Good afternoon Ladies and Gentleman. Thank you to the ACT Law Society for your invitation to present this address and for the warm welcome you have given me today.

The last time I got to my feet to speak in Canberra it was to deliver the final submissions of counsel assisting to the Coroner in relation to the 2003 Canberra Bushfires. And what an extended saga that was with all the issues that arose in that Inquest being raised and magnified in the Royal Commission that is getting under way in Victoria.

Canberra has been very good to me over a number years. I started doing the occasional case here in 1994 as the prosecutor in the tax fraud trial of the R v Barker & Ors and came to know and understand the Canberra branch of the profession. I joined Jack Pappas’ Empire Chambers until that disintegrated. I defended Madhavi Rao, an alleged accomplice of Anu Singh in the death of Joe Cinque – perhaps the most bizarre case I was even involved in and which caught the attention of Helen Garner in her book Joe Cinque’s Consolation.

When she was writing the book, she called me up and said, “I am planning to describe you as a cold blooded monster – how do you feel about that?”. I told her I was not so keen on the concept. In the book she used adjectives like “turgid” and “lack lustre”. At a breakfast discussion she and I both participated in I told her I would have preferred “cold blooded monster”.

And my last criminal trial here was the defence of Simon Lappas – an unhappy and frustrated young man who was struggling with life and did a few silly things as a trusted employee of the DIO. From that case I learned some lessons about government over-reaction which stood me in good stead for the defence of Jack Thomas and my interest in the case of David Hicks.

But that is all in the past. 34 years as a barrister, gone forever. And so far no regrets. But now from the inside I have developed an increased interest in the plight of my colleagues.

So, I have chosen as my topic “Unelected judges – out of touch with the real world” because after only a short time – 18 months - as a judge of the Victorian Supreme Court, I hold to the view that judges should participate in the public discussion about our role more than we do. That is of course on the proviso such participation does not compromise our capacity or perceived capacity to deliver objective and independent justice.

It is, I think, important to do this in part because the tag which is applied to us as “out of touch with the community” or “out of touch with the community’s expectations” is a huge furphy. The furphy is most often used when some aspect of the media wishes to criticise a decision of public interest – usually, but not always, the imposition of a sentence. I will come to that shortly.
The emphasis on judges being “unelected” has really achieved notoriety in the context of the debate about whether there should be a Federal Bill of Rights in Australia. Writing in *The Australian* on 7th June 2008, Janet Albrechtson suggested that even the organisation Young Labor was against the introduction of a Bill of Rights because of amendments that might be made to it by a future conservative Government. The headline: “Even young progressives don't want to give unelected judges more power”.

Our very own Andrew Bolt from the Melbourne Herald Sun, has pursued a similar line and referred to the potential for ‘unelected judges’ to have power over elected politicians. The abstract from his article of 13 December 2008 reads:

> “The Rudd Government is now pushing a bill of rights that would give unelected judges more say over elected politicians in deciding public policy. This has long been the dream of many in the Left, who arrogantly believe the views of an unrepresentative cultural elite should prevail over the wishes of a majority of voters.”

Cultural elite? I will come back to the issue of diversity later on.

The Queensland silk, Stephen Keim[^1] – a man who has experienced a thing or two about the abuse of the power of the executive as counsel for Mohammed Haneef – made the important point in his review of Geoffrey Robertson’s book *Statute of Liberty*:

> “I find it particularly strange that many who decry “unelected judges” in one breath, in their next say a human rights act is unnecessary because of the protections of the common law. Who, one may well ask, created the common law, including its protections of the Englishman's “castle” from entry by officials unless that entry has been, specifically and unequivocally, authorised by law? That's right: more than 700 years of unelected, activist judges laid down the common law and all its protections.”

The Chief Justice of the Victorian Supreme Court referred to this in her *Deakin Law Oration* in August 2008 when she said:

> “Unelected does not equate with undemocratic. Although members of the judiciary are appointed they have as much to contribute to the functioning of democracy as do members of the political branches. Each branch has its own role to play in the doctrine of the separation of powers and each facilitates the successful execution of democratic governance in this country.”

