

**Australian and New Zealand College of Notaries – Dinner
Address**

“Fronting Up.”

23 November 2012

[1] Thank you for the opportunity to address you this evening.

[2] In preparing to speak tonight I did a bit of research on notaries public. I discovered that, like much of our common law, the office of notary public can be traced back to Roman law. I also reflected on the fact that, like judges, notaries public play a role in upholding the rule of law. As lawyers, the New Zealanders amongst you have a statutory obligation, imposed by s 4 of the Lawyers and Conveyancers Act, to uphold the rule of law and facilitate the administration of justice. Notaries have a special contribution to make by facilitating the creation and enforcement of binding transactions, and enabling proof of those transactions. So I thank you for the work that you do.

[3] The topic I have chosen to speak about tonight occurred to me because of some of the recent controversy gaining heavy coverage in newspapers and on TV about the role of judges in our society. Visiting judges and academics from overseas frequently remark upon the extent to which what goes on in our courts is a focus of our media. They consider it to be

unparalleled. This is no doubt in part explained by the fact that in a peaceful and small country like New Zealand, there isn't much big news, and reporting on the courts provides easily accessible and often dramatic news material. It is also because, unlike almost any other country in the world, New Zealand courts allow cameras reasonably unfettered access to the courtrooms.

[4] When New Zealand first allowed cameras into courts in 1996, this was done at the initiative of the then Chief Justice. So it was judges who allowed the cameras in, in keeping with the constitutional principle that it is judges who must control the processes of their courtroom. To this day the ability of the media to film in court remains under the control of judges. Allowing television coverage of court proceedings was seen at the time as a natural extension of the principle of open justice, and likely to increase public understanding of the functioning of our courts. It was anticipated that this was a natural development and that with time, other jurisdictions would follow suit. However, that has not been the case. New Zealand remains one of the only common law jurisdictions that allow filming of trials. In the United Kingdom, the courts are only now starting to make tentative steps to allowing cameras in court, and then only for the sentencing phase. In Australia, and most Canadian states, cameras are not allowed in the trial courts.

[5] Initially, in the guidelines issued in connection with filming in court, the requirement in New Zealand was that any coverage broadcast be at least two minutes in duration, and that the two minutes should be divided equally between coverage of the prosecution and defence cases, to better ensure balance in the reporting. However, over the years, these requirements have been relaxed. It is now not at all unusual for television coverage of a trial to show a fleeting image of a witness, perhaps responding emotionally to questioning, maybe even weeping, or even more dramatically, holding up the murder weapon. That footage may appear interspersed with images of events taken from a different day's coverage (although judges are vigilant for any misleading splicing of film).

[6] There is an entirely different speech I could give as to the impact of this coverage on our system of criminal justice, and in particular the jury trial. But I do not propose to do that tonight as the judiciary is presently giving consideration to recent calls from the Minister of Justice and the New Zealand Law Society for a review of the extent to which we allow filming of our court proceedings.

[7] But what I would like to address is some of the issues the media has been raising as to the role of judges in society. I diverged onto the issue of cameras in court, because I think it explains in part at least, the extent of the media's focus on what

goes on in the courts, and the role of judges. In last week's Herald on Sunday alone there were two articles on the topic of the judges' role in connection with bail, and a letter to the editor on the issue of sentencing.¹ One article raised the issue of making judges accountable, by making them "front up and justify their decisions". Another questioned why judges stay out of the public debate that their decisions spark.

[8] Recent coverage has given rise to some questions, to which I would like to give you the answers. To my mind, these questions are as follows:

(a) Why don't judges get involved in the public debate?

(b) How, if at all, are judges accountable?

[9] For reasons I will come to, Judges are not vocal participants in public discourse. Judges have historically depended upon traditional defenders, the Attorney-General, the Solicitor General and the Law Society, to speak up for them in the public debate. But nowadays, with an increasingly volatile media environment, our traditional spokespeople are hesitant in speaking up for judges. In a recent appearance before the Justice

¹ Kerre Woodham "Fronting up over foul-ups" *Herald on Sunday* (Auckland, 18 November 2012); Paul Little "Errors deepen victims' pain" *Herald on Sunday* (Auckland, 18 November 2012).

and Electoral Committee, the Solicitor-General likened offering a defence of judges as sticking his head up above the parapet.

