



Speech delivered by Chief Justice Anne Ferguson – Melbourne University Law Review Dinner, 19 September 2019

- Good evening.
- I would like to begin by acknowledging the traditional owners of the land on which we meet. I pay my respects to their elders past and present.
- It is a pleasure to be here at the 2019 Melbourne University Law Review annual dinner to deliver the Sir Zelman Cowen Address.
- I would like to thank the Melbourne University Law Review for organising tonight's event and I also thank Professor Pip Nicholson, Dean of the Melbourne Law School.
- I would also like to acknowledge the many distinguished guests here tonight.
- It has been a very long time since I was involved with a Law Review.
- I remember that it was a lot of fun, and a great opportunity to explore some interesting areas of the law.
- What I also clearly recall is that Justice Emiliios Kyrou and I were both involved with Law Reviews at about the same time – him at Melbourne University, me at Monash University. It was later a great pleasure when our paths crossed again at the Supreme Court.
- Tonight, I am going to talk to you about a matter that I think is of fundamental importance – reframing what open justice means.
- Eight years ago, former Supreme Court Judge Paul Coghlan, now a Reserve Judge, sentenced a Melbourne father who threw his daughter off the West Gate Bridge.
- At the time I wasn't sitting in crime, I was in the Commercial Court working on corporations cases.
- That morning, however, I took time to listen to the sentence. It was broadcast live on ABC 774 and 3AW.
- I remember the power of hearing Justice Coghlan's voice, and the way he delivered his remarks – not just the words he was speaking, but his tone, his cadence.

- I have no doubt that the broadcast of those sentencing remarks would have similarly moved other members of the community listening, and helped to impress on them how and why courts do the work they do.
- According to media reports at the time, the radio stations were inundated with messages of support and thanks after the 40-minute judgment.
- I am sure that part of the reason for that is because people understood what they were hearing.
- They could hear for themselves not only what the sentence was, but why his Honour had reached the decision he had.
- In essence, they connected with the judge and the sentencing process.
- The broadcast was an early, innovative example of the Supreme Court communicating directly with the public.
- We tend to throw around terms like 'open justice' without necessarily thinking about what it means to deliver justice now. Is it any different today from 10, 20, 50 years ago?
- The question is top of mind for me, in part due to the recent high profile matters we have been broadcasting to the public in the Court of Appeal.
- We are also seeing changes to the *Open Courts Act*, which come into effect early next year.
- At the same time, the Victorian Law Reform Commission is reviewing Contempt of Court laws and considering if they need to be modernised to build public confidence in the justice system and allow for clearer enforcement.
- These are all good reasons to focus on the notion of open justice.
- But the most important reason I want to talk about open justice is because it goes to the heart of public trust and confidence in the courts.
- Open justice is one of the most fundamental aspects of the justice system in Australia.
- Expressed in modern form in the House of Lords decision, *Scott v Scott*¹ in 1913, the High Court confirmed the principle in the 1976 case of *Russell v Russell*,² with Justice Gibbs saying:

It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view'.

¹ [1913] AC 417.

² (1976) 134 CLR 495.

This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected.

Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts.

The fact that courts of law are held openly and not in secret is an essential aspect of their character.

It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'.³

- The principle of open justice has been reaffirmed by superior courts countless times.
- But what does open justice mean, or what should open justice mean, in our modern, digital world?
- One academic has suggested that open justice has expanded to mean the community's ability to view or access information about court proceedings through the internet or social media, rather than just through traditional print or electronic mediums.
- But I would go further than this.
- In my view, we need to revisit our idea of open justice.
- While courts should be open to the public and what happens in court should be capable of being seen and reported, a reframed notion of open justice would *also* require the courts to proactively engage with the community, and in so doing improve the community's understanding of how and why courts perform the work they do.
- The reframing I'm suggesting comes at a time when how the community engages with the justice system has changed, and is continuing to change.
- For a start, people rarely come to court to see cases for themselves.
- My colleague at the Supreme Court, Justice John Dixon, puts it this way:

"If you go back to when this Court was built, there was no television, no movies.