Well there is a respectable argument to be made that a Bill of Rights might well shift power not to “unelected judges”, but to disenfranchised citizens who find themselves significantly disadvantaged by the actions of executive government many operatives of which are also unelected (think of departmental staff, political advisers, and the varying, but frequently heavy influence of lobby groups and industries). However, weighing into the debate about an Australian Bill of Rights is not for now.

In passing, of course it should be noted that those critics of the unelected judiciary pay no attention at all to the effect on judicial independence if judges were required to be elected. There are very good reasons why we do not elect a judiciary, and similarly why judges have guaranteed tenure and may only be removed for serious misconduct: this allows them to judge cases according to law with neither fear nor favour. The procedure for
appointment and the method of termination of judges goes to the heart of the constitutional principle of judicial independence. As Former Chief Justice Gleeson has said in relation to judicial independence:

What is at stake is not some personal or corporate privilege of judicial officers; it is the right of citizens to have their potential criminal liability, or their civil disputes, judged by an independent tribunal. The distinction is vital. Independence is not a prerequisite of judicial office; the independence of judicial officers is a right of the citizens over whom they exercise control.[2]

But that is not quite my point. The critics don’t just point to the fact that judges are not elected. The far more demoralising criticism is that we judges are “out of touch”, a criticism often repeated in response to individual or community dissatisfaction with sentencing outcomes in the criminal justice system.

The growing influence and prevalence of news media in modern life certainly has its advantages and disadvantages, however perhaps one disadvantage is an increased need to capture the attention of the reader or listener quickly with sensational headlines. Judges ‘getting it wrong’, particularly in gritty, gory or heart-wrenching cases are an easy target. Here’s a few examples to grab your attention:

- “Fury at lenience on child molester” The Australian 7/3/09
- “Judge is out of touch, out of line” The Australian 21/2/07
- “Fury after gang rape sentence cuts” SBS World News Australia 17/12/08
- “Fury at lenient rape sentences by Cairns judge Sarah Bradley” The Herald Sun, 10/12/07
- “Throw away keys: Rapist case sparks fury” The Herald Sun, 15/5/06
- “Family fury at killer’s sentencing” The Sydney Morning Herald 25/7/08
- “Police fury at sentence” The Mercury, 5/5/09
- “Judges out of touch: bereaved father” ABC News, 12/6/06
- “Out of touch judges soft on crime” Wotnews.com.au Feb 09

Fury, crims ‘getting off’, ghastly crimes and ‘those silly old judges’: the combination of themes must be a publisher’s dream.

There are countless examples of media outcry in relation to sentencing. Let me be clear though: there is nothing wrong with criticising a sentence. It happens all the time usually in the courts of appeal and there is no reason why the public should not express an informed view on why such an outcome is wrong, too severe or not severe enough.

However, what the media can and often do is two-fold. First of all, they can ignore the detail of the reasons given by the judge – a rather negligent practice I might say – and second, they can get away with it! The media needn’t fear that they will be criticised for their selective reporting because no-one will come to the aid of the judge except perhaps a Bar Association or Law Society and by the time that happens the moment will have passed – the community will recall the outrage, the unfairness, the horror, and pay little if any attention to the comments of some other lawyer or judge, whom the public probably need little convincing, is just out to protect his or her own.
One example of sentencing outcry that you would probably all be familiar with is the recent matter of *R v Ronald King*, in which the offender, a 24 year old Aboriginal man, admitted to having digitally penetrated a four year old girl in Grafton NSW, having broken into her grandmother’s home. There was a significant backlash against the sentence ultimately imposed by Judge Geraghty of the NSW District Court in February this year: he sentenced Mr King to a two year suspended sentence and imposed a two year good behaviour bond. The offence for which King was charged had a maximum penalty of 25 years, and so the community, with a great deal of assistance from the media, was outraged at the seemingly paltry sentence.

