CRIMINAL DEFENCE LAWYERS: UNWITTING HUMAN RIGHTS DEFENDERS

IN DEFENCE OF THE DEFENCE

CHANCELLOR'S HUMAN RIGHTS LECTURE

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Theatre GM15, Melbourne Law School

Introduction

Human rights as a cause and as a calling for lawyers has developed dramatically since World War 2. The end of that war also increased the internationalisation of criminal law through the trials in Nuremburg and Tokyo and created a legacy that has found development with the International Criminal Court.

That is not to say by any means that no-one cared about such things before then. One needs only to consider that the Magna Carta was created in 1215 and that the rights of habeas corpus which effectively began with that document remain an important basis of human rights law, particularly recently in the United States as challenges were made to the Military Commission regime.

However because, like the Universal Declaration of Human Rights, the State of Israel and Prince Charles, I turned 60 this year, and for the purpose of this speech, I have begun to reflect on some individuals who both locally and internationally have had an impact on human rights and their protection, in some cases perhaps because they were doing no more than they were paid to do. The people I have in mind are the unsung heroes of the movement: criminal defence lawyers.

Criminal defence lawyers are often maligned. However, these lawyers are often better described by observers as the individuals who stand between the subject charged with a crime and the State. The role of these lawyers has been, and remains, vital.

Tonight, therefore, I am going talk about some of them and the contribution they have made to the preservation of human rights that most of us take for granted and which others think should be compromised in the cause of improving the efficiency of the criminal justice system.

Criminal Defence Lawyers as Human Rights Lawyers

As I have often said, by virtue of the nature of their role criminal defence lawyers are human rights lawyers. They may not always see themselves in that role, but of course the protection of basic rights is inherent in the defence of individuals charged with criminal offences.

It starts in the police station when an individual, sought to be interviewed by police as a suspect, rings his or her solicitor and is advised of the right to silence. Later, human rights which are put into effect in the course of defending those charged with committing criminal offences include:

- the right to require the prosecution to prove the charge beyond reasonable doubt;
- the right to equal treatment under the law;
- the right to silence and the presumption of innocence;
- the right to an adequate defence;
- the right to liberty, both in the context of imprisonment of an individual after conviction and in the context of detention of an individual prior to or in the absence of a trial on criminal offences; and
- in circumstances where capital punishment is still a penalty imposed on those convicted of criminal offences, the right to life, and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Although criminal defence lawyers, in simply performing their job, are fighting for the recognition and enforcement of the human rights of their clients, some of them have a greater impact on human rights issues generally and on public awareness.

This will be the case where in fighting for an individual's right, the defence lawyer finds him or herself also involved in advocating for a cause which for some reason has a significance that reaches well beyond the individual accused. In this way, particular cases or particular lawyers can come to stand for particular social issues. And in such cases, the criminal defence lawyer can have a significant impact on the human rights consciousness, as a direct consequence of simply performing his or her role in the criminal justice system.

A good example of this is **death penalty cases**.

- In our own country and our own State, a case that became iconic in this respect was the case of **Ronald Ryan** (the last person to be executed in Victoria in February 1967). Ryan was represented at his trial in 1966 and in later appeals to the High Court and the Privy Council by **Phil Opas QC**. While initially a firm believer in capital punishment, Opas' belief in Ryan's innocence, and his perception of the political motivations for his client's execution, changed his views about the death penalty. Every other individual on death row in Victoria in the preceding 16 years had had their death sentences commuted to life imprisonment; Liberal Premier Henry Bolte, however, successfully campaigned for Ryan's execution.

