
TRANSCRIPT OF PROCEEDINGS

THE MEDICO-LEGAL SOCIETY OF VICTORIA

MELBOURNE

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"THE CRIMINAL JUSTICE SYSTEM - FAIRNESS FOR ALL?"

PRESENTED BY: Mr Lex Lasry QC

1 "THE CRIMINAL JUSTICE SYSTEM - FAIRNESS FOR ALL?"

2 MR HURLEY: Good evening fellow members and guests. This
3 evening we are privileged to hear Mr Lex Lasry QC address
4 the Medico-Legal Society of Victoria and I expressly
5 welcome him to the Society.

6 Firstly, two points of housekeeping. I'd like to
7 remind you that mobile phones should be switched off
8 within the club and that gentlemen's jackets should
9 remain on throughout the evening.

10 Tonight we are very fortunate to hear an address to
11 the Society on the top of "The Criminal Justice System -
12 Fairness for all". There is always broad interest in the
13 criminal justice system reflected by its frequent
14 reporting in the national media. I think it is fair to
15 observe that in recent times there has been renewed
16 interest in the criminal justice system due to a number
17 of high profile cases and the associated commentary that
18 these cases have generated.

19 I also think it fair to state that our guest
20 speaker, Mr Lex Lasry QC is pre-eminently placed to
21 address the Society on the criminal justice system and I
22 am pleased to thank both Rob Nave for bringing this topic
23 to the committee's attention and to Mr Michael Wheelahan
24 for securing Mr Lex Lasry to present a paper on this
25 topic. I expect that many of you in the audience will
26 either know Mr Lasry or be familiar with a number of
27 cases that he has been involved with over the 34 years of
28 his extraordinary career to date as a barrister.

29 By way of introduction I would like to remind the
30 audience that not only has Mr Lasry much experienced in
31 the criminal justice system but he also has broad

1 experience beyond this area. Included in his extensive
2 curriculum vitae is his role as junior counsel assisting
3 the Costigan Royal Commission into the Federated Ship
4 Painters & Dockers Union in the early 1980s; temporary
5 counsel assisting the National Crime Authority;
6 Australian defence counsel for Van Nguyen in Singapore
7 (2002-05); senior counsel assisting the Coroner in her
8 inquiry into the 2003 Canberra bush fires; defence
9 counsel in Canberra in the murder trial of Singh and Rau;
10 defence counsel for Jack Thomas in his terrorism case;
11 defence counsel in the terrorism case concerning members
12 of the Tamil community in Australia; independent observer
13 for the Law Council of Australia at the trial of David
14 Hicks at Guantanamo Bay; member of the Council of
15 International Criminal Bar for counsel practising before
16 the International Criminal Court.

17 Mr Lasry has been awarded the Inaugural President's
18 Medal by the Law Council of Australia for his
19 contribution to the law. We are extremely fortunate to
20 have Mr Lex Lasry QC address us on what promises to be a
21 fascinating topic for all of us here tonight.

22 MR LASRY: Thank you very much, Michael. Ladies and gentlemen,
23 just while I'm getting my notes out, I have to make a
24 confession about this particular room. The last time I
25 was here I was sitting right down "that" end of the room
26 and I tell you confidentially it was as the drummer in a
27 rock 'n roll band at a wedding and the rock'n roll band -
28 and you are not to mention this beyond this room - the
29 rock 'n roll band was known apparently by others in the
30 band as the "Lex Pistols".

31 So when Michael Wheelahan asked me about this speech

1 some considerable time ago he said it would be at a
2 sophisticated Melbourne club (there's no doubt about
3 that) and this speech would have to be made wearing a
4 dinner suit and I immediately got edgy. I've made plenty
5 of speeches over recent years but this is the first time
6 I've actually made one with a dinner suit on. I don't
7 know whether that's important or not. Perhaps it's not.

8 The topic for tonight is obviously one of general
9 interest these days - "Criminal Justice System - Fairness
10 for All?" - and it was Michael Wheelahan who suggested
11 the topic and I agreed to it because primarily as a
12 criminal lawyer for the last 34 years I do have some
13 views about the state of the criminal justice system and
14 I want to say at the outset that I think by and large the
15 state of the criminal justice system is pretty
16 satisfactory, which is not to say that the system cannot
17 be under threat from time to time and particularly in
18 these times.

19 Of course the "fairness for all" aspect of the topic
20 is important because it creates a tension because, to put
21 it in its most simple terms, a criminal trial usually is
22 preceded by some sort of human conflict and that means
23 that those involved in the case, those who are interested
24 in the outcome have pretty diverse interests. There are
25 the accused (there might be several of them) and a victim
26 and perhaps several of those.

27 The system is always tested in the difficult case.
28 Often the conduct that the court has to deal with is
29 conduct that repulses us. Perhaps the most recent cases
30 include the case of people like Peter Dupas and his trial
31 for the murder of Mersina Halvagas and the recently

1 concluded trial of Robert Farquharson who was found
2 guilty recently of the murder of his three children.

3 It is because people look at those cases and just
4 can't believe the conduct that the system comes under
5 pressure and it comes under pressure because watching all
6 this is the community but, by and large, the community
7 are watching through the eyes of the media and sometimes,
8 therefore, what they're seeing is the media's account of
9 what is happening coupled with the media's opinion about
10 what's happening and not only that but what should
11 happen. So, there's another pressure. The community's
12 role, apart from looking on and watching what's happening
13 and wondering about how on earth such conduct could
14 occur, the community also have a very important role in
15 the criminal justice system, of course, as jurors.

16 I had always been told by the people who wanted to
17 express their opinion to me as a law student and beyond
18 that trial by jury was one of the great virtues of a fair
19 criminal justice system and after 34 years I am convinced
20 that that's right. Juries, by and large, have their
21 advantages and disadvantages but there's no question, in
22 my opinion, that juries bring to the criminal justice
23 system the reality and a sense of commonsense, if you
24 like, that is invaluable to the system.

25 There are those who would abolish it and it has been
26 abolished in other countries in the criminal system.
27 Recently, on an ABC program called "The Law Report",
28 which is not one I listen to all the time, although you'd
29 think perhaps I would, Justice Betty King of the
30 Victorian Supreme Court got herself involved in a debate
31 about the jury system and she launched a very spirited

1 defence of it and if you can ever listen to the program
2 it is worth listening to because it's an interesting
3 discussion about the pros and cons but for what it's
4 worth I thought Her Honour defended the jury system
5 extremely well and I agree with pretty much everything
6 that she said.

