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The fight for independence

The Australian, Australia



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The fight for independence

Catherine Holmes, Chief Justice of the Supreme Court of Queensland, goes to bat for the judiciary



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Catherine Holmes, Chief Justice of Queensland: 'Judicial independence is not some kind of unassailable citadel.'

Story / CATHERINE HOLMES
Photography / RUSSELL SHAKESPEARE

Uninformed criticism from media and politicians risks damaging public confidence in the judiciary

Declaration of independence



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It was suggested for this essay that I write about the way forward for the courts. I will do that, in a sense, but my focus is on my anxiety about the maintenance of the independence of the judiciary as an arm of government. In particular, I am concerned about tendencies in media and political discourse to speak about courts and their decisions in ways which can, directly or indirectly, undermine judicial independence.

This may sound a little precious, so I had better start by emphasising that I am not suggesting that anyone should desist from criticising judicial decisions. Discussion and criticism are to be expected in a healthy democracy.

My plea is for better informed criticism, because public confidence is essential to the preservation of what I contend is a very good legal system; and for better targeted criticism, because there seems to be an increasing, damaging willingness to attack that system as a whole on the strength of dissatisfaction with a very small number of decisions.

So what does judicial independence mean, and why does it matter?

Essentially, judges need to be able to decide the cases on the evidence before them in accordance with the common law and statute, without influence or pressure from any external source. Judicial independence is not some sort of privilege for judges; it is a safeguard of impartiality and independence in judgments.

I don't think there would be much dispute that equal treatment before the law is a crucial democratic right. Australia performs well in that regard. Someone with a claim against the government can be sure that the judge will not be taking directions from the executive on how to decide the case.

A defendant in a sensational criminal case in this country can be confident that notoriety is not going to make any difference to his or her rights at trial. A litigant against a large corporation does not have to worry about bribes flowing into judicial chambers.

It's not difficult to point to other countries where that's not so, but



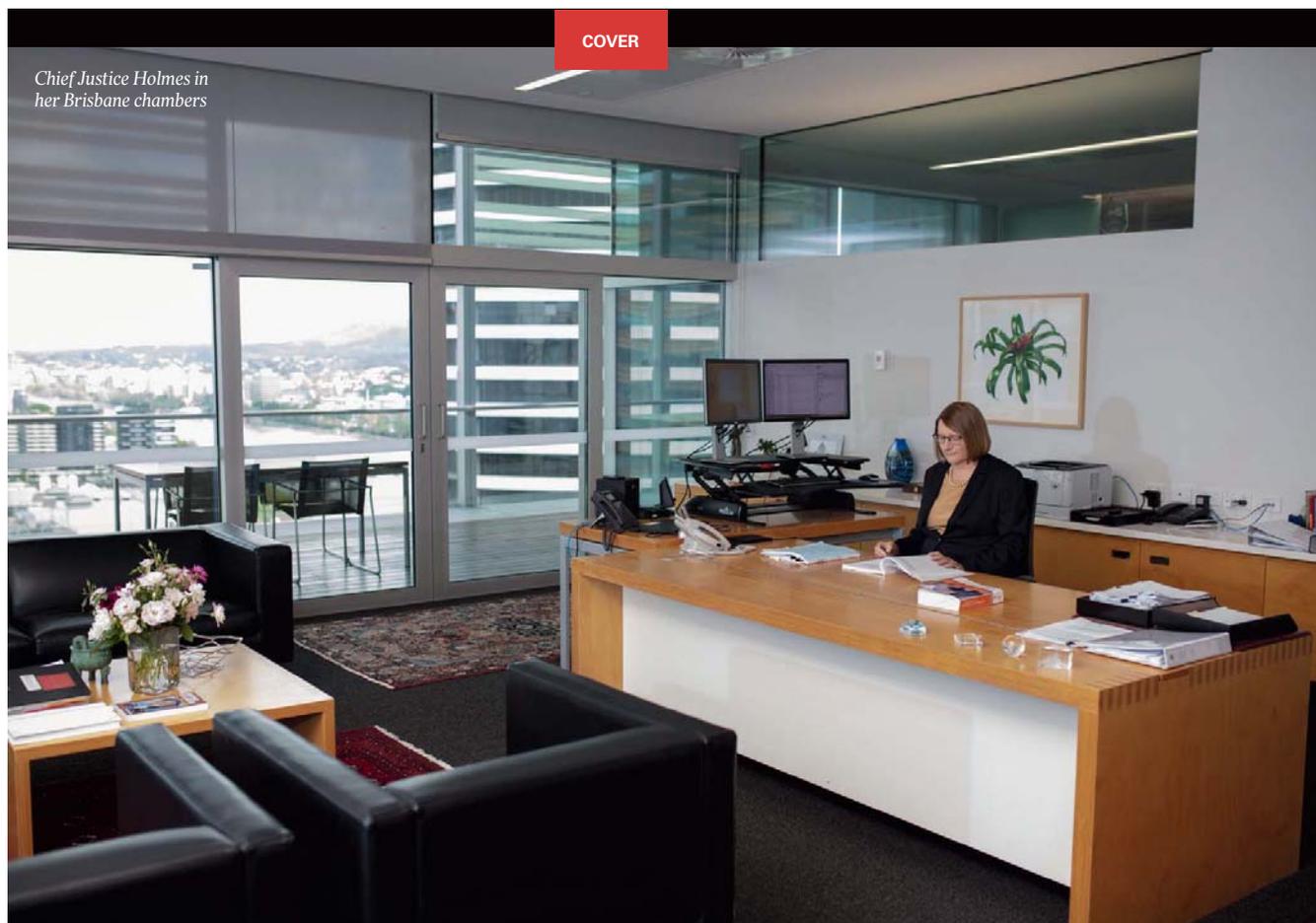
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Chief Justice Holmes in her Brisbane chambers