Justice Sackville, of the NSW Supreme Court, later criticized *The Australian* newspaper for failing to report that King had already been in custody for 14 months at the time of his sentencing. This is an excellent example of how the media, in its sometimes sensational reportage, can miss a crucial element and thus skew community’s perceptions as to judicial sentencing considerations. As you would be aware, there is a vast array of factors that a judge must consider in sentencing an offender, and pre- and post-trial custody is one very important factor. There were, in fact, an array of factors that led Judge Geraghty in passing the sentence that he did – as one more balanced journalist remarked in relation to the sentencing considerations: it “looks like a pretty messy balance sheet of credits and debits”.

You may or may not be aware that the sentence Judge Geraghty imposed was recently quashed: on 23 April 2009 the NSW Court of Criminal Appeal allowed the Crown’s appeal against sentence and King was resentenced to a term of imprisonment of 4 years 6 months non parole. King will now be eligible for parole on 27 May 2012.

In allowing the appeal, the Appeals Justices of the Court of Criminal Appeal found (*R v Ronald King* [2009] NSWCCA 117):

- That the trial judge had erred in imposing a sentence falling far short of appropriately denouncing King’s crime.
- The Appeals Justices noted

  ‘Society is entitled to have the sentence imposed denounce the criminal conduct of the offender and, if the sentence does not do so, there has been an error in the exercise of the sentencing discretion’

It is a shame that this type of judicial commentary is less exciting, therefore less conveyed by reporters, as such comments may go some way to allaying community fears about the state and state of mind of the judiciary.

Primarily the media exist to inform the public. Much of the media is privately owned and therefore profit is also relevant. Nothing wrong with that. But the public would be helped by a more disciplined approach to its coverage of criminal sentencing in particular. Sentencing should be criticised, however it should be criticised fairly, and in such a way that assists in educating the community about sentencing principles. Leaving out, or under-reporting on critical aspects of sentencing laws misleads the community and undermines the integrity of the judiciary. However, of course, we judges cannot expect the media to do all the work for us…

It seems to me that we as judges, among others, have a role to play in helping the community understand what judges do and what is involved in our work. We are unelected but we are
nonetheless responsible to the community who have a legal, moral and financial stake in the operation of courts. So what is the answer? More media releases from the Courts? More interaction with journalists to ensure that the whole story is told? I am not sure. We at the Supreme Court now have a ‘Strategic Communications Adviser’ on staff, and for those of you who are initiated in all things televisual, she is to the Supreme Court what CJ Cregg is to the West Wing. In short, she deals with the media, feeds them with some information, and tries to ensure that media court reporting is well-informed. It sometimes works. Perhaps fair and balanced doesn’t sell as many papers as fury, crims and silly old judges...

So let me now deal with the furphy of judges being ‘out of touch’, and deal with it in some detail.

As Chief Justice Gleeson (as he then was) remarked in the speech to which I earlier referred (in 2004):

Judges have no technique for, or expertise in, assessing public opinion. Judges ordinarily do not seek to influence public opinion. As an institution, the judiciary is passive in these respects. Courts sometimes conduct surveys of litigants and lawyers for limited purposes related to their administration, and seek to inform the public about aspects of their business, or about topics such as judicial independence, but they do not sample community opinion for the purpose of informing their decision-making. And they do not set out to influence wider community values. They are neither followers nor leaders of public sentiment.

However, as any practising litigation lawyer would know, the casting of us as “out of touch” is a myth which deserves to be busted. On any one day in my court as a judge of the trial division of the Supreme Court I have prosecutors, defence counsel, police, accused people, witnesses, court staff, victims, victim support staff, protective security officers, prison officials, journalists and various onlookers including members of the public all sitting in and perhaps playing roles in the court room. The subject matter under scrutiny is usually a homicide. It has usually happened in emotional and violent circumstances of some form of human conflict. It may have been committed by a person with psychological or psychiatric conditions. It will have resulted in a post mortem examination, the details of which we all have to pore over and usually we must also examine the accompanying gory photographs.