In 1997, Opas personally published *Throw Away My Wig: An Autobiography of a Long Journey with Few Sign Posts*. The book begins, under the heading "A cause for reflection", with a description of 3 February 1967, the day Ronald Ryan was executed:

> *I was no longer visualising the scene. I had already done that too often. Two nights ago in my hotel room in Bangkok* [on his way back from the Privy Council], *the night I was sure the hanging would be carried out, I could see it all happening. I could picture the crowded confines of the condemned cell. The State was about to commit judicial murder. Without the Court judgment following the jury verdict of guilty, what was about to happen would be pre-meditated murder.*
>
> *This murder was long planned. The hangman and his assistant appointed by the Sheriff to carry out this gruesome task, had already carried out tests with carefully weighted dummies matching Ryan's body weight. It was important that he be hanged neither too much nor too little. If the rope were to be too long and the drop too severe, the head might be severed and roll under the Hessian curtain after bouncing on the floor. On the other hand, if the rope were too short or the knot placed wrongly, he might strangle and take a long time to die to the embarrassment of the official witnesses.*
>
> *He must be killed scientifically by breaking his neck, quickly and painlessly. Painlessly! It will of course be painless to the hangman and his assistant. ...*

After the Ryan case Opas committed himself actively into the campaign to abolish capital punishment, and when the death penalty was abolished in Victoria in 1974, Opas continued to express his outrage at the continuing use of capital punishment overseas.

In the time leading to the execution of Van Nguyen in Singapore, Phil Opas became a support for me. He had become iconic as a death penalty lawyer. Whilst the defence team in *R v Ryan & Walker* also included the great Jack Lazarus for Walker and that great South Melbourne and Swans identity, Brian Bourke, as Opas' junior, it was Phil Opas who led the moral charge against the death penalty. It is part of his great legacy – he would also claim a role in Geelong's 2007 premiership – and we can honour him and the stand he took all those years ago by being steadfast now on this dreadful and unjust penalty in our region.

After an outstanding career in many facets of the law, Phil Opas passed away in Melbourne on 25 August this year.

- **Justice of Appeal Frank Vincent**, who is a very senior member of the Supreme Court of Victoria, was a barrister for 24 years before he was appointed to the Bench. In the early days when Victoria had a mandatory death penalty for murder – yes, mandatory – Vincent appeared in a number of

murder trials. Recently, in a speech marking the re-opening of the 4th Supreme Court, Vincent recalled that:

> *Counsel appearing in those trials were forbidden to refer to the death penalty. Of course, and particularly in cases in which there was concern that it might be imposed, it was almost irresistible not to make some comment obliquely alluding to it. When this was done, judges generally would let the breach pass without anything being said. In that trial however, my reference could hardly be described as a passing allusion. I concluded in my final address with the statement that – "In one sense, it can be said not to matter whether this trial ends with the clang of the gaol gate or the snap of a gallows rope. Each is a terrible sound, and I pray to God that it will not be in the moment of silence that follows that sound that you discover the meaning of reasonable doubt."*

There were great pressures on these young lawyers of the time. Every tactical decision they made in the running of murder trials carried the *"what if I am wrong"* question mark and the possibility that wrong forensic judgments could lead to a client being hanged.

Most death sentences were commuted by the Executive Council but it was not guaranteed and it was in the hands of politicians.

- More recently, since the abolition of the death penalty in Victoria and throughout Australia, iconic cases in the eyes of the Australian public have involved Australians charged with offences in foreign countries where the death penalty might be imposed, or already has been imposed. In the 1980s, Australians were introduced to the idea of Australians being executed in foreign countries by the case of **Kevin Barlow and Brian Geoffrey Chambers**, who were executed in Malaysia in 1986 after being arrested in 1983 with what by today's standards is quite a small amount of heroin (about 140g). Melbourne criminal lawyer **Frank Galbally** joined Malaysian lawyer Karpal Singh in the defence of Barlow.

  As Galbally describes, he first became involved in Barlow's case because it was his firm opinion, on the basis of all the evidence, that Barlow's right to a fair trial had not been protected, and that he had therefore been wrongly convicted. He states:

  > *I was not interested in the least whether [Barlow] was innocent. I was concerned with the fundamental principle of any civilised society, which affirms that everyone is entitled to a fair trial and that no person should be denied justice. This is all the more important when the consequences of conviction are execution. ... I believed that Kevin Barlow did not receive a fair trial, and it was for this reason – regardless of any consideration of guilt and apart from any personal sentiment – that I felt so frustrated and aggrieved by his execution.*[1]

[1] Frank Galbally, *Galbally! The Autobiography of Australia's Leading Criminal Lawyer* (1989) 187.

In the end, Prime Minister Bob Hawke described the execution by hanging of Barlow and Chambers as *"barbaric"* – a remark that had some detrimental effect on Australia's relationship with the Malaysian Government for some time.