it is true of Australia. (If the reader does not accept that premise, no point in reading on.)

But I am not sure that most people give much thought to how this fortunate state of affairs is achieved and what is necessary to maintain it, because judicial independence is not some unassailable citadel.

In Australia, section 72 of the Constitution provides that federal judges cannot be removed except for proven misbehaviour or incapacity and that the executive cannot reduce judicial salaries.

You can see why security of tenure and remuneration matters: the public might well question the independence of a judge who could be dismissed or have his or her pay cut because of decisions which offended the government. Most, but not all, states have legislation to the same effect. But in no state, apart from NSW, are those conditions entrenched; that is to say, their removal requires merely a vote of parliament, not a referendum.

And while security of tenure and salary is critical to judicial independence, it is not by any means a complete assurance of it. Government still appoints judges and provides the staff and infrastructure necessary to the operation of the courts (or the funding by which they are secured).

At least in the state context, parliament is able to legislate to restrict judicial power and discretion. The



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maintenance of judicial independence is really a matter of good faith and mutual respect between the arms of government: the legislature, the executive, and the judiciary.

It can be imperilled at the institutional level by legislative change or by moves by the executive to interfere with the conditions necessary to independence; and at the level of the individual decision-maker, by attacks from media or politicians. And one form of imperilment can provide fuel for the other.

It seems to me that the pressures on judges and magistrates in their decision-making from media attention are greater now than at any time in the two decades I have been a judge. (When I speak about media, I am talking about traditional media, print and television news. Social media is too diverse and diffuse to lend itself to coherent discussion, and there is little point in appealing to notions of responsible reporting when it comes to Twitter and Facebook.)

At the same time, some politicians appear prepared to use court decisions as a form of political ammunition to attack opposing parties, without regard for the possible impact on judicial independence, both actual and as perceived by the public.

What chiefly attracts public commentary is the criminal law, although, of course, it represents only one area in which courts make decisions. Decisions to grant bail and sentencing decisions are the areas of most intense focus.