[10] The understanding of others involved in the legal system has also been important in shaping public discourse, and probably never more so than now. Relentless criticism undermines public confidence in the judiciary, and ultimately may prevent the most able from accepting judicial appointment. It is for this reason that I particularly value the opportunity to speak to you this evening.

[11] To coherently answer these questions I have posed, it is necessary to understand something of judicial independence. As a society we must value the fact that we have a truly independent judiciary because that is the necessary pre-condition for the rule of law. Stated in its simplest formulation, the rule of law refers to the principle that all people, including public and private institutions, even the State itself, are accountable to laws that are equally and impartially enforced.

[12] For this condition of equality before the law to be met, those who come before the courts must be satisfied that the judge who hears their case will decide it impartially, and without outside interference- so without hope of advancement from deciding the case a certain way, conversely, without fear of dismissal, without

concern for the popularity they will win, or hope of monetary payment.

[13] It is not enough for our society that the judiciary be free of outside influence. The public must also have confidence that that is so. The courts have little ability to compel compliance with their rulings, they have no standing army. Compliance with their rulings is usually voluntary and is based on confidence in the independence and impartiality of the decisions. As a famous English judge once said, “justice must be rooted in confidence”.²

[14] The essence of the responsibility of the judge is captured in the judicial oath. Each judge swears to do “right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will”.

[15] There are internationally recognised minimum requirements for the preservation of judicial independence.³

- Security of tenure. Once appointed, a judge of the High Court is entitled to serve until retirement-absent misconduct. A High Court judge can only be removed for misconduct on the address of the House of Parliament.⁴

² *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 per Lord Denning MR.

³ Commonwealth (Latimer House) Principles on the Three Branches of Government (November 2003).

⁴ Constitution Act 1986, s 23.

- Financial Security: Judges must be paid sufficiently so that the conditions for corruption do not exist, but more fundamentally their pay must be secure against reduction – so that a judge need not fear that if he or she decides a case a certain way they will get their pay docked.⁵
- Finally, the courts must be sufficiently administratively independent so that judges are in charge of how cases are heard and managed.

[16] So that was a whistle stop guide to judicial independence, and that brings me to the question that I posed earlier. Why don't judges get involved in the public debate that their decisions engender? Until recently the convention was, in this jurisdiction and in others, judges did not speak publicly. This was subject only to limited exceptions, which our Chief Justice has described as follows:⁶

An exception was made for Chief Justice, who could be relied on to be uncontroversial and dull. A further exception was made for speeches and papers to legal audiences on technical legal topics. Such papers not infrequently touched on matters of policy, and were occasionally controversial. But a fig leaf of decency was preserved because the audience was limited and law was not a popular sport.

⁵ Ibid, s 24.

⁶ Sian Elias, Chief Justice of New Zealand "Between Locked Jaw and Locked Horns, What Scope for Extra-Judicial Speech for Judges?" (Paper for the fourteenth conference of Chief Justices of Asia and the Pacific, Seoul, Korea, 14 June 2011).

[17] In effect, until perhaps the last decade, New Zealand followed the 1955 rules promulgated in England by Viscount Kilmuir, which prevented judges from making public comment. This was based on the theory that this could preserve the judge's aura of wisdom and impartiality, a view that probably owed more than a little to the advice given by Mark Twain “[k]eep your mouth shut and people may not think you're a fool. Open it and they'll know you're a fool”.⁷

[18] Although judges are today more willing to speak than they were in the 1950's, in some ways the need for caution is far greater than it was than in the time of Viscount Kilmuir. Why is speaking out for a judge in the 21st century so fraught? It is not because the deficiencies that might be revealed through speaking out are more manifest than they were in the 1950's. The principal reason is that public statements may imperil the appearance of impartiality and with it the ability to sit on a matter.