7 It is important because our system, the credibility
8 of the criminal justice system is dependent on its
9 fairness and its independence and history, of course, is
10 a great teacher in this regard and a place that you can
11 start just to think about the principle is at the
12 Nuremberg trials in 1945 at the end of the War when
13 ultimately the senior German officers were put on trial
14 at the insistence, of course, of the United States and,
15 as I follow it, over the objection of Winston Churchill.

16 In opening that case in Nuremberg, Justice Robert
17 Jackson who was of the U.S. Supreme Court and who took
18 leave in order to prosecute these cases said this -
19 emphasising the need for fair trials -

20
21 "We must never forget that the record on which
22 we judge these defendants is the record on which
23 history will judge us tomorrow. To pass these
24 defendants a poison chalice is to put it to our
25 own lips as well. We must summons such
26 detachment and intellectual integrity to our
27 task but this trial will commend itself to
28 posterity as fulfilling humanities aspirations
29 to do justice".

30 I think that is an outstandingly appropriate quote for
31 any consideration of the criminal justice system. So
32 that's the standard. The standard is a standard of
33 detachment and intellectual integrity.

34 Our system here in Australia does its best and it
35 does it a great deal better than many other countries.

1 There's a lot of pressure on the system, as I said out
2 the outset, by the public scrutiny of the system and no
3 one complains about public scrutiny, it's absolutely
4 appropriate. But in these days criminal lawyers will
5 tell you, and you can see it for yourselves in the media,
6 that we do have now often in the particular case a régime
7 of, in a sense, media pre-judgment of cases. We will
8 always have the Herald Sun headline that talks about the
9 monster or the sex fiend and we will always have
10 commentators, several of whom write for that newspaper,
11 who will want to not only describe what's happening but
12 to say what should happen and I'll come back to that a
13 bit later.

14 But when you look back over the history of criminal
15 cases that have attracted that kind of attention of
16 course they are not hard to think of. The yardstick is
17 the trial of Lindy Chamberlain. And it is often said by
18 lawyers in a particular case where there's been a lot of
19 publicity "My client's got about as much chance of a fair
20 trial as Lindy Chamberlain and what they mean is that if
21 there is media saturation about the crime and the
22 character or lack of character of the person charged with
23 the crime then by the time the person charged gets before
24 a jury there won't be a person empanelled on that jury
25 who doesn't have a view about the case. That's not quite
26 the idea.

27 You can think of other cases, of course, that get
28 that kind of saturation coverage. The Mohamed Haneef
29 case is a recent case in point which was saturation
30 coverage. And it's an interesting set of circumstances
31 to dwell on now, the Commonwealth DPP having come to the

1 view that Haneef never should have been charged and yet
2 if you look back over the media coverage of that case and
3 you look back over the comments made by people like the
4 Foreign Minister and the Immigration Minister you'd be
5 forgiven for thinking in the earlier stages that Haneef
6 was on the phone as the bomb went off at Glasgow Airport.

7 And there are others and there are others of course
8 in history. Charles Manson no doubt you will remember;
9 OJ Simpson, an excellent an example. If you were to
10 Google OJ Simpson you would see an endless supply of
11 information about him and that case and you've no doubt
12 heard the old "knock knock" joke about OJ Simpson which
13 goes something like "Knock, knock, who's there? OJ. OJ
14 who? Great, you can be on the jury".

15 Ivan Milat, a serial killer here in Australia with
16 something like seven victims. You will remember, of
17 course, Greg Domaszewicz acquitted of the murder of
18 Jayden Leskie. You will remember Timothy McVeigh, the
19 Oklahoma bomber. Julian Knight for the Hoddle Street
20 murders and Martin Bryant in Port Arthur. Those are the
21 cases that test the system and they test it because
22 people are of course immediately offended by the very
23 conduct and ultimately it is the way the system deals
24 with those cases that tests the credibility of the
25 system.

26 The primary object and exercise as far as the
27 criminal justice system is concerned is to have a jury
28 system and to have a jury trial where the jury can make a
29 decision about the guilt or lack of it of the accused
30 without being influenced by the media and by other
31 extraneous considerations. So a great deal of care is

1 taken to make sure that the jury is kept away from
2 influences that might divert them in their deliberations.
3 They are regularly warned by trial judges about not
4 discussing the case with other people.

5 It's always a very homely little direction that you
6 hear from the trial judge who usually in a fatherly way
7 says "Now, members of the jury, you will go home tonight
8 and of course your friends and loved ones will be most
9 interested to know what you've been doing and of course
10 you can tell them that you've been to court and that you
11 were involved in a criminal case but you mustn't say
12 anything else". And there are judges and there are times
13 when it sounds just like the first day at primary school.

14 But it has a purpose and it obviously has a purpose
15 and at the end of that warning the purpose is, of course,
16 explained and the judge will say "The reason for this is
17 because those people who are offering you their opinions
18 about the case haven't been in court as you have, haven't
19 heard all the evidence, haven't heard the lawyers cross-
20 examining the witnesses, haven't had the lawyers making
21 submissions. You are the ones who have been here. You
22 know the story. You are best placed. You should not be
23 influenced by those outside with an opinion to express
24 which is ill-informed". And I think in many ways that is
25 the problem about a great deal of the media coverage.

26 But I started by saying that I thought that the
27 criminal justice system was in pretty good condition and
28 there are lawyers here who may or may not agree with
29 that. Pat Tehan I see here. Pat no doubt as a very
30 senior member of the Victorian Criminal Bar will have a
31 view about it and I don't know what that is. But my view

1 is coloured by what I've seen out of Australia over the
2 last few years. For various professional reasons I've
3 travelled quite a bit and those travels have taken me to
4 places like Singapore where not only do they have a
5 mandatory death penalty for those who deal in drugs above
6 an amount of 15 grams but in the cause of producing
7 government-approved results, in my opinion, they
8 abolished trial by jury.

9 Mandatory death penalty, of course - and you'll
10 forgive me but this is a topic very close to my heart -
11 mandatory death penalty, we shouldn't get too
12 sanctimonious about it, we had it here until the 1970s.
13 The mandatory penalty for murder in those days was death
14 although ordinarily it wasn't actually carried out. But
15 "mandatory" means once the judge determines that a person
16 is guilty of the crime (as the judge did in our case in
17 Singapore) then there's no other penalty to be imposed
18 but death. Here, when someone is found guilty of an
19 offence there's another phase in the case, the Americans
20 call it "the penalty phase". We call it "making a plea".