Reporting and discussion of bail decisions leave a lot to be desired. There is a strong tendency in the media, shared by some of our politicians, to speak about bail as if it were some form of preliminary sentencing; so that if, for example, someone gets bail on a charge of



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dangerous driving causing death, it is portrayed as their “walking free” despite having killed someone.

It makes for a very powerful headline, without any regard paid to the presumption of innocence or the relevant considerations in bail decisions, which are essentially about an assessment of risk: risk of flight or reoffending.

Someone can be charged with a very serious offence, but be most unlikely to abscond or reoffend before trial. Conversely, someone charged with a minor offence may be a risk of breaching his bail, but the offence charged would not warrant holding him in custody for what may prove to be a longer period than any eventual sentence, assuming he is convicted. Those factors tend not to receive any consideration or discussion.

Similarly when it comes to media coverage of sentencing decisions, there is little consideration of the factors that the sentencing judge has actually had to take into account, such as mitigating circumstances — those things which can be said in favour of the offender.

Reporting usually takes place from the viewpoint of the victim or the victim’s relatives. That is not at all surprising; but while that perspective is important, it is not all that must be considered. Society’s interests are not identical with those of the victim; that is why we long ago moved from individual vengeance to the state bringing charges through a prosecutor.

There are other things which matter in that larger perspective. One is the advantage of giving what’s called a discount in sentence for a defendant who undertakes to give evidence against a co-offender, because that enables a case to be made against someone who might otherwise go unpunished.

Another is a reduction of sentence to recognise a guilty plea, which may show remorse, or at least allows the matter to proceed in a way that reduces the trauma to those involved and saves state expenditure which would be unsustainable if most cases went to trial.

In the case of an offence for which a short sentence of imprisonment is an option, it is necessary to consider whether the need for deterrence outweighs the economic and social impact of uprooting the individual from his or her accommodation, job and family, because there will be a cost to the community in that.

Longer sentences need to be imposed with regard to an outcome which will improve the prospects of the individual successfully re-adjusting to society. Reporting often talks of a person who is eligible for parole after, say, two years of a six-year sentence as though they will then be free, which ignores, firstly, the fact that eligibility for parole is just that: depending on behaviour in prison, it may never come to pass; and, secondly, that their freedom will be conditional and may be ended at any time during the period of the sentence.

The prospect of release on parole gives a prisoner something to work towards, while actual release on parole gives the benefit of supervision over an extended period. That is likely to give society better protection than releasing prisoners direct to the streets, without prospect of oversight.

And what isn’t recognised in some reporting is that an essential aspect of the sentencing system is consistency; otherwise people would be sentenced differently for exactly the same conduct, which is anathema to the idea of equal treatment before the law. Individual judges can’t, in response to public indignation about a particular crime, or, for that matter, personal abhorrence of it, suddenly impose a substantially higher sentence for an offence than has previously been imposed for crimes of that type. Sentences can be appealed and parliament can increase penalties, but judges cannot take unilateral decisions to set a higher level of sentence in a particular case.

In fact, the tendency is for the level of sentences for those crimes that do attract public anger (and the nature of those changes from time to time) to increase gradually. Sentences for sexual offences and domestic violence offences are much higher now than when I was a junior barrister, and it is not purely because of legislative intervention.

What can’t happen, though, without damaging the system’s

fairness, is sudden change in reaction to public sentiment. How, in any event, does one gauge that sentiment? It is often said judges have failed to meet community expectations. That raises the question of quite what that term means: community expectations as represented by (and perhaps formed by) media reporting of particular cases, or community expectations as informed by the actual detail of cases?

There is a marked difference between the two, as demonstrated by two jury sentencing studies, one conducted in Tasmania between 2007 and 2009 and the other in Victoria between 2013 and 2014.

The methodology in the two studies was largely the same: jurors who had sat on a trial were initially surveyed after they had returned a guilty verdict, but before any sentence was imposed. The jurors in each study were given a list of sentencing options and asked to indicate the sentence the offender should receive, and to give their opinions as to general sentencing levels. (The only difference between the studies was that most of the Tasmanian jurors had heard counsel’s sentencing submissions at the time they were first surveyed and the Victorian jurors had not.)