The court room itself can be a place of direct conflict. I witnessed a triple murder in the corridor of the Supreme Court in 1980. Notorious Melbourne criminal Ray Chuck was murdered on the steps of the Melbourne Magistrates Court. The Russell Street bombing which was aimed at Police Headquarters indeed killed 1 young policewoman and injured 22 others outside the Russell Street Police Headquarters in March 1986, with shrapnel damaging the former Melbourne Magistrates Court building. Those marks can still be seen today. The famous Mark Brandon ‘Chopper’ Read attacked a County Court judge in Melbourne.

With respect, I do not think most members of the public, nor elected politicians for that matter, would have:

- viewed as many heinous images,
- heard as many harrowing tales of abuse, violence and loss,
- read as many psychological reports,
come into contact with as many people from backgrounds of extreme disadvantage and despair
tried to understand and analyse the effects of addiction to drugs, alcohol and gambling
tried to grapple with prospects for rehabilitation
or witnessed so many sad cases

as the judges sitting on the benches of the courts in the society in which we live today.

As Chief Justice Gleeson also observed:

"Judges live in the community. There is no empirical evidence that, as a group, their general experience of life is narrower than that of most other occupational groups. People who administer criminal justice probably see conduct that most members of the community never imagine. A Family Court judge would have a regular view of domestic relations that would throw many people into despair.

When you consider the parade of life that passes before a suburban or rural magistrate, it is difficult to understand why the judiciary, as a class, might be regarded as isolated from reality."

In that speech, His Honour made another excellent point with which I would, with respect, agree. The reality is that judges are not out of touch either with reality or community expectations. Indeed, subject to the discretion we have, community expectations are codified into the growing mountain of legislation which judges are constantly called upon to interpret and apply. The relatively new offence of child homicide in Victoria is one instance of such codification in line with community expectations after the outcome in the matter of DPP v McMaster, a Court of Appeal case on which I sat.

There are perhaps other reasons for community disquiet with the judiciary other than criminal sentencing. Common perceptions exist of pompousness, old age, an upbringing and education complete with a silver spoon firmly lodged in the mouth, a misunderstanding of the concept of judicial tenure, an impression of high-pay for low output, inflexibility, and being above the law. This last one has been highlighted in recent times with the conviction and sentencing of former Federal Court judge Marcus Einfeld. However, it is unfortunate that the community at large does not have a greater understanding of the variety of personalities and backgrounds on the bench. A great many judges of the Courts have worked for Legal Aid or on legally aided matters, many are associated with or have worked at or have founded Community Legal centres around Australia, many judges in the criminal jurisdiction have appeared for both the prosecution and the defence, numerous have degrees other than in Law. It is an outdated and indeed, unfair perception that we are all the same.

The newest member of the High Court – an outstanding appointment – is such a judge. And, of course, the judge she replaced, Michael Kirby, was a man who very well understood the plight of minorities, the importance of justice and consequences of legal decisions on less able to defend themselves. His judgement in Thomas in which I confess more than a passing interest, bears regular reading. In that judgment, the High Court had to rule on the continued monitoring of Mr Thomas, then a terror suspect. Kirby J (together with Hayne J) delivered dissenting judgments, arguing against the continuation. In his judgment, Kirby J said that the "thin veneer of legality" on which the control order legislation was based involved a "serious
and wholly exceptional departure from basic constitutional doctrine unchallenged during the entire history of the commonwealth".

There also exists a perception that judges lack an understanding of ‘real life’ – that we only have an understanding of law texts, legislation and Latin. Certainly in Victoria, there are very few judicial appointments, either to the Supreme or County Court from academia. Regardless of one’s opinion on judicial appointments from academia, the fact that the vast majority of judicial officers are from the Bar tends to negate the view that judges are out of touch – many of us have been representing clients from all walks of life, usually for decades.

One good example of a judge with many strings to his bow is our most experienced criminal trial and appellate judge - Justice of Appeals Frank Vincent of the Victorian Court of Appeal. He is soon to retire after something like 24 years as a judge. One of his early trials was as the trial judge in the Russell Street bombing case.