21 We then get to present to the judge as a separate
22 part of the hearing material which enables him to make an
23 informed and independent view of what sentence should be
24 imposed on the accused. You don't have that in
25 Singapore. They replace it with presidential clemency.
26 Okay - well, we compiled 80 or so pages of submissions
27 saying why our client shouldn't be hanged and put both
28 legal and personal material in there in a very detailed
29 way. That was our way of conducting basically the
30 sentencing submissions. And the response to that was a
31 one paragraph letter that said "Your application is

1 rejected. Please make funeral arrangements". So, it's
2 an example (Singapore) of a country that has many of the
3 trappings of democracy; the courts have many of the
4 trappings of the British common law but the reality is
5 something quite different.

6 I have also been to Sierra Leone in the cause of
7 Peter Halloran's case, the Victorian policeman who found
8 himself in some bother over there and the thing that
9 struck me about that trip was that I was in a country
10 where a usual part of the process is to bribe the judges
11 and I don't know who was more surprised - me, when it was
12 suggested that a payment of \$10,000 to one of the judges
13 of the Court of Appeal might do the trick or the lawyer
14 watching me who was shocked at my surprise. After 33 or
15 32 years, I think it was then, here I am in a situation
16 that thank God I've never come anywhere near anywhere in
17 Australia.

18 All I can say about that place is that it is - I
19 mean Sierra Leone - I suppose you'd expect that kind of
20 thing in a country where the unemployment rate is
21 something in excess of 80 per cent. But this is
22 obviously a country in crisis. This is a country that
23 has been devastated by the civil war, the war that
24 involved neighbouring countries and war over diamonds and
25 God knows what else and they are trying to rebuild
26 themselves and the stress and the pressure on the
27 criminal justice system in that country is just
28 phenomenal.

29 Then, twice I had the pleasure - I think it was a
30 pleasure - to go to Guantanamo Bay Cuba. For me it was a
31 pleasure because it was a great adventure and I see

1 yesterday that Major Mori of the US Marine Corps has been
2 given the Australian Lawyers' Alliance Civil Justice
3 Award for his efforts on behalf of David Hicks. And the
4 reason that that trip was important was not to do with
5 David Hicks.

6 As I said many times during the course of that case,
7 my interest as the Law Council's observer was not in
8 David Hicks, he had his own lawyers. My interest was in
9 the process. And what we saw in Guantanamo Bay was
10 basically a mock-up of a criminal justice system created
11 by the Pentagon, totally lacking in independence. Again,
12 it had all the trappings and you can always tell in these
13 sort of circumstances that it's not going to be fair
14 because the senior military officers keep telling you
15 "This will be full and fair". And they say - it's a bit
16 like Joe Hockey. I think Joe Hockey should change his
17 name to "Joe Union Bosses Hockey" because he gets those
18 words into every phrase he utters and some of these
19 military officers do the same: "full and fair" gets in
20 to every sentence and the fact that they keep saying it
21 is an early indicator that the process isn't going to be
22 fair.

23 I had a client in Mauritius charged with drug
24 offences. She has been in custody now for in excess of
25 two years and in Mauritius there is no trial by jury and
26 there is absolutely nothing we can do from this distance
27 to expedite her case. I have with Julian McMahon and
28 some others two members of the Bali nine, Myuran
29 Sukumaran and Andrew Chan, facing the death penalty in
30 Indonesia. And the death penalty in Indonesia is carried
31 out by firing squad rather than hanging. But that case

1 is occurring again in circumstances where the country is
2 in the process of being, as it were, a developing
3 democracy and trying to renovate its process after past
4 years and trying to bring itself into the modern human
5 rights era and that's a bit struggle for that place and
6 our clients' lives, in a sense, depend on the outcome of
7 that discussion in that country. So, it's very good to
8 get home and it's against that background that I'm able,
9 I think, to make some judgment about the Australian
10 criminal justice system.

11 In May of last year I delivered the Law Week Oration
12 and I used one of my favourite quotes from Martin Luther
13 King in relation to the topic which was to do with
14 defending and unpopular causes and the quote I started
15 with was that the ultimate measure of a man is not where
16 he stands in moments of comfort and convenience but where
17 he stands at times of challenge and controversy. And I
18 was making the point during that lecture that much of the
19 challenge now in the post-September 11 era is a challenge
20 which has to be taken up by the legal profession.

21 Whenever an unpopular cause is to be defended then
22 inevitably it's left to lawyers to defend it and how the
23 cases are defended is a critical part of the barometer by
24 which we can measure the standards of our community and
25 the legal profession obviously is a crucial pillar in the
26 whole process. And I gave some examples in that case to
27 perhaps highlight the point and I referred to an American
28 by the name of Stephen Bright who in 1994 was the
29 Director of the Southern Centre for Human Rights in
30 Atlanta Georgia and he was the visiting lecturer and the
31 Yale Law School and he'd been involved in the trials,

1 representation of many people facing the death penalty
2 since 1979. And he wrote an analysis about the quality
3 of representation in some of those cases and the title of
4 his analysis was "Counsel for the poor - the death
5 penalty not for the worst crime but for the worst
6 lawyer".

7 At the end of his article he concluded as follows -
8 he said this: "So long as juries and judges are deprived
9 of critical information and the Bill of Rights is ignored
10 in the most emotionally and politically charged cases due
11 to deficient legal representation the court should not be
12 authorised to impose the extreme and irrevocable penalty
13 of death otherwise the death penalty will continue to be
14 imposed not upon those who commit the worst crimes but
15 upon those who have the misfortune to be assigned the
16 worst lawyers"..

17 An English lawyer by the name of Clive Stafford-
18 Smith went over to Louisiana several years ago and was
19 telling me on one occasion of his first death penalty
20 case and it appeared that part of the appeal which he was
21 then involved in concerned the fact that trial counsel
22 slept through the better part of the trial and he smiled
23 and said "I knew then that I only had to stay awake to do
24 a better job".

25 But the point of all this is that the effectiveness
26 of our system depends on the commitment of lawyers. And
27 I want to put that as clearly as I can because I think
28 it's important that it be understood. There's no
29 question the commitment of defence lawyers has to be a
30 commitment to their client. The role of a defence lawyer
31 in the criminal justice system is to defend their client

1 to the utmost within the rules that prevail and subject,
2 of course, to the lawyer's duty to the court. The role
3 of a prosecutor is not to win the case. The role of a
4 prosecutor is to conduct themselves independently - in
5 the old-fashioned language - as ministers of justice and
6 who should be indifferent to the case. And I think,
7 unfortunately, that's changing.

8 Some of the great prosecutors that I can remember
9 over the years and others who have been in the criminal
10 law will remember them have been people who have been
11 committed to that principle. So, it's not just the
12 defence counsel, the prosecutor's role is important.
13 It's a role that involves being candid with the court,
14 it's a role that involves being fair and it's a role
15 which involves presenting effectively and strongly the
16 evidence available.