After the sentence was handed down, those who were willing were given the judge’s sentencing remarks, reminded about sentencing options, and provided with some information about the purposes of sentencing and the factors to be taken into account, and were surveyed again.

In the Tasmanian study, a majority of jurors when first surveyed thought that sentences generally were too lenient. But 52 per cent of the jurors would, as it turned out, have imposed a sentence more lenient than the judge actually did impose in the case in which they were empanelled; 4 per cent the same sentence; and 44 per cent a more severe sentence.

When later asked to rate the judge’s sentence, about 90 per cent of the jurors said that it was either “very appropriate” or “fairly appropriate”.

In the Tasmanian study, jurors were asked whether they thought judges were in touch with public opinion. About 83 per cent of those in the second survey thought they were, compared with surveys of the general population, which have found only somewhere around 20 per cent of people with that view.

In the Victorian study, when asked for their general views about sentencing, the majority expressed the view that it was too lenient, with the exception of property offences, where they thought it was about right. But about 62 per cent of jurors would have imposed a sentence more lenient than the judge, and 87 per cent, when resurveyed, viewed the judge’s sentence as “very appropriate” or “fairly appropriate”.

None of that would come as a surprise to anybody with experience in the legal system. What those studies show is that information is critical. To know more about a case is to understand that there is a good deal more to be considered in sentencing than the crime itself.

Unfortunately, nuance, detail and explanation are lacking in most media coverage. The problem is that the 24-hour media cycle does not really lend itself to considered analysis, and print media, at least, are coping with fewer staff to do the reporting.

Even if that were not so, I would suspect that the drive for advertising revenue, particularly online, is a powerful motivator: a quick dose of uninformed



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outrage is likely to be much more alluring for the casual reader than a close analysis of the facts.

This should be understood: judges can't defend their own decisions. It is important that they maintain both their neutrality and the appearance of neutrality and don't descend to arguing the rights and wrongs of particular decisions.

Courts try to communicate information. In controversial cases in my court, we put the sentencing remarks online as quickly as possible. That's not easy; we have to wait for the transcript to become available, and there is always the next case to attend to.

(Provision of written reasons for sentencing or bail decisions in the Magistrates Court is not really feasible because of the sheer volume of work flowing through that court, which would be significantly slowed if magistrates attempted to make available reasons for everything that might conceivably arouse public interest.)

In the Queensland Supreme Court, we allow journalists to use recording devices in court so as to promote accuracy, and we permit the filming of sentencing remarks in some high-profile cases.

The idea behind filming sentencing remarks was that it would assist in conveying the reasons for a decision. I would not say that it has been a negative, because the judges of my court always strike me as looking extremely reasonable when I see them on television, but there is never more than a couple of minutes of footage used as a story illustrator. As a means of conveying anything of substance, it is very ineffective. All this matters, because complete and accurate reporting, or the want of it, go to public confidence in the system.

And sometimes it is simply not possible to provide information. Two years ago in Brisbane a man called Scown was sentenced for the manslaughter of his toddler stepson on the basis that he had failed to obtain medical assistance for the child at a time when his partner had inflicted a lethal injury on him.

Scown was sentenced to four years' imprisonment, suspended on the day of sentence because he had already spent two years and eight months on remand. He was filmed leaving the court and walking down the street. At one point he grinned broadly, possibly because he had just seen a cameraman falling backwards over a rubbish bin. The headlines then were along the lines: "Killer laughs as he walks free."

The footage and the coverage caused outrage and a wave of adverse commentary. The court could say nothing about it. It was all the more frustrating because Scown had been given a discount in his sentence on his undertaking to give evidence against his partner, who was ultimately found to have delivered the fatal blows.

In Queensland it can't be revealed that an individual's sentence has been reduced because of a promise to testify until they have actually given the evidence. I am able to talk about it now because he did give the evidence, but too late to prevent the condemnation of the court on a false premise about the nature of the sentence he was given.