Justice Vincent’s’ father was a wharfie and an executive member of the Waterside Worker’s Federation. Justice Vincent grew up in the then much maligned Western suburb of Footscray in Victoria. After signing the Roll of Counsel in 1961, Justice Vincent practised as a barrister in the areas of criminal law and general common law until 1974. At this time, he commenced employment with the Victorian Aboriginal Legal Aid Service and later with the Central Australian Aboriginal Legal Aid Service.

His Honour resumed practice as a barrister in 1975 and was appointed one of Her Majesty's Counsel in 1980. In April 1985, His Honour was appointed to the Supreme Court of Victoria. In the same year he was appointed as Deputy Chairperson of the Victorian Adult Parole Board. In 1987 he became the Chairperson of this Board and held that position for 15 years. As Chairman, His Honour experienced first hand the misery and deprivation of marginalised lives. Being witness to "30,000 years of incarceration" convinced him that law enforcement represents the failure of our society, above all the failure to educate all our citizens since the common feature of those incarcerated was educational deprivation. His Honour is patron Western Chances, an organization set up in Melbourne’s Western suburbs, an area afflicted with a high crime rate and a generally low economic platform. The organization assists young people in the Western Suburbs to realise their potential through the provision of scholarships. Western Chances’ programs support the development of the west as a community - improving skills, building pride and enhancing employment opportunities. Their catchphrase is “Bringing out the best in the West.” Justice Vincent was awarded an Order of Australia in January 2007 and is today the Chancellor of Victoria University, a university in the Western suburbs of Melbourne which continues to grow in size and esteem.

The community are also possibly unaware of the continuing professional development and educational activities that judges are required to undertake: Judges and Associate Judges (formerly known as Masters) of the Supreme Court of Victoria are required to undertake a minimum of ten hours judicial education per year, which is in keeping with the professional development requirements for barristers and solicitors to retain their practicing certificates. The topics of the judicial education seminars are broad and interesting. Some examples include:

- Aboriginal people and the judicial system
• Managing cases involving persons with mental health issues
• Managing cases where Facebook and MySpace arise
• Sudanese cultural awareness
• Child and cognitively impaired witnesses
• The judge’s role in assisting with juror comprehension

And so on.

The relatively recent emphasis on judicial education is perhaps an indicator that the judiciary is trying to keep in touch with society’s developments.

A judge’s relative ‘separation’ from the community may be partly to blame for the misconception that judges are out of touch, as indeed, in some ways, we are not accessible to the general public. What the community perhaps do not understand as well as they might is that the relative inaccessibility of judges happens for a reason. The reason is not connected with superiority or a gentlemen’s club mentality. (As a side note, slightly over 20% of the judiciary of Victoria’s Supreme Court is now female, including of course, our Chief Justice. It is at least an excellent start in whittling away at the gender imbalance in the Court.) However I digress. The relative inaccessibility of the judiciary is because judges must be careful about their activities out of court in case their independence is, or appears to be, in some way compromised. As a judge, I must now be careful about activities as harmless as, for instance, enjoying a drink with friends on a Friday night. Former colleagues of mine at the Victorian Bar are of course still practicing as such. Our conversations may only be as controversial as topics such as whether St Kilda really are contenders for the AFL premiership this year, however, if a bystander were to witness such a harmless catch-up, and my said friends were to appear before me in a trial at a later date, there could be some perception of bias or influence of some sort. This is but one elementary example of how easily an impression of bias may be created. God help me if I happened to be friends with any politicians!

Where I think we have fallen short is putting our case in the community and helping the community understand the work we do and the relative complexity in balancing considerations relevant to a particular decision, particularly when it comes to the imposition of sentences.

It is the raw coal face of human conflict that judges must supervise and it is, with the greatest of respect, mindless criticism to suggest that one could be “out of touch” in such circumstances.

Thank you.

1 The Australian – 3rd April 2009

2 Murray Gleeson, Embracing Independence (Local Courts of New South Wales Annual Conference, Sydney, 2 July 2008) at 3.

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