17 One example which perhaps many of you will remember
18 which is still talked about is the trial of Ronald Ryan
19 and Peter Walker now something like 40 years ago. You
20 will remember no doubt, if you're of sufficient age to
21 have been around at that stage and I certainly was, that
22 Ryan and Walker broke out of Pentridge prison and a
23 warder by the name of Hodson was shot dead in the middle
24 of Sydney Road in the course of the escape. The details
25 and the arguments in the case perhaps don't matter.

26 The important thing for the purpose of this
27 discussion perhaps has two elements. I remember as an 18
28 year old the level of hysteria that prevailed in
29 Melbourne when that happened. I lived down in the
30 southern suburbs and I think everyone thought that Ryan
31 and Walker were holed up in the back shed because that's

1 what we were being told, that they were extremely
2 dangerous, they could pop up anywhere and "Lock your
3 doors, shut your windows" and so on and so forth and
4 people were absolutely terrified. And in the midst of
5 all that Phil Opas and Brian Bourke, two very well known
6 members of the Victorian Bar, defended Ronald Ryan and
7 Jack Lazerus (equally well known) defended Peter Walker.

8 The pressure on those people in that case was
9 phenomenal and part of the pressure they were dealing
10 with, of course, was pressure from the government. The
11 Premier, Henry Bolte was making it clear what he thought
12 should happen; the media reported the case in an
13 hysterical and sensational way and if you read any of the
14 books - and I do commend Mike Richards' book to you about
15 this - you will get some sense of the pressure that was
16 on those three barristers in defending that case.

17 There's another unpopular cause, of course, which is
18 now to be defended perhaps more than ever and that is
19 what might be described as the rule of law, the rule of
20 due process and the independence of the judiciary. And
21 as I have already said, I think the role of lawyers now
22 has changed quite dramatically because we're now,
23 unfortunately, without enough politicians as leaders who
24 will take an idealistic risk and who are prepared to lead
25 this country on human rights issues and on civil
26 liberties issues. And what we are now centrally
27 concerned with is the economy, of course; a continuing
28 fear of terrorism and border security. And Federal
29 politicians on both sides now have a very well-developed
30 carefully spun instinct for job preservation and they
31 watch the public mood with great care and they react to

1 it by the development of policy which they hope will meet
2 with electoral approval. And the security of political
3 incumbency is underpinned to some extent by the existence
4 of a climate of fear of terrorism and, unfortunately, a
5 continuing fear of the other, whether the "other" be
6 Somalian, Muslim or whatever, and that fear developed as
7 it is is developed usually on religion, race, ethnicity
8 or perhaps political beliefs.

9 Lawyers - criminal lawyers particularly and Julian
10 Burnside as well - have a very important role in the
11 debate because the community needs to be reminded of the
12 importance of due process. Another example, which I will
13 just mention briefly because I think the times are not
14 dissimilar, was the role of lawyers back in 1950 in the
15 Communist Party dissolution case. Lawyers Ted Hill, Ted
16 Laurie and others who argued the case in the High Court
17 in December 1950 and it was the case that challenged the
18 constitutionality of the Communist Party Dissolution Act.

19 In the modern climate it's interesting to note to
20 look back at that case and just be reminded that if the
21 Communist Party Dissolution Act had survived the
22 challenge it would have instantly dissolved the
23 Australian Communist Party and it would have provided a
24 procedure by which groups of people possessing communist
25 affiliations or connections could be the subject of an
26 application to the Governor-General in Council to be
27 declared an unlawful association. And if you read about
28 the case I think you'll see some interesting parallels
29 between the criteria for the selection of organisations
30 that might be subject to such a declaration and some of
31 the modern efforts that arise from the criminal code to

1 criminalise organisations to be designated as terrorist.

2 The other unpopular cause that I want to talk about
3 in the criminal justice system context which is integral
4 to maintaining the fairness and independence of the
5 system is the independence of the judiciary. In the
6 modern media, in my opinion and in the opinion of others,
7 there is now what might be described as an outrage
8 industry, the kind of thing I was talking about before
9 and one of the results of this outrage industry is that
10 comments about the criminal justice system which would
11 normally attract condemnation are forgiven and often pass
12 without comment, signifying acceptance. It is
13 particularly so in the United States but I think it is
14 also the case here.

15 In the United States there's an organisation called
16 "Justice at Stake" and it's run by a man called Burt
17 Brandenburg and he refers to the US Criminal Courts and
18 suggests that the courts are in a cycle of public
19 criticism of judges and I think we're in the same sort of
20 cycle here. Criticism, he says, is not a bad thing.
21 Judges are public servants, they're not beyond criticism.
22 But now there is an outrage industry in the tabloid
23 newspapers and the cable news services and this is
24 something that I think we have to be careful about.

25 The outrage industry in any particular case is
26 usually triggered by a particularly bad case where a
27 horrible crime has been committed and a judicial decision
28 has either excluded some important evidence or imposed a
29 lenient sentence. The outrage will be usually manifested
30 by complaints about the sentence imposed or the fact that
31 an alleged criminal has been allowed to go free and

1 rather than reporting the detail of how the decision or
2 sentence came to be passed and exercising their editorial
3 judgment by educating the public about the importance of
4 an independent judiciary, the media solution can often be
5 to turn the judge into the villain and the idea is to
6 exclude him/her from the mainstream and to accuse the
7 judge of being unaccountable.

8 These attacks on judges in criminal cases are, in my
9 opinion, very harmful. They undercut the credibility of
10 the courts and, importantly, they pressure and perhaps
11 empower governments who are inclined to do so to reduce
12 the powers and the discretion of judges. Unfortunately,
13 this debate is often led by victims' groups and, of
14 course, victims - there is no question victims have an
15 important central role and interest in the process.

16 But the usual allegation is that judges are out of
17 touch with the community and no doubt sometimes judges
18 and magistrates who are the subject of this sort of
19 pressure and criticism are affected by it. But I have
20 never really understood the argument because judges are
21 very much in touch with the community. Every day in
22 criminal courts judges are doing the community's
23 business. Every day in criminal courts they're doing the
24 community's hardest business. But the problem is that
25 often these pressures will be applied to government in
26 order to contract the discretion or the powers of
27 criminal judges and criminal trial judges and perhaps
28 even appeal judges.

29 One way of doing that is, for example, for
30 governments to impose in particular cases - and this is
31 often called for - mandatory sentencing. I will just

1 remind you that the sentence imposed in our client in
2 Singapore was also a mandatory sentence. And it's what
3 the community don't know about this complaint and this
4 process that is perhaps important.

