big) audiences.

But there is a good body of research that shows that when members of the public are presented with the facts, circumstances and considerations that a sentencing judge has had to consider, and are asked to go through the sentencing process themselves as an exercise, the sentences that they would have imposed tend to be about the same as those of the sentencing judge and, if anything, a little less severe: and see the study by Professor Kate Warner and others, in *Trends and issues in crime and criminal justice*, No 407, Feb 2011, Australian Institute of Criminology.

(I might make the point here in parenthesis that these results, showing that the views of members of public who have had to consider all the relevant matters and give them all due weight are much the same as those of sentencing judges, might be considered by politicians who are minded to respond to arguments that “the public” demands heavier sentences.)

Sentencing is obviously a matter of vital concern to the accused, the victims and the public, all of them having different if overlapping interests in the process. It is also a complicated process in which the law requires many factors to be taken into account to be given appropriate weight.

In some courts reasons are made available on the Internet and, notably, in the Supreme Court of Victoria, in some cases the judges’ sentencing remarks are streamed with live audio from the court’s website. Notably, the Supreme Court’s media officer also alerts interested parties via social media – by a tweet – that the streaming is to occur. It seems that tweeting encourages the phenomenon of
re-tweeting so that, within a very short time, there is a wide dissemination of the material. I would argue that this is wholly to the good since it enables the public to see the complexity of the sentencing process and the care with which it is undertaken.

Moreover, since the audio comes directly from the judge it has direct authenticity and authority. (This is another reason for judicial summaries in civil cases.) The audio is unedited. The language of sentencing, being concerned essentially with factual matters, would be more accessible to interested members of the general public. But in practice, this may well depend upon the style of the individual judge and, here again, I would raise for consideration whether, notwithstanding the possible risks, summaries should be delivered as part of the reasons for the sentence in a form that would make the essential reasoning readily available to the interested public.

Before leaving this topic I would stress that summaries – in a judgment or as a separate communication – that make a court’s reasons practically accessible to the community at large do not involve, in any sense, “dumbing down”. To suggest otherwise is to misunderstand the nature of the process and, it must be said, the art of clear expression.

There is another, very important, aspect of communication between the courts and the community, and indeed between parliaments and the courts and the community, which I was keen to include in this lecture but which, for reasons of time, I have decided that I must leave out. That aspect of communication is the comprehensibility of the directions that judges are required to give to juries.

I am certainly not blaming the judges who have to interpret very complicated legislative provisions but my point is that if the laws enacted by the Parliament are so complicated that they seriously tax the comprehension of those members of the community who have to decide the issue of guilt in a criminal trial, we surely have a problem. It is a problem of communication.

The acute nature of the problem was highlighted in my mind by reading about jury directions in the United States in those states where the jury has to decide whether or not the death penalty should be imposed. But we have our own examples of triple negatives, shifting onuses and complications that tax the minds of seasoned lawyers.

One could surely argue that if a concept upon which guilt or innocence may turn is not reasonably understandable by those whose task it is to apply it – a jury – then it cannot be the law. As a common lawyer my entry into that argument would be the common law right to a fair trial; how can a trial be fair if an accused person loses the chance of an acquittal fairly open to him because of incomprehension? This is a large area for further discussion and I would invite attention to two recent papers by judicial writers, each highly qualified by background and experience to express opinions on the matter: Justice Mark Weinberg of Victorian Court of Appeal, a former Dean of the Melbourne Law School, Commonwealth Director of Public Prosecutions, Queen’s Counsel and Federal Court judge. His article, an edited version of the first Peter Brett Memorial Lecture is about to be published in the Melbourne University Law Review under the title “The Criminal Law, A ‘Mildly Vituperative’ Critique”. The other paper also by a member of the Victorian Court of Appeal, with a background in the academy and in law reform, is by Justice Marcia Neave and is entitled “Jury Directions in Criminal Trials – Legal Fiction or the Power of Magical Thinking?” It was delivered in January 2012 to the Supreme and Federal Court Judges’ Conference.
I would like to conclude this lecture by referring to a powerful point made by Sir Richard Blackburn in his first lecture, back in 1986. Sir Richard spoke of a duty the Law Society had, as representative of the profession, to assist the community to understand such vital matters as the rule of law, the functions of the legal profession, the functions of the courts and the independence of the judges. He pointed to the fundamental importance of an informed understanding of the role of the courts, and it is only through such an understanding that true public confidence in the courts can be maintained.

Of course the points made by Sir Richard over twenty five years ago are as important now as they were then and the need remains as great.

It seemed to me that an opportunity to make substantial progress here presented itself with the proposal, some years ago now, for the establishment of a program for a national curriculum for schools that would include civics as an essential element. However, whilst work on a national curriculum project has been proceeding for some years – at least since 2008 – it appears that civics and citizenship is one of the last aspects to be tackled and that a national curriculum for civics and citizenship will not be produced before 2014.

Perhaps it is a case of better late than never, but my concern is that whilst some references to the independence of the judiciary and the role of the courts do appear in the available papers, these do not seem to have a prominent place in the proposals.

Of greater concern is the apparent absence of any emphasis upon the concept of the rule of law. If this does reflect the way in which a national curriculum for civics and citizenship is proceeding, the Law Society and its associated bodies, and lawyers generally, should – I suggest – agitate strongly for the inclusion of the rule of law as a central element of any national curriculum for civics and citizenship. The rule of law is far more than the individual aspects of it such as the independence of the judiciary; the rule of law should be seen as an overarching concept that embraces all three branches of government and provides the foundation for civil society.

Any national curriculum for civics education that did not explain the fundamentals of the rule of law would, in my view, be seriously defective. I think we can be confident that the first Chief Justice of this Territory, in whose honour and memory this lecture is given each year, would agree.

(Delivered, Pilgrim Conference Centre, Canberra, 15 May 2012)