- In my own case, representing **Van Nguyen** (the Australian executed in 2005 in Singapore) and working on the case of the **three Australians** currently facing the death penalty in **Bali**, I also found that in such cases advocating on behalf of a client to protect one of their human rights will necessarily involve taking a stand on the death penalty more generally. In those cases, the criminal defence lawyers involved have each begun their role by exploring the ways in which these individuals can be defended; challenging the appropriateness of the death penalty as a criminal sanction inevitably played a big part in the defence of these cases, and the criminal process through which guilt was determined became a small part of the overall process of defending the client.

  Here in Australia there is a band of lawyers, me once included, who carry the responsibility for the defence of the three members of the **Bali Nine** who are on death row in Indonesia. This is very difficult work – it is often done at long distance and requires talent not just in the law but in foreign law, sometimes foreign language, diplomacy and nuances of politics both in this country and in Indonesia. And there is no comfort that at least the case earns an income. At least in the case of the Melbourne lawyers, John Champion SC, Julian McMahon and others, there is no fee – no income.

- In the **United States** there are numerous lawyers who defend in death penalty cases and do it day in day out. Let me give you a particular example because this is now the project of Melbourne lawyer **Richard Bourke** – it is the **Justice Center in Louisiana**. The Center was established in 1993 and intended to rectify some of the greater excesses of the death penalty in the southern states of the US.

  The lawyers engaged at the Center are involved in a large number of death penalty cases particularly at trial. What they noticed when the particular leaders of the Center got more involved was that the standard of defence advocacy in some of these cases was poor. Clive Stafford Smith, an English lawyer who was centrally involved in the establishment of the Center told me about one of his early death penalty cases which was a re-trial where counsel for the accused had slept through most of the trial. *"I only needed to stay awake to do a better job"*, he said.

  The Center has worked actively to engage with those victims of capital crimes who have survived – usually the family of the person murdered. Some have been willing to lobby and speak publicly against the death penalty despite the loss they have suffered. The Center has also concentrated on racial bias in the laying of charges, the selection of juries and the passing of sentences.

  This is very important work – flowing from the work done on a day to day basis on the cases they handle is the development of some social policy to

reduce injustice and to change opinions and long held prejudices. This is where the work of lawyers who are primarily criminal defence advocates but who understand the effect of the work they do is so important.

Other examples of cases where criminal defence lawyers end up as human rights advocates are those which involve so-called **unpopular causes**; in other words, cases which require a lawyer to defend a person who is sometimes loathed by the community.

- **Terrorism** cases represent the unpopular cause of recent times. Perhaps the most famous defence lawyer in Australia in this regard is the Marine Corps Major who defended David Hicks, Major Dan Mori. Here was the classic example of a man who was part of the military establishment in a real and practical sense but, as a lawyer, saw an injustice he simply could not ignore. And the more he got into it the more clearly defined was the injustice that was symbolised by Guantanamo Bay and the Military Commission process.

  Major Mori's defence of David Hicks is now a matter of public record but there are two particular things about him that are important. First, he saw the value of taking up the cause of David Hicks in the media. He was a lawyer who was prepared to confront the vilification and the considered disregard of Hicks' position by an Australian Government who, at the time, thought it was politically beneficial to do so. Mori turned the Australian attitude almost on his own; not so much to David Hicks, but he made people understand the injustice and the breach of basic human rights that was the regime in Guantanamo.

  The second important thing about Major Mori was that he was supported to the hilt by the officer in charge of the defence section within the Office of Military Commissions – Col Dwight Sullivan. He was more unsung but crucial to the public contest that Mori had engaged in, particularly in the media in Australia because Mori needed that support for the conduct of the public debate and he had it without question.

  I cannot leave this topic without making some comment about the remarks of President-elect Obama declaring his intention to close Guantanamo with a particular view of endeavouring to restore the reputation of the United States. I am of course very pleased to hear this. This has occurred, in part, because the lawyers who insisted on being involved on behalf of detainees who were reviled by the populace generally made a case. First in the US Supreme Court in *Rasul v Bush* and then, later, in *Hamdan v Rumsfeld* in June 2006. In that later case, I had the pleasure of listening to the recorded oral argument of Professor Neal Katyal from Georgetown Law School who argued the case for the petitioner. It was simply outstanding and it changed, almost single-handedly, the attitude of the Court and then the American public to the harm that was being done at Guantanamo.