5 In April 2005 the Chief Justice of the Victorian
6 Supreme Court wrote a paper under the heading "Sentencing
7 Issues" and she made the point that - in fact she said
8 this: "Of the thousands and cases dealt with in higher
9 courts each year most appeals against sentence complain
10 that they're too severe". She went on to make the point
11 that those cases are rarely reported in the media and, of
12 course, inevitably create a distorted impression of
13 sentencing practices in Victoria.

14 Now these days, of course, you can look at what's
15 happening. You can go on to the internet and you can
16 look at the legal sites, you can find the work of the
17 courts, you can find the work of judges in Courts of
18 Appeal in Victoria and the Supreme Court and read the
19 judgments if you want to and you will see that that is
20 so, that the vast majority of criminal appeals are - of
21 course, there are appeals against conviction and the
22 appeals against sentences are appeals against the
23 sentence as being excessive. There are occasionally
24 appeals by the prosecution against what they say is a
25 manifest inadequacy.

26 So what we're left with is a picture being painted
27 which suits the particular argument and the argument
28 always is an argument based on a particular case. A
29 judge is always said to be out of touch because of what
30 happened in one particular case. You will never hear the
31 argument about criminal trial judges being out of touch

1 based on any kind of survey because the survey won't
2 support the argument. So, conveniently it suits the
3 critics to take the particular case, to listen to the
4 criticism, to say the sentence is too lenient therefore
5 the judge is out of touch.

6 It is perhaps stating the obvious but the
7 independence of our judiciary is absolutely crucial to
8 the process and when you're reading the criticisms of the
9 kind that I've been talking about, please bear that in
10 mind. The independence of the judiciary, apart from
11 anything else, is the most important means of preserving
12 the rule of law. Political interference with the process
13 is obviously undesirable and what I've seen in other
14 countries tells me that if we're not careful about this
15 and if we don't protect our processes and if we don't
16 understand the value of our individual protections and
17 freedoms within the criminal justice system then we at
18 least risk that in a climate of fear, particularly a
19 climate of fear of terrorism, that the occasional change
20 will be made which will never be able to be recovered.

21 You have to ask yourself whether when politicians
22 are saying "We want to give the police more power and we
23 want to reduce the rights of the individuals under
24 investigation or on trial by taking away their right to
25 silence" or whatever the process happens to be, are you
26 as members of the community satisfied that the argument
27 is not an emotional argument? Are you actually satisfied
28 that we will be safer as a result? I think if you look
29 at the history of Singapore you will see that one of the
30 reasons that Lee Kuan Yu and his family so easily gained
31 acceptance was that they promised the Singaporeans after

1 the last war that they would never be brutalised like
2 that again and they made some fundamental promises about
3 food in their stomachs and a roof over their head and I
4 think the compact was "Just give us that extra bit of
5 control and we will ensure your security" and I think
6 although the security is there the control has gone way
7 too far.

8 There are a huge range of causes to be defended
9 within the criminal justice system which are unpopular.
10 When you're looking at the reports of the difficult cases
11 bear in mind my argument at least that the system depends
12 for its survival and for its credibility on the quality
13 with which those cases are defended and the fairness of
14 the trial that is given to the particular individual.

15 The conclusion that I have come to is that the
16 fairness, a propos of the topic "Fairness for all", the
17 fairness extended to all the participants in the
18 Australian criminal justice system is satisfactory. It's
19 not perfect but it's good. And I think the benefits of
20 that are reflected in the quality of life we enjoy and I
21 think they're reflected in the reasonably high confidence
22 we have in the system but the system needs defending and
23 we should all be interested in that, I think.

24 There's a quote which Benjamin Franklin seems to
25 have donated to the Northern Territory Criminal Law
26 Association for their T-shirts at their annual
27 conference, which I'll come to in a moment. But when I
28 was first going back to look for it I found another one
29 which as the years go by I must say it's completely
30 irrelevant to what I'm talking about tonight but I'm
31 going to tell you anyway what it is. He apparently said

1 "I wake up every morning at nine and grab for the morning
2 paper then I look at the obituary page. If my name's not
3 on it I get up". The quote that is relevant to the topic
4 is "Any society that would give up a little liberty to
5 gain a little security will deserve neither and lose
6 both". Thank you very much.

7 MR HURLEY: In his inaugural address to the nation on Sunday,
8 4 March 1933 Franklin Delano Roosevelt famously said to a
9 pained and fractured nation, which of course at the time
10 was gripped in the vice of the terrible suffering of the
11 Great Depression, "The only thing we have to fear is fear
12 itself. Nameless, unreasoning, unjustified terror which
13 paralyses needed efforts to convert retreat into
14 advance". Of course the criminal justice system at its
15 root is a fundamental tool in the machinery of the
16 operation of a civilised society by which society itself
17 seeks to advance and not retreat into an abyss of
18 lawlessness and chaos. We must at all costs treasure and
19 nurture it. We must be assiduous to guard our well won
20 liberties. Uninformed alarm and baseless criticism has
21 been outlined in part tonight of this system only serves
22 to mark a retreat in what otherwise ought to be an
23 advance.

24 I've had occasion over the years to look at the
25 Victorian Government Gazette and some of you - perhaps
26 many of you - may tonight wonder how in my chosen
27 occupation I can or do or how any of my colleagues fit in
28 to some of the things that Mr Lasry tonight has spoken so
29 eloquently about in terms of capital punishment. If one
30 opens the Victorian Government Gazette one can see, at
31 least before the last hanging, in an entry perhaps under

1 a road closure notice or before a notice concerning
2 infectious diseases or the like an entry which is the
3 final marking of the State of the taking of the life of
4 an individual. And recorded in that Government Gazette
5 are the essential facts of what had happened but who
6 subscribes their name under that Government Gazette
7 notice? Not the Premier, not the Attorney-General, it's
8 a medical practitioner employed for the purpose. That
9 person might have been employed by the State - one
10 presumes so. So when one looks at that entry and it
11 strikes me, of course, as a member of the younger
12 generation as to how stark such an entry appears, my mind
13 has often wondered about what went through the mind of
14 that medical practitioner when they were simply doing the
15 job they were employed to do.

16 Now we on our committee have repeatedly received
17 requests for a paper to be presented which outlines some
18 of the rationales, bases and details of the criminal
19 justice system, particularly for those who are neither
20 versed or practised in the ways and details of the
21 criminal justice system in this country in order that
22 some of the myths and abnormalities which may seem to
23 present on the surface be explained and understood.