Scown's is not the only case which has attracted public indignation because the true reason for an apparently very lenient sentence could not be disclosed. If in fact the defendant never comes to give the evidence — for example, because the subject of it pleads guilty — the co-operation and its effect on sentence can never be revealed. How to convey what has actually happened is one problem.

Another issue is the personal attack. The pursuit of individual judicial officers, particularly magistrates, can be intense and unpleasant and can have implications for independence. There seems to be a tendency to identify magistrates perceived as "soft" sentencers and pursue them over time, although in my experience there is no correlation between those whom the media identify as producing unsatisfactory sentences and those whose decisions are regularly overturned on appeal.

My concern is that there may be two unfortunate effects for magistrates subject to sustained and unfair scrutiny.

The first is that the risk of personal attack begins to affect their decision making, particularly in cases likely to attract publicity; the second, that even if it doesn't, the public perception may be

that their decisions are affected by that concern.

I don't say there are not effects on judges of higher courts too, but magistrates operate at closer quarters to the community at large than any other section of the judiciary, and they deal with an enormous number of matters. Recent Victorian experience has tragically shown that the pressures on them can become intolerable.

Media criticism often entails portrayal of the judiciary as out of touch and elitist; as living in "ivory towers". Most judges would respond: "If only."

Any judge or magistrate who sits in crime is exposed to the grimmest realities of existence. There is no aspect of human life which does not come before them. Judges are, anyway, members of the community; they have kids at school, they shop for groceries, and they sit in peak hour traffic, just like everyone else.

Now I come to the role of politicians. I make two things clear. The first is that most politicians — and I think I can say this, with respect, of the current members of the Queensland parliament — are appropriate in their discussion of court decisions. The second is that there is no reason politicians shouldn't criticise courts' decisions.

It is preferable, of course, that they refrain from comment until they are thoroughly informed; although media pressure for an immediate expression of views may be considerable. What politicians say matters a good deal, because members of the public are likely to assume that they know what they are talking about, and that what they say is accurate.

But there are two very worrying developments in political commentary. The first is for some politicians to suggest, on the strength of a decision that they don't agree with, that the entire legal system is dysfunctional.

There was that remarkable statement, "the law is an arse", which I've now heard from more than one politician. (It seems to misapprehend the Dickens quote in a fundamental and unfortunate way.) But that is a statement which I do not think a politician in this country, let alone an acting Minister for Justice, would have made 20 years ago.

And it was disheartening, a couple of years ago, to read that the Victorian opposition leader said of a sentencing decision in that state that it showed not just that the system was broken but that it was completely and utterly broken. A big call, you might think, to make on the strength of one sentencing decision. (It was, in fact, another instance where a defendant had been given a very substantial discount on his sentence because he had undertaken to give evidence against his older accomplice who was going to trial.)

A second development of recent times is the way some politicians are expressing their disapproval of courts by casting aspersions on their members for their supposed political leanings; which is, in effect, to say that the court as an institution is neither impartial nor independent.

By way of example, in 2017, a Queensland magistrate gave a defendant bail after he had spent a significant period on remand for assaulting his wife; it appeared likely that by the time he came to trial or sentence he would have served more imprisonment than could properly be imposed on him for the assault.

While on bail, he killed his wife. A federal minister said on talkback radio: "If you appoint civil libertarians

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to court benches you will get soft sentences and that's exactly what's happened here."

It wasn't, on any view; it was not a sentence, it was release on bail. The minister went on to say that Queensland's judiciary was "mostly Labor-appointed" and that magistrates in particular were "left-wing softies". One gets the impression that the real target was the other side of politics, but unfortunately in that kind of attack, the courts become collateral damage.

Something similar happened when three federal ministers made statements about a sentence appeal in the Victorian Supreme Court in relation to terror-related charges.

What they said, importantly, was not criticism of a decision, but of discussion between the bench and counsel during submissions. Two of the judges on the court had observed that there was a difference in sentencing patterns between NSW and Victoria, which might indicate that less weight was given in the former state to youth and prospects of rehabilitation.