  The Australian Government was the only western power and ally of the US to support the regime in Guantanamo. However, that regime was an affront to important basic concepts and, apart from allegations of torture and delay in

dealing with prisoners, it was an affront to the most basic concept of the independence of the judiciary. The lawyers who acted for the detainees made the argument, put the case, and they won.

- In the more distant past, unpopular causes have involved representing **communists, racial minorities, individuals who sought to avoid the draft etc**. Within each community and in every era, the unpopular cause has somehow or other ended up being intertwined in the defence of an individual before a criminal court. An example of a lawyer who effectively made a career of defending individuals who represented the unpopular causes of their day is American **Clarence Darrow**. Clarence Darrow is probably the most famous defence lawyer of all time, not only because he was immortalised by Spencer Tracey in the film *Inherit the Wind*. A close second was Gregory Peck in *To Kill a Mockingbird*, followed by the man who never lost a case, Perry Mason. Darrow's clients ranged from communists[2] to teachers who taught evolution in school, but he most frequently fought for the cause of racial justice.

  For example, in the **Sweets case** in 1925 and 1926, Darrow fought against segregation and intolerance when he represented 11 members of the Sweets household who had reacted with force against a white mob trying to evict them from their home in a white neighbourhood in Detroit, killing one man. *"I believe the life of the Negro race has been a life of tragedy, of injustice, of oppression. The law has made him equal, but man has not. And, after all, the last analysis is, what has man done? – and not what has the law done?"* These were remarks made by Darrow in his closing argument in the defence of Henry Sweet, on his second trial for murder in April 1926.

  Most famously, Clarence Darrow defended **John Scopes**, the Tennessee teacher who was in 1925 charged with the offence that arose from his teaching of the theory of evolution. The case became, as much as anything else, about whether the laws which prohibited the teaching of evolution were unconstitutional. He is said to have told the jury in that case that *"the pursuit of truth will set you free, even if you never catch up with it"* and, he also opined, *"laws should be like clothes; they should fit the people they serve"*.

  Another example of a great criminal defence lawyer in American history who took on unpopular causes was **Samuel Leibowitz**. Leibowitz was a New Yorker and a Jew, who came to Alabama during the 1930s to defend nine young black men, now known as "the Scottsboro Boys". Their alleged crime was the rape of two white women. In those days black men accused of rape of white women rarely made it to trial – they were often lynched beforehand. These defendants are now conceded to have been innocent. Leibowitz attacked southern prejudices (i.e. systematic exclusion of blacks from grand juries), and ultimately prevented the execution of all his clients, even winning freedom for some.

[2] Case of the Communist Labor Party in Chicago in 1920, where 20 members were charged with conspiracy to advocate the overthrow of the Government by use of force.

In **Victoria** there is a significant array of criminal defence lawyers far too numerous to mention. Some, like Robert Richter, are very well known. I have already mentioned Vincent JA and he was, and is, similarly well known.

Frank Vincent was appointed to the Supreme Court in May 1985 – 23 years ago – and as I stated earlier, he had been a barrister before his appointment for 24 years. At one point during his career, Vincent left the Victorian Bar in 1974 to work as a solicitor for the Victorian Aboriginal Legal Aid Service. In the second half of that decade, after he had returned to the Bar, he and his best mate **John Coldrey** committed themselves to the defence of many aboriginals in the Northern Territory. John Coldrey has also served as a judge of the Victorian Supreme Court, having been appointed in 1991; he retired earlier this year.

One such case in the Northern Territory was *Collins v R* (1980) 31 ALR 257. In that case Coldrey represented a 13-year-old Aboriginal co-accused named Stuart. Vincent represented another accused named Williams. Dyson Hore-Lacey represented the accused Woods and one of the leaders of the Criminal Bar of the time, W.M.R. Kelly QC represented Collins.