[19] Once upon a time it may have been possible to speak at a legal gathering on a point of law or even policy. The convention was that the profession regarded the speeches as in house and the media had no interest in them. The society we live in now is quite different. All things legal are now legitimate material for the media, public figures especially. Coupled with that, our lives are

⁷ Stephen Cameron “Silence is Golden (But my heart still cries): The Case Against Ex Tempora Judicial Commentary” (1996) 45 UNBLJ 91 at 91.

saturated with news, flowing from the mainstream media and the blogosphere. Once something is in that vortex, it is, for all practical purposes accessible by anyone with internet access forever. I cannot assume that anything I say of any real interest, in any forum, will not appear on some blog tomorrow and in a newspaper the next. And anything judges say publicly outside of judging, can have an impact on our appearance of impartiality.

[20] You may say that explains why we don't give a lot of speeches, but it doesn't explain why we don't stand up for ourselves when we are attacked. According to one recent media commentator,⁸ the judiciary's approach to this issue, which he characterised as never explain, never complain, while admirably staunch, is misguided. He thought that intelligent people like us, ought to be able to come up with a plan to better communicate why we do what we do.

[21] The first reason judges don't leap into print to defend their decisions, or those of fellow judges, is that the judge will already have justified his or her decision in a judgment. Every time judges make a decision, other than the most trivial of administrative decisions, we must give reasons for that decision. Nowadays, bail decisions and sentencing decisions, are accompanied by reasons, often lengthy reasons, which must convince.

⁸ Little "Errors deepen victims' pain", above n 1.

[22] This is all part of the increasingly complex world of a judge. For example, the exercise of the judge's sentencing discretion is now subject to a very tight legislative framework. Judges must work through what is quite a structured process in sentencing. So that whereas in 1980, a judge might have said to the convicted offender, "Joe Brown, you are a fool, but a dangerous one, seven years", the judge faced with the same offender and offending would now likely give five plus pages of justification as to how the sentence was arrived at. (I say as an aside that although there are downsides to this, not the least of which is workload related, the resulting consistency in sentencing far outweighs these).

[23] So the answer to this first question is that the judge will already have said as much as can be said to justify the decision. A judge cannot give a justification for a decision that is not already recorded in that judgement. To do so would in itself provide grounds for appeal.

[24] Perhaps even more fundamentally, for a judge to seek to justify his or her decisions would involve the judge trying to sell the decisions to the public. This would involve judicial spin. The public are entitled to regard the judiciary, if nothing else, as "spin free". It is our task to adjudicate according to right - not to seek favour or popularity. The notion of a judiciary trying to spin their

actions to ensure good media coverage should be anathema to everyone. It would be in conflict with our judicial oath.

[25] What we can do, and must do better, is make our reasons more accessible. Most decisions, certainly of the High Court, are accessible online, on the site Judicial Decisions Online. We also need to strive to make our decisions easier to read and understand. And provide summaries, so that the media, who must in this day and age, move at speed, can find a simple summary that they can report and so report the outcome and reasons for it simply.

[26] We can only go so far with this, however, as the reality is that much of what the courts deal with is complex and subtle. But, the media often do not report complexity and subtlety and what the media reports shapes the public discourse.

[27] Heads of Bench can of course step in to defend a judge, but they do so cautiously, because the judgment is the best justification. External influence inconsistent with compliance with a judge's judicial oath can include influence exerted by a colleague or head of bench. We must not just be independent from influences external to the judiciary, but also from each other. If a head of bench is prepared to defend a judge, then the public might also legitimately expect that they be prepared to

criticise a judge. To do so, except in the case of clear misconduct, would risk improperly influencing that judge and others.

[28] What a Head of Bench can quite properly do, is provide context that is missing from the reporting, such as explaining the sentencing process or pointing out any legal point that is critical to understanding the outcome. The Head of Bench should also step in to correct misreporting. Finally the Head of Bench can write and speak on issues such as sentencing and bail so as to improve public understanding of the key processes.

[29] There is currently very little support available to Heads of Bench to assist them in fulfilling this role. In the higher courts, Heads of Bench are working judges, who also carry a very significant administrative work load. Therefore, if Heads of Bench are to fulfil the role of public spokesperson, they will need to be provided with adequate resources to allow them to do so.