One of the ministers said that these comments were deeply concerning; that the Victorian government should immediately reject the statements; and that courts should not be the place for ideological experiments in the face of the threats posed by Islamic extremism.

A second said that judges were divorced from reality and were more concerned about the wellbeing of terrorists.

The third combined both the concerning aspects of politicians' commentary to which I have referred by saying: "It's the attitude of judges like these which has eroded any trust that remained in our legal system. Labor's continued appointment of hard left activist judges has come back to bite Victorians."

None of the three was initially prepared to apologise to the court. They began by making a statement saying that they did not intend their remarks to undermine public confidence in the judiciary or to suggest that the court would not apply the law in disposing of the matters before it, and they had not imagined that their statements could or would pressure or influence the court.

What they did intend was not so clear. They had sent their emails containing those comments to the same journalist within minutes of each other, so it seems that whatever the intention, it was a joint one. After the court reserved the decision on whether to refer the three of them for prosecution for contempt, they did apologise.

I know that opinions have differed around the country as to whether the Supreme Court should have responded in that way. In my view, the court was placed in an impossible situation by the three ministers' remarks.

It is not an answer to say that judges were unlikely to be influenced by them. If the court, letting the comments go unchallenged, increased the sentences, which it ultimately did, there was a real prospect that members of the public would think that it had been cowed by this concerted approach by the politicians. The appearance of independence would thus be damaged. If, on the other hand, they did not increase the sentences, the risk was of a perception that they were reacting against the ministers' intervention.

I think, with respect, that the court acted as it had to in those circumstances. But contempt is not a course which you would adopt in any but exceptional cases.

My point is that there seems to be a contemporary willingness to attack courts for short-term advantage in a way which, if not designed to damage public confidence, may certainly have that effect.

Public confidence matters because people are more likely to respect and comply with judicial decisions, rather than taking matters into their own hands, if they have faith in the system.

The possibility of political interference with courts in a way that damages their independence is less likely with an informed public. In the criminal law sphere, there is a concern that governments may come under pressure to appoint judges who indicate a willingness in advance to impose harsh sentences.

And there is the risk, on the other hand, that capable individuals



Chief Justice Holmes:
 "There seems to be a contemporary willingness to attack courts."

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There is the risk that capable individuals become unwilling to serve as judges because of the kinds of pressures I have described; or worse, are unable, once appointed, to serve fearlessly

become unwilling to serve as judges because of the kinds of pressures I have described; or worse, are unable, once appointed, to serve fearlessly.

Journalists generally might think harder about the advantages of living in a system in which there can be confidence of impartiality and integrity, and try a little harder for balance and less for excitement.

Politicians might consider refraining from the sorts of attack which are corrosive of the judicial system, and instead recognise its importance as an institutional underpinning of our democracy, and do their best not to undermine the social consensus that supports it.

And the courts? We keep trying to think of ways of informing the public while balancing the need to remain above the fray. Judges can't justify individual decisions. A head of jurisdiction can point out that the criticism is unfair, but that kind of intervention is seldom met with a gracious acknowledgement of its justification and is more likely to be seized on as an opportunity for prolonging the excitement.

Judges can do their best to inform the community, speaking as often as possible about the role of the courts; but there are time constraints. It is not much good embarking on public relations at the expense of the core work of the courts in deciding cases.

I am grateful for the opportunity to have an essay like this published in the mainstream media. It enables me to explore and explain these concerns at length, in a way that reactive comment could never do.

I hope that if there is criticism of the essay, it comes from people who have read the whole of it, and is not a knee-jerk reaction to passages taken out of context; because that is part of the problem. Whether it attracts denunciation or discussion or simple indifference remains to be seen.

My final message: there is a correlation between the robustness of a democracy and the independence and impartiality of its judiciary. Australia has fared pretty well on that score; let's not let this advantage be eroded. LR

Catherine Holmes is Chief Justice of Queensland.