The charges arose out of the death an individual at Huckitta Station on New Year's Eve in 1978 and involved murder charges brought against four aboriginal boys aged between 12 and 18 years. During the course of the investigation into the murder, the accused had made confessions by taking part in a re-enactment of the killing. At trial in the Supreme Court of the Northern Territory, the accused submitted that the re-enactment material was not voluntary, or if it was voluntary then it had been obtained by the use of unfair and improper methods, and should be excluded in the exercise of the court's discretion to ensure the fair trial of the accused.

Coldrey and Vincent were ultimately unsuccessful in their efforts to exclude this evidence at trial and also on appeal to the Full Federal Court. However the argument they fashioned had the approval of then Federal Court Justice Gerard Brennan, later Chief Justice of the High Court. The case, and Justice Brennan's dissenting judgment, came to represent an important precedent on the issue of voluntariness. Justice Brennan, in dealing with the circumstances, noted that each of the accused was a child or child-like in mentality and they came from an environment where aboriginal children were scared by the arrival of a police vehicle. They were puny by comparison with the large police officers and, *"… the power of the police was manifest from the first moment of contact …"* (page 320).

That judgment later led to a clarification by the High Court of the principles governing the discretionary exclusion of voluntary confessions in the later case of *Cleland* (1982) 151 CLR 1.

In November 1984 John Coldrey was appointed as the Victorian Director of Public Prosecutions. He brought with him his concern for the rights of suspected individuals in police custody derived both from the *Collins* case and his earlier role as junior counsel assisting the Beach Inquiry into allegations

against members of the Victoria Police in 1975-6. As Director of Public Prosecutions he chaired the Victorian Consultative Committee on Police Powers of Investigation which for a time I participated in. That committee is best known as the Coldrey Committee. Most notably the committee recommended, among other things, that which is now the law in Victoria that before an admission by an accused can be admitted into evidence it must be electronically recorded. Unsigned, unadopted confessions by suspects related by police officers were no longer acceptable. So, it was intended, the era of the police verbal would end.

Thus, while human rights advocacy may begin as an unexpected consequence of simply being a criminal defence lawyer, it can, in some cases, inevitably lead criminal defence lawyers into different areas: political, diplomatic, maybe even international in some cases. Because of the inherent human rights aspect of their work, some criminal defence lawyers have become leading human rights advocates because they have seen and understand what is at stake.

Exposure to Criticism and Violence

Criminal defence lawyers, particularly when they become an icon for a particular cause, can, like other human rights defenders, be exposed to criticism and even violence. For example, Hina Jilani, the former Special Representative of the United Nations Secretary-General on Human Rights Defenders, reported in 2004 that about ten percent of cases she considered where human rights defenders had had their own rights violated because of their work involved lawyers who were targeted in their professional capacity.[3] She reported that lawyers have faced disciplinary proceedings from their professional boards, have been sanctioned, and at times have been disbarred and had their licences taken away for offering legal counsel. She reported that some have lost their jobs in connection with their action in the defence of human rights.

While lawyers are relatively free to take up the unpopular cause in Australia without reprisal, there have been some examples even here where lawyers have been vilified for their role in defending human rights.

- In his autobiography, which I referred to earlier, and which was appropriately entitled *Throw Away My Wig*, Phil Opas QC describes the effect that his involvement in the *Ryan* case had on him, both personally and professionally:

  > *The death of the unfortunate Ronald Ryan affected me deeply. It certainly changed my life. Before the trial Sir Arthur Rylah had informed me that with the next vacancy occurring on the Supreme Court I would be appointed to fill it. After I had done my utmost to thwart the intention of the government to hang my client, I walked into the bar of Menzies Hotel to be greeted by Rylah glass in hand with: "Opas! So long as I am Attorney-General you will never get another brief from the Crown. And as*

[3] UN Doc E/CN.4/2004/94 (15 January 2004).

for the Bench – you had better pick one out in Fitzroy Gardens." I left without a word.