[30] This takes me on to the next question, how if at all, are judges accountable? My answer is that we are accountable. Although that accountability may not have the kind of content required of others, such as loss of job, or compulsory apology, for reasons I will explain, our society should be satisfied that judges are as accountable as they should be, consistent with the principle of judicial independence.

[31] The first thing I wish to say is that I recognise that judges get things wrong. We are human. I also recognise that because judges deal with some issues that affect public safety, an error has the potential to have terrible consequences. That is the truth that keeps judges awake at night. It is the context in which we work, and it is a reality that weighs heavily on the shoulders of every judge.

[32] It may be of some assistance if I give you some workload context. Last month the Justice and Electoral Committee issued a report in which it estimated that New Zealand's 255 judges deliver on average 586,500 judgments per year. Moreover, in 2008, bail decisions were made in connection with over 86,000 offenders. The number of bail decisions would be far greater than this, given multiple bail applications.

[33] The risk of offending on bail is always present, but not everyone accused of a violent offence can or should be in custody. So risk assessments must be undertaken. Judges have a responsibility to exercise great care with those risk assessments but risk assessments are only easy in hindsight. Even so, according to figures released by the Ministry of Justice only 0.5% of all defendants who spent time on bail between 2005 and 2008 were sentenced to more than two years imprisonment for

offences committed while on bail.⁹ The Ministry regarded a sentence of two years as a good indicator that the offending was serious. I note that these figures also capture people who were on bail for non-violent offending at the time they re-offended.

[34] I don't suggest that even this low level of offending on bail is acceptable, none is, but if there is to be public discussion about bail decisions, it is important for that discussion to be informed.

[35] So how are judges accountable? First, they must conduct the business of the court in public. The court is open to the media and the public. Much of what we do, certainly in connection with serious offending, is subject to the most intense media scrutiny. Judges must also give reasons for their decisions, which can be publicly scrutinised. For the High Court at least there is easy access to those decisions.

[36] If a judge gets something wrong, that decision can be appealed, and corrected on appeal. Bail decisions can be appealed. If the Police believe that someone should not have been released on bail, they can appeal that decision. Sentences can also be appealed, and often are.

⁹ Ministry of Justice *Review of aspects of the bail system* (March 2011). Accessed at www.justice.govt.nz/publications/global-publications/b/review-of-aspects-of-the-bail-system.

[37] Because of how public their actions and reasons are, judges are subject to criticism in the media. Even when they don't get things wrong, but their decisions is, for whatever reason unpopular, they are subject to media criticism. Judges just have to accept that fact.

[38] People also have a right to complain about judges to the Judicial Conduct Commissioner. The aim of the Act establishing the office of Judicial Conduct Commissioner is two-fold; to provide a robust investigative process to initiate a judge's removal, and secondly to protect judicial independence.¹⁰ The latter is important because of the potential for disciplinary processes external to the judiciary to place pressure upon judges to decide a case in a particular way, in the hope of finding favour with those in charge of that disciplinary process.

[39] In practice, the Commissioner investigates many complaints that could never result in removal of a judge, and in respect of the vast bulk of complaints, they are either dismissed, or no further action is taken.

[40] Some suggest that judges should be even more accountable. There should, for example, be an independent body established to review the decisions of all judges where their decisions have been a catalyst for a death. Just how such a review

could be constructed is hard to imagine. Would the judge be called upon to explain the decision? The judge has after all, already given his or her reasons and can say no more to justify the decision. Still harder to see are the possible benefits. The risk to judicial independence created by such a body would be too great a price to pay. Others suggest that judges should be elected, but I doubt any of us would wish to live in a society where judges exercised judgment with an eye to the next election.

[41] So to conclude, like judges, legal practitioners often have to take the harder road, if they are to live up to the exacting standards of the legal profession, and to fulfil their obligation to uphold the rule of law. For a lawyer this can require that you refuse to give the advice your client needs to enable a transaction to proceed, or to accept an instruction you believe to be unlawful. Acting in accordance with principle can come at personal cost. But society needs people of principle. And if our actions, taken in accordance with those principles, are not to be misunderstood, which would be ultimately to the detriment of the rule of law, people such as those gathered in this room tonight, need to be able to speak up in defence of them. So I thank you for listening to me.

¹⁰ Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.