24 And, of course, how wonderful it has been tonight to
25 hear what can be described, if I may say so, as a
26 masterly display of principal reason and commonsense.
27 We, of course, are most grateful to you, Lex, for taking
28 so much time and trouble to present to us tonight, to be
29 with us and present in such a learned, practical and
30 illuminating way. So before the floor is open to
31 questions and I ask all of you to partake as vigorously

1 as you can because Lex is happy to receive them, may I
2 ask on behalf of the members and guests of the Society
3 tonight to thank you, Lex, very much and I ask you all to
4 show your appreciation in the usual way.

5 The proceedings have been recorded for the purpose
6 of the publication of the proceedings, so if there is a
7 microphone - and I'm not sure that there is - I would ask
8 that the person who is asking a question take possession
9 of the microphone before they address their question and
10 perhaps for the sake of the transcript if you could say
11 who you are and what your chosen call is. Thank you.

12 MR KENNEDY: Ian Kennedy, lawyer. I was having dinner in
13 Canberra with the Law Council on Grand Final eve. I only
14 mention Grand Final eve just to make the point that my
15 team Geelong was successful the next day, which was the
16 sole purpose of the question.

17 MR LASRY: Congratulations.

18 MR KENNEDY: Not really. And I was talking to a very old
19 friend who is a senior Federal judge, not a criminal
20 lawyer, in another State and I asked him how he managed
21 to get the day out of court and get to Canberra. He said
22 he actually had been in court, although no one would ever
23 have known that because he was not listed as sitting.
24 The case that he was hearing no one would ever know that
25 he was hearing because it was not mentioned anywhere, but
26 he had to deal without the assistance of counsel and had
27 no help on it, he was clearly quite distressed about it.
28 I found it extremely disturbing and I wondered whether
29 you have a sense of how in our community these issues
30 under terrorism law are going to play out politically and
31 in terms of where we're going in that direction and can

1 we expect any change one way or the other in resolving
2 those issues.

3 MR LASRY: Have you got another hour? The terrorism laws and
4 the way already they're working are already a problem,
5 obviously for a variety of reasons and, Ian, you've
6 mentioned one of them. Under the legislation that
7 applies in terrorism cases it is now possible for the
8 prosecution to be presenting evidence in a criminal court
9 which an accused person won't be able to hear and which
10 in particular circumstances his counsel won't be able to
11 hear and even if they can't they won't be able to tell
12 him about it and it may be evidence that is crucial in
13 the case and it may be evidence on which he is found
14 guilty and the unfairness of that is obvious.

15 There are a string of other measures in relation to
16 terrorism laws generally as to the way in which people
17 can be questioned, the way in which they can be held
18 without being charged. And you saw the Haneef case, that
19 was an excellent example of that. I mean the thing about
20 that was an aspect of those terrorism laws, Ian, which
21 just amazes me that in the end the prosecution can arrest
22 someone and hold them for weeks while they work out
23 whether there's a case and then get the decision wrong
24 and there's no comeback as far as Dr Haneef is concerned.

25 So, yes, there are a series of problems in the
26 terrorism laws which give enormous power to the
27 Australian Federal Police and to ASIO which reduce the
28 entitlements of people charged in particular cases and
29 which impose requirements on people to be able to have
30 access to information which usually of course an accused
31 person won't be able to fulfil.

1 It was the case in Guantanamo Bay. The rules under
2 which the military commissions were conducted were
3 conducted on that kind of basis that at particular points
4 in the process it would be necessary for the accused and
5 possibly the accused's civilian lawyer to leave the
6 hearing room. I mean I laughed when I saw that that was
7 happening because it hadn't really hit me that the same
8 possibility can occur me. It's obviously a matter of
9 concern.

10 MS JOCKEL: Maria Jockel. I'm an immigration lawyer, Lex.

11 Your comments in regard to the importance of due process
12 and the need to be very concerned about politicisation
13 and following on from the Haneef case are even more
14 important because as we know the Minister for Immigration
15 has extraordinary powers under the Migration Act to, in
16 effect, usurp the role of the courts and due process and
17 determine that somebody is someone of bad character and
18 proceed to cancel their vehicle and as in the case of
19 Haneef actually require them to depart Australia so that
20 in fact you bypass all possibility of the legal system.
21 One of the things that really concerns me is that we who
22 profess to be really concerned about a democracy and the
23 importance of having proper processes, particularly where
24 it's alleged that you're a criminal, why we allow this in
25 the case of the Migration Act and that we do this both
26 for permanent residents and both for temporary residents.
27 I mean Dr Haneef is the most recent example of a
28 temporary resident where this has happened but it's also
29 happened in regard to permanent residents. I'm just
30 wondering whether you'd like to make some comments given
31 your extensive experience in criminal law as to how it is

1 that we've allowed this rather anomalous process to occur
2 where a politician in a given point in time can determine
3 who and who isn't actually a criminal for the purposes of
4 cancelling their visa and then ousting them out of a
5 country and what can we do about it, besides changing the
6 Migration Act and overhauling the entire political
7 system?

8 MR LASRY: One of the great immigration experts of course is
9 here with us and he did give me some warning you might
10 ask me a question like that and I did tell Julian
11 Burnside that I would handball the question to him and I
12 see he's got the microphone.

13 I think the most offensive thing about - to deal
14 with Haneef first - was that it always seemed to me and I
15 think I said so because I was asked by the media to
16 comment and it just seemed to me that the timing of the
17 cancellation of Dr Haneef's visa, which wasn't for the
18 purpose of getting him out of the country at all, it was
19 to negative the effect of a magistrate's decision to
20 grant him bail was just phenomenal. I don't know whether
21 I'm wrong about this but it seemed to me then that that
22 was simply an abuse of executive power and I don't think
23 I've had any reason to change my view about that. The
24 timing was just phenomenal.

25 Because politicians these days are so driven by
26 their perception of what the electorate thinks you can
27 assume that politicians do this because they think it's
28 what the electorate want and, regrettably, opinion polls
29 in relation to things like immigration and terrorism
30 support that. And for a while I thought that the mood of
31 the electorate was changing. I believed for a while that

1 people - and I don't just mean people to the left. I
2 think there are people - genuine true conservatives both
3 in this country and in the United States who are just
4 appalled by the way these things are occurring. And I
5 think there are a lot of people in the electorate on both
6 sides of the old-fashioned left, right wing divide who
7 would love to see leaders come on to the political scene
8 who could show some genuine idealistic leadership and my
9 feeling about it is that until that happens it's going to
10 be very difficult to shift public opinion and until
11 public opinion is shifted these kinds of executive
12 interferences and declarations of guilt, as you refer to,
13 are going to continue because they think it holds their
14 job for them and, unfortunately, I think in many respects
15 they're right about that.