The reaction did not end there. When at the Attorney-General's direction, the Public Solicitor was compelled to withdraw my Brief so that Ryan could be hanged before his appeal to the Privy Council could be heard, I sought the advice of the Ethics Committee of the Bar Council. I wanted to know whether there was any objection to me seeking through the medial a solicitor prepared to brief me free of charge on the basis that I declined any fee for myself and was prepared to pay my own fare to England as well as necessary accommodation and other expenses. I was told that I could not do so because that would be unprofessional conduct amount to touting for business. I remonstrated pointing out that a man's life was at stake and I would certainly not profit financially. The Committee remained adamant. I defied the ruling. ...

As he describes later in the book, he made an appearance on television and spoke on radio. He attacked the government *"as being callous and ignoring basic principles of justice in refusing a condemned man every avenue of appeal and removing from him the right to legal aid"*. He stated that he was prepared to offer his services free, provided that a solicitor was prepared to act for Ryan and brief him.

After the hanging, Opas was called on by the Bar Council to show cause why he should not be struck off the Roll of Counsel for his action. He describes being so physically and emotionally drained by his ordeal that he decided not to defend himself, yet his friends made arrangements for his representation. He later justified his actions by stating that he had done nothing *"except to pursue what I believed was my appropriate course"*:

I was acting for a client in an unpopular cause. He was entitled to be represented and it so happened that I was his representative. There was nothing I did throughout the association with Ryan that I would not repeat in similar circumstances. Anyway, the clear message to me: I had no future at the bar.

Opas was unanimously absolved by the full Committee of the Bar Council. In dismissing the charge, the presiding silk, Louis Voumard, said: *"What this bar needs is more Phil Opases, not one less."* However, Opas had had enough, and he left the Bar for nearly five years.

While we are lucky in this country that lawyers will rarely suffer such consequences because they have defended an individual's human rights, this can be a common occurrence in some States.

- For example, returning to **Samuel Leibowitz**, the American criminal defence lawyer who defended the Scottsboro Boys in Alabama in the 1930s: Leibowitz was faced with constant threats on his life during that trial, and had to be constantly surrounded by state troopers for protection.

- A more example is **Karinna Moskalenko**, a prominent Russian human rights lawyer and defender. In April 2007, a motion was issued by the Prosecutor General's Office to the Russian registration service seeking to disbar Ms Moskalenko from practising law. At the time Ms Moskalenko was representing Khodorkovsky, a business man and Russia's most prominent political prisoner, in a complaint to the European Court for Human Rights in which he claimed that his right to a fair trial had been violated. The attempt to have Ms Moskalenko disbarred prevented her from attending hearings on a defence appeal against a court ruling to extend her client's custody. The International Commission of Jurists is reported as having called on the Russian prosecutors to stop pursuing Moskalenko, describing the campaign to have her disbarred as nothing but harassment. Similarly, the United Nations Special Representative for Human Rights Defenders made representations to the Russian Government, expressing similar concerns. In June 2007, the Moscow Bar Association refused to disbar Ms Moskalenko.

These are just a few examples of lawyers who, for doing no more than their duty, risk a personal consequence over and above the stress of doing the work. The reports of Hina Jilani, as Special Representative on Human Rights Defenders, describe countless cases of intimidation and abuse of criminal defence lawyers, ranging from violence, persecution and obstruction in countries like Zimbabwe and China, to death threats and assassinations in places like Iraq and the Philippines.

Even in places where criminal lawyers are not subjected to such harassment, in addition to the stress of doing their work, there is always the pressure that is applied to criminal defence lawyers by the public debate which surrounds some cases. So long as a fair trial is not affected, public interest in, and discussion about, these cases is important.

There are particular cases which always attract public interest. They will often be cases which appear to demonstrate callous and brutal violence usually involving defenceless victims. The cases are emotional. Members of the public looking on now see on their television screens the distraught families on both sides of the process. Inevitably people pose to themselves the question, *"How would I cope with such trauma?"* Perhaps it has always been the case but the manner in which we deal with those accused of crime in our courts seems to me to be a very tense issue. It is one that the community is very interested in and about which there are strongly held opinions.

My observations of juries over 35 years leads me to believe that if members of the community are given good information about how the justice system functions, they will come to understand it and, in particular, understand its importance and the importance of the individual rights that those charged are entitled to exercise. They do, I think, understand that the community itself is judged by the fairness with which we treat such people.