"For entertainment people would come to the courts and they would watch the cases and they would watch the leading barristers perform ... the public galleries were full.

"That is mostly not the case anymore."
- And with the rise of social media, the community has greater access to unmediated information about the courts – some of which may be misrepresentative, inflammatory, or just plain wrong.

³ *Ibid* 520.

- This is another reason for courts to become more proactive. We should all be concerned when we see around us misinformation or lack of understanding about the work done in our courts.
- Now, the quote from Justice Dixon I read to you just now didn't come from an interview with the ABC, or an article in the Age. It came from Episode One of *Gertie's Law* - a podcast series the Supreme Court produced to explain or unravel lesser-known, misunderstood or complex parts of how the Court works.
- The aim of *Gertie's Law* is to try and provide the community with meaningful context around what the Supreme Court does.
- We also need to write clear and accessible judgments, and produce summaries to help explain complex judgments and decisions.
- Open justice is more than just being able to see what happens in court. It is bigger than that.
- We need to ensure that we explain what it means in a way that people can clearly understand.
- We must do this if we are to achieve the purpose of an open justice system as described by Justice Gibbs.
- In *Gertie's Law*, we have a section called 'Ask a Judge' - where the podcast team interviewed people in the Bourke Street Mall and asked listeners to send in questions.
- Here are some of those questions:
 - Where does criminality come from?
 - How much preparation goes into a judgment before actually handing down?
 - But some questions were unexpected. For example:
 - A schoolgirl in Bourke Street asked: How do you go about ruling on laws you don't personally agree with?
 - And a girl who came along to Courts Open Day wanted to know: Are cases with child witnesses more complicated?
- I was struck by those two questions. They were nuanced and sophisticated. And when we think about our court users, we don't immediately think of children.
- I thought they were good examples of why, when we talk about open justice, we need to think very carefully about the different people we are trying to reach.
- Chief Judge of the County Court, Peter Kidd, understands this well. He appears on ABC and 3AW radio, taking 'talkback' questions - via text message. The Chief Judge does this because he wants to do everything he can to help the community better understand why and how judges make the decisions they do. His is just one way, not the only way, to go about the task.

- In my view we have a responsibility to make sure our work is both transparent, and understood.
- You don't trust what you don't understand. You don't value what you don't trust.
- That is why engendering trust in the system and those who work in it is so important. Because our courts are a fundamental part of the democratic society that we live in.
- Thinking about tonight, I wondered what I would have done as a Law Review committee member with the notion of open justice.
- Law Reviews are a wealth of knowledge and understanding about the law. They traditionally involve lawyers, law students and academics speaking exclusively to each other.
- But what role or responsibility, if any, do Law Reviews have under this new notion of open justice. Is it worth taking a fresh look? Do you have a responsibility to communicate your knowledge and understanding about the law to a broader audience?
- To start you thinking – is there scope for a well-informed blog about cases likely to be of public interest, including sentencing decisions? A place where people can go for a reliable account of a decision written without an eye to headlines or sensationalism?
- I'm sure that there will be initiatives that you could come up with that will hit the mark perfectly.
- Every day, Victorian courts and tribunals make genuine efforts to uphold the principle of open justice. But is our view of it - and our role in applying it - too narrow?
- Sir Zelman Cowen made a significant contribution to public understanding of complex issues. In the 1950s, while Dean of Law at Melbourne University, he began broadcasting news commentaries, mostly on legal topics – something that was very new for its time. He liked to talk to people and he listened to what they said.
- It was also said that Sir Zelman 'lived in the real world, engaged with its problems. He was fascinated by its technologies and communicated its controversies to the professions and the public alike'.
- We all need to challenge ourselves to do things that don't come naturally to us.
- For a principle as important as open justice, I would expect nothing less.
- Thank you.

**The Honourable Anne Ferguson
Chief Justice of the Supreme Court of Victoria**