16 MR BURNSIDE: Julian Burnside, barrister. Just a footnote to
17 Ian's question. I recently did a two-day case in which
18 my client and I spent most of the two days sitting
19 outside the hearing room because the Attorney-General had
20 certified that neither my client nor I was entitled to
21 hear the evidence or hear the submissions. It was a very
22 disarming experience. But my question is this. In the
23 trial that David Hicks was to face the Commission was
24 allowed to receive evidence obtained by coercion. Two
25 recent High Court judgments have held that confessional
26 evidence which has been obtained by trickery, whether by
27 the police lying to the accused and saying falsely that
28 the evidence will not be used against them, that evidence
29 is held to be admissible and I wonder if you'd like to
30 comment about the effect on the system of confessional
31 evidence obtained whether by coercion or trickery being

1 allowed in.

2 MR LASRY: I should get Pat up here to help me answer this
3 question. I haven't read the judgment although I heard
4 someone talking about it in the last few days. I think
5 the simple answer to the question, Julian, is that - and
6 it was the way on a slightly topic we argued the case in
7 Jack Thomas's case - that when people are under
8 interrogation by police in whatever circumstances then
9 there is no place for the use of force, the overbearing
10 of their will or deception, because once those people
11 have been asked the question and given the incriminating
12 answer they're stuck with it for the process.

13 The High Court now take - I think they take in that
14 case what they regard as a realistic view and I think
15 they probably also have done an analysis which suggests
16 that in the end in the particular case which I think was
17 a case of a rather violent home invasion or two home
18 invasions the violence displayed was - and they don't say
19 it in these terms - but the violence displayed was such
20 that the police really have to have the complete support
21 of the courts to do whatever they can do to obtain the
22 evidence that they need to get guilty people convicted.

23 And I think that does bring us to some of the
24 tension in the debate about how far are we prepared to go
25 and I don't think the guilt of lack of it of the person
26 under investigation is the test. I think the test is how
27 far do we want our law enforcement agencies to be able to
28 go to extract what might be incriminating evidence. In
29 the end do we think that it's much more important to get
30 that evidence than to maintain the standards by which
31 we've lived up until now and I think the answer to your

1 question is that those decisions are obviously a
2 departure from that general principle.

3 MR NAGLE: My name is James Nagle and I'm a guest here tonight.

4 I was listening with interest to an interview of
5 Mr Downer I think on ABC radio a.m. program in the last
6 few days and he was being asked to distinguish his
7 position or justify his position - the government's
8 position from that of Mr McLelland in his speech about
9 the death penalty and making applications on behalf of
10 the Bali bombers. The gist of what Mr Downer was saying
11 was that we can't be expected to waste taxpayers' money
12 as advocates for foreign nationals who are subjected to
13 the death penalty but if they're Australians at risk
14 we'll do everything in our power, you know, even go so
15 far as to say we'll act very robustly to defend
16 Australians. I thought, well hang on, there are two
17 cases that you've been involved in in recent years that
18 don't sit comfortably with that. There was the Van
19 Nguyen case where it seemed only got out to the public
20 arena very late in the piece but apparently there was
21 some mechanism where the Federal Government could have
22 laid charges that would have been - put Van Nguyen in a
23 position where he would've been - the Singapore
24 Government would have been advised to extradite him to
25 Australia.

26 MR LASRY: Would have required him as a witness against others,
27 that was the idea.

28 MR NAGLE: And Mr Howard and Mr Downer encouraged that they'd
29 done everything they could for Van Nguyen and he was
30 still hanged. And the other case was that in the Bali
31 nine case Mr Rush would've been convicted - it doesn't

1 seem to get the publicity it deserves, but his father
2 apparently got wind of this and went to the Federal
3 police or went to the police, he wanted his son to get a
4 good shaking up but expected that they'd treat his
5 information with due sensitivity and I mean there's
6 something really smelly about that whole case.

7 MR LASRY: Yes, there is.

8 MR NAGLE: It seems they've basically set up where rather than
9 being arrested in Australia on the basis of informant
10 information, they've subjected to the death penalty in
11 Indonesia. I don't expect you to comment on that latter
12 case but in those two instances it seems to me that
13 there's not a lot of difference between the Federal
14 Government's position and that of the Bush administration
15 on the torture of suspects where they say "We're opposed
16 to torture" but they're not opposed to (indistinct) to
17 some other country where they'll be subjected to all
18 sorts of terrible conduct. What I was saying to you in
19 the Van Nguyen case - Mr Moloney said you're happy to be
20 questioned vigorously. What happened with that issue
21 about the witnessing where he could be extradited as a
22 witness? Was that only an afterthought that only
23 occurred to the defence team late in the day or was it
24 always an issue where it only emerged in the public arena
25 so late that it didn't really get much - - -

26 MR LASRY: No, it emerged in the public arena late. Van had
27 given a lot of information to the AFP over a period of
28 time and in the end what we were dependent upon was a
29 willingness by the AFP to lay a charge effectively
30 against the man who procured his trip and in the end they
31 wouldn't do it, they said there wasn't enough evidence.

1 And, indeed, we were endeavouring to persuade the DPP
2 about that right up until the last weeks. It would have
3 meant that we would've been able to say to the
4 Singaporeans "You're going to now execute the main Crown
5 witness in a case in Australia" and we thought that that
6 probably would have at least gained some time. So that's
7 what happened in that case.

8 Can I just say very quickly what I think the problem
9 is, because this debate has been totally diverted by, I
10 think, in a sense mischief on the part of the government.
11 Australia has legally an international position of
12 opposition to the death penalty. We ratified the second
13 optional protocol in 1990. Our position is we're opposed
14 to it in all circumstances. It's absolutely right to say
15 that the only diplomatic representations we can make is
16 for Australians who are in that situation. That's the
17 government's role. It's not for the government to make
18 diplomatic representations on behalf of the Bali bombers.
19 No one is suggesting they should do that. But the other
20 point that's made is that what Australia should do,
21 consistent with its now 17 year old position, is to in
22 effect lead a debate and a campaign in South-East Asia
23 for the abolition and to be uniformly against it so that
24 when politicians are asked "What do you think about the
25 execution of the Bali bombers" they would say "We are
26 opposed to the death penalty in all circumstances, in
27 every case we're opposed to it". The rest of this
28 business about representations is a diversion. And I
29 must say, I read with horror - and I really mean that - I
30 read with horror today that the Prime Minister is quoted
31 in this morning's Age as observing that a movement away

1 from the death penalty has been "festering". I think
2 that's a most unfortunate comment to make in the present
3 circumstance.