The debate is polarised to some extent by the inevitable tension between the plight of victims in criminal cases and the fair trial of an accused. Ease of access to information through the electronic media means that everybody has a view and that is appropriate. Courts, as the third arm of government, are not immune from criticism.

Those lawyers who defend individuals charged with crimes are likewise not immune from criticism.

However, in a recent article in *The Australian* on 31 October 2008, Professor David Flint, Emeritus Professor of Law and former Chair of the Australian Press Council and the Australian Broadcasting Authority has expressed the view that the criminal justice system now functions more in the interests of the criminal (note: not *the alleged criminal* but *the criminal*) than the *"great mass of law abiding citizens"*. I am afraid he is simply wrong about that.

Lawyers are said by him to favour this imbalance, not because they want a fair trial for their clients, but because, he suggests, they have a vested interest in preserving the system. One can only wonder what kind of vested interest a defence barrister on legal aid rates who is paid only for a portion of the work they do and, then, at very low rates, would have.

Professor Flint underpins his argument by reference to *"public expectations"* but never quite identifies what they are. He then quotes senior prosecutor in NSW, Margaret Cunneen:

> *There seems to be a fashion, among some in the criminal justice system, for a kind of misplaced altruism that it is somehow a noble thing to assist a criminal to evade conviction.*

This carries the unfortunate and wrong implication that the criminal defence lawyer, whose job it is to ensure that their clients is given a fair trial, has some independent responsibility to make their own judgment about the guilt of their client and then act according to their own view. The responsibility of all involved in the process is to ensure that every accused person receives a fair trial. As juries are so often told, the criminal trial is not a search for the truth – the question they always must consider is whether the prosecutor can prove his or her case against an accused person beyond reasonable doubt. If they cannot do so an acquittal must follow.

A fair trial does not mean a verdict of not guilty. Fairness simply deals with the basic concepts of requiring the prosecution to prove its case beyond reasonable doubt and giving the accused a fair opportunity to test that case and be heard in his or her defence. There is a wide misconception which is fuelled by some commentators, some of whom are lawyers, which, as I have said, tends to have a polarising effect on the community. The misconception is that one is either for the rights of victims of crime or for the rights of the accused. You are one or the other.

Judges, it is claimed recently, pay insufficient attention to the rights of victims. There is of course always a tension between what sentence a victim would understandably wish to see imposed on the accused and what sentence is actually appropriate considering what both the statutory law and common law require. This tension was beautifully identified by Justices Teague and Coldrey when they spoke at the ceremonies marking their retirements from the Court. They would miss the Court and the work of the Court, they said, but what they would not miss would be the eyes of mothers looking up from the court. Mothers of victims wanting justice and mothers of accused people wanting mercy.

Judges are often accused of living in some form of unreal cocoon away from the realities of life. Well, let me tell you that in the Criminal Division of the Court we deal every day with the realities of life. With accused people charged with murder. With victims and witnesses. With the desperate and displaced. With police. With prisons and prisoners. With the futures of those participants. We do the community's business every day. It is very real. The Criminal Court is no cocoon.

Conclusion

This has been, in many respects, a trip down memory lane. Over the last 7 years, since 11 September 2001, I have had cause to reflect on the importance of those who will stand out against the pragmatists and those who would label a group of people as less deserving of equal treatment in the criminal justice system.

The criminal justice system is a system of human rights. Nowhere else in the court system are common law or statutory rights more important. Whatever the shortcomings of our criminal justice system, it is superior to so many other systems in the world because, in part, lawyers of the calibre I have mentioned have understood what is at stake and defended it in the face of considerable political and social criticism and condemnation.

The thirst of some for vengeance and retribution is perhaps stronger now than it has been for some time. It is the criminal defence lawyers who have to confront it. They are the ones driven to constantly remind us that we can measure our civilisation and our humanity as a group of humans by the way we treat the most reviled members of our community.

The people to whom I have referred are people whose principles and commitment I have long admired. They are hallmarks by which we, as the servants of the law and of the community it regulates, should measure our commitment and courage on these issues. They would agree with the sentiments expressed by former US Supreme Court Justice Robert Jackson who left the court for a time to prosecute the trials at Nuremburg after the war. In his opening address to the Court he said:

> *We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.*

Thank you.