14 August 2015

Electronic Publication of court Proceedings Committee
c/ Chambers of the President of the Court of Appeal
Supreme Court of Queensland
PO Box 15167
CITY EAST QLD 4002
By email: electronicpublication@courts.qld.gov.au

Dear Committee Secretary,

The Joint Media Organisations welcome the opportunity to make a submission to the Supreme Court of Queensland's Electronic Publication of Court Proceedings Committee regarding the *Electronic Publication of Court Proceedings Issues Paper* (the Issues Paper).

The media organisations that are parties to this correspondence – AAP, ABC, APN News & Media, Australian Subscription Television and Radio Association (ASTRA), Bauer Media, Commercial Radio Australia (CRA), Community Broadcasting Association of Australia, Fairfax Media, Free TV (representing all of Australia's commercial free-to-air television licensees), Media Entertainment and Arts Alliance (MEAA), News Corp Australia, SBS, SkyNews, The Newspaper Works and The West Australian.

THE PRINCIPLE OF OPEN JUSTICE

The principle of Open Justice as applied in Common Law jurisdictions requires that justice be administered in open court.[1]

As Lord Scarman said:

> *'Justice is done in public so that it may be discussed and criticised in public'*[2].

Further:

> *'Whatever* [the media's] *motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them'.*[3]

JOINT MEDIA ORGANISATIONS' RECOMMENDATION

We recommend that there be a presumption in favour of recording, filming or photographing court proceedings – subject to existing limitations (see details in body of submission).

To decide otherwise should be at the discretion of the Court on a case-by-case basis.

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[1] Dr Daniel Stepniak, The Therapeutic Value of Open Justice, http://www.aija.org.au/TherapJurisp06/Papers/Stepniak.pdf
[2] *Home Office v Harman* [1982] 1 All ER 532, 547
[3] http://www.judcom.nsw.gov.au/publications/benchbks/civil/media_access.html#p1-0200

We make the following comments to questions and issues posed in the Paper:

ISSUES FOR DISCUSSION: THE ADMINISTRATION OF JUSTICE

Other inquiries have recognised the risk that the possibility of being filmed could add strain and anxiety to witnesses. It is impractical to assess the likely impact of being filmed in each individual case and in relation to each individual witness. Given this situation, should there be an absolute ban on the in-court filming and photographing of witnesses?

An absolute ban on in-court filming/photographing of witnesses is unnecessary and can be better dealt with by directions from the court as to the publication of footage/photographs as and when necessary.

Further, the evidence of witnesses, their demeanour and character is as much a part of open justice as any other part of the proceedings.

As stated by the Media Freedom Committee submission[4] to the New Zealand Media Review Panel a blanket ban on showing the delivery of evidence '*is to deny the public the true, full and balanced story that all parties seek to achieve. Expressions, emotion, reaction and force of character are considered by jurors and judges and contribute to the manner and conduct of cross-examination, for example by counsel*'.

If there is not a general rule against filming witnesses, should there be a general rule that permission not be granted to film or photograph first instance proceedings in cases involving vulnerable witnesses, including children?

We submit this is not necessary because such matters are better left to discretion of the court on a case-by-case basis.

Further, in relation to children, the following provisions already prohibit identification in connection with court proceedings:

- Child concerned in domestic violence order proceedings – *Domestic and Family Violence Protection Act 1989*, s. 82
- Child harmed by a parent or step-parent – *Child Protection Act 1999*, s. 189
- Child party to protection proceedings – *Child Protection Act*, s. 192
- Child the subject of guardianship orders – *Child Protection Act*, s. 189
- Child the subject of harm investigation – *Child Protection Act*, s. 189
- Child victims of offences generally – *Child Protection Act*, s. 194
- Child victims of sexual offences – *Child Protection Act*, s. 193
- Child witness to sexual offence – *Child Protection Act*, s. 193

Publishers would have to appropriately pixilate/beep-out footage or photographs to comply with these provisions.