4 DR ZUBOVIC: John Zubovic. I'm an anaesthetist. I joined the
5 Medico-Legal Society to see how much share insight there
6 was and I'm very pleased by the talk you've given tonight
7 because I'd like to say welcome to a road much travelled.
8 As medical practitioners we've faced a lot of the things
9 that you're now starting to face and I'm glad - and I
10 hope that gives you insight into our position. For
11 instance, the way we deal with terrorism is to immunise
12 the population and what's frustrating is that you give
13 individual rights to people who want to become non-
14 immunised and therefore potentially able to spread the
15 virus and so that's the insight we have as medical
16 practitioners.

17 And so you mentioned Betty King and her comment
18 about having a jury. Well, she made comment also, if I
19 may add to it, is that she said "It's too much pressure
20 on one judge to make these decisions and after a year
21 they get burnout". Well, as doctors we've had to suffer
22 that for quite a considerable number of years and not had
23 any sympathy given to us at all.

24 But to get back to your topic, the thing that
25 fascinates me recently is reading the Jerilderie letter
26 and it would be very fascinating to use that as an
27 example of the - Ned Kelly believed he was being accused
28 of the wrong crimes and not being accused of the horses
29 he did steal. Is that what the justice system is all
30 about as I hear the press talk about professional
31 criminals. I can't understand in my own mind that there

1 are professional criminals. Why aren't they in gaol.
2 And I can only assume that we can't nail them for the
3 crimes that they are done. Is that what the justice
4 system is about, that you want due process to show that
5 while we all have appendices we can't operate on one that
6 isn't infected, so we're in the same category you are as
7 far as criminal justice, we can't operate on every
8 appendix to make a living, we've got to prove that it's
9 infected and therefore we have a mandatory right
10 therefore to move it and that's what mandatory rights are
11 about. We have to, for instance, report child abuse
12 because it's mandatory. That's to protect us from being
13 prosecuted by the parents who might think that we're
14 being out of place and I believe that this is what is the
15 case for mandatory death sentence. It's because - either
16 in the case of Sharia law it's mandatory because the
17 population must know that they can't go around killing
18 other people because they themselves will pay the price
19 and so there seems to be some confusion, as you've
20 indicated, that the people are accusing the judge of
21 making that death sentence but he's freed of any
22 responsibility on the basis that all he has to produce is
23 the fact is the patient's guilty and that's mandatory -
24 the government will then execute according to
25 legislation.

26 MR LASRY: Yes. Well, my complaint in Singapore - I think I'm
27 answering your question but I'm not actually confident
28 about this - my complaint is with the government not with
29 the judge and, indeed, I think there was always a
30 question about the independence of the judiciary anyway.
31 But if your question is asking whether or not mandatory

1 sentencing is some kind of an answer then of course it's
2 not because any individual case will have in it
3 circumstances which are completely peculiar to that case
4 and sentencing generally must be conducted on the basis
5 of all the facts and circumstances of the case. It is, I
6 think, impossible to effectively formulate sentences and
7 apply them fairly. The other theme I picked up from your
8 question was a theme which I think you were asking, in
9 effect, about the deterrent value of sentences and the
10 death penalty in particular and I'm happy to refer you to
11 the literature in relation to this but I think those who
12 have examined it in detail over the last few years have
13 come to the view that deterrence simply is not a
14 "benefit" from the death penalty, it simply doesn't deter
15 people and much better more effective research than I've
16 ever conducted seems to have come to that view and
17 therefore the use of the death penalty is diminishing.

18 MR MOLONEY: I've been told that we are out of time. Gabriel
19 Medley says there's time for one question so that means
20 there is.

21 MS STERN: Kate Stern. I'm not legal so I'd like to ask you
22 are there effective mechanisms within the legal
23 profession for you to help improve the situation with
24 respect to fairness for all with these issues with the
25 way terrorism law is being practised? Are you completely
26 impotent or are there ways of being able to improve the
27 situation?

28 MR LASRY: Can I use a different word? It's difficult, is that
29 all right? Governments have all sorts of parliamentary
30 enquiries and committees and so on and they say "And then
31 we're going to do this", they measure the electoral mood

1 and then they say "We're going to do this". And then
2 they put it out for discussion and people - the legal
3 community expresses an opinion. Inevitably, it's an
4 opinion contrary to - for example, the 2005 terrorism
5 laws. But in the end it's a political decision and once
6 the laws are in place then in a sense you're stuck with
7 them and politicians I think regard the public benefit of
8 dispensing lawyers to the boundary as one of the great
9 electoral advantages because they regard us as very
10 poorly regarded in the community so anything they can say
11 about the self interest of lawyers and the desire by
12 lawyers to promote themselves under the guises of public
13 debate they say. And, look, there won't be change until
14 there's a clear public mood for it, I suspect, not the
15 kind of dramatic change that ultimately will have to
16 come.

17 QUESTION: (indistinct) and I felt it was unfair to the victim
18 rather than to the person accused and (indistinct) made a
19 speech saying that she thought the pendulum swung too far
20 in favour of the accused but also that criminal
21 barristers (indistinct) and criminals were clearly
22 guilty. I wonder whether you could comment on that.

23 MR LASRY: This is an often asked question, isn't it, Patrick?

24 In the end, it's important to know that as criminal
25 defence lawyers it's not our job to make any judgment
26 about the guilt or lack of it of our clients. It's just
27 not something you have to think about. I mean you have
28 to think about it in a tactical and forensic sense but
29 it's not for us to make that judgment. There's a jury
30 and there's a court to make that judgment and our job,
31 the purpose of which is to protect the system, is to give

1 whoever that person is the best defence they can have in
2 the particular case and if they're acquitted well they're
3 usually acquitted because the evidence wasn't sufficient
4 and that's the way the system should work. The verdict
5 is not guilty or innocent. The verdict is guilty or not
6 guilty. That is, can the prosecution prove beyond
7 reasonable doubt all the essential elements of the crime
8 and if they can't they should be acquitted.

9 There are all sorts of examples. Perhaps the Walsh
10 Street shootings is a good example where those charged
11 with that offence, you would think looking at the
12 material, are almost certainly guilty of that offence but
13 the Crown pinned its case to an informer who had no
14 credibility ultimately in the course of the case and the
15 jury said "not guilty" and it was exactly the right
16 verdict because otherwise to convict people on the basis
17 of speculation or information delivered in the media is
18 obviously the wrong way to go about it. So, yes, it's
19 satisfying when a client is acquitted but it's satisfying
20 because apart from anything else it reinforces your
21 feeling that the system works as it should.

22 MR HURLEY: Thank you all. There's a lot of food behind those
23 doors I think waiting to come in, so thanks again and
24 thanks again to Lex.

25 - - -