Additionally:

- Section 193 of the *Child Protection Act* provides that the court may make orders prohibiting the identification of a child who is a witness in a case not involving a sexual offence;
- Section 21A of the *Evidence Act 1977* already sets out an appropriate regime for dealing with evidence to be taken from special witnesses and children. Including a decision about whether the

[4] https://www.courtsofnz.govt.nz/business/media-centre/submissions-to-the-consultation-paper/In-Court-Media-Submission-Media-Freedom-Committee.pdf, at para 18

proceedings may be filmed when deciding how the evidence is to be received pursuant to this section is only a minor additional matter; and

- Section 21AZC of the *Evidence Act* prohibits the publication of video-taped evidence of a child or special witness without the approval of the court and subject to any conditions the court may impose.

Should witness protection from recording be available as of right to any witness who seeks it?

We do not support such an approach. As our recommendation clearly states, the Court should decide on a case-by-case basis.

Should there be an absolute ban on the in-court filming and photographing of defendants?

We note that the following categories are already protected by existing legislation:

- identity of defendants who have yet to be committed in specified sexual offence cases (*Criminal Law (Sexual Offences) Act 1978* s. 7); and
- defendants in the witness protection program (*Witness Protection Act 2000*, s. 36).

Further, the basic principles of contempt law would prohibit the identification of any defendant in relation to which identity is in issue until such time as all of the identity witnesses have given evidence at trial (for example, in the same way the court managed the publication of photographs of in the matter of *R v Brett Cowan*).

We submit that other cases should be a matter for the court to decide on a case-by-case basis.

How is the inadvertent filming of jurors, for example as they leave and enter the court, to be avoided?

The media is mindful of obligations pursuant to section 70 of the *Jury Act 1995*.

Some categories of witness (e.g. expert witnesses) may not be so stressed.

As our recommendation clearly states, there should be general rule that permission is granted to record, film or photograph court proceedings – subject to existing limitations the Court. TO decide otherwise should be a decision of the Court on a case-by-case basis.

Given the nature of some categories of witnesses, including the example of expert witnesses, we support the filming of such testimony.

Should there be a rule, as in New Zealand, that members of the public attending the trial not be filmed?

We do not support such an approach. A courtroom is a public place and members of the public attending a trial have no attendant expectation of privacy.

We recommend that courtrooms in which filming will occur be sign-posted as such. This will ensure that members of the public can make an informed decision about whether or not they wish to observe those particular proceedings.

How should any system avoid the risk that in-court media coverage, instead of increasing public understanding of the justice system and of particular proceedings, reduces it by concentrating on 'sound bites' and prurient and sensational material? Should there be a two minute rule as originally applied in New Zealand or a similar rule?

We do not support artificial rules being placed on news reporting, including timeframes. Placing a timeframe is tantamount to attempting to define news, which we do not support. Such an approach is not supported by media organisations whether the context of news gathering is the sporting field or the court room.

We also note that the 'two minute rule' while applied in New Zealand previously, has not been a requirement for some time, and was not supported in the recent consultation.

The time constraints of audio and/or audio-visual recordings that constitute broadcast news are such that no more than a few minutes, at most, can be devoted to reporting any particular story. This is also true of online news reporting, including audio-visual material that enhances digital news reporting. The concept of a requirement for a minimum timeframe of in-court recording is opposed, regardless of the proposed duration.

Notwithstanding these comments, journalists are committed to a range of codes of ethics, standards and editorial professional conduct policies in undertaking their role in news gathering and reporting. Additionally, across all media channels and platforms, there exists a range of complaints mechanisms that anyone, including justice officials, can use to raise concerns regarding coverage.

In order to aid comprehension, what, if any, written submissions should be made available to the public? What about exhibits?

In the spirit of open justice, all written submissions should be made available to the public subject to any suppression orders or statutory restrictions, as currently provided for by rules 56, 56A and 57 of the *Criminal Practice Rules 1999*.

Does the filming of criminal appeals raise special issues e.g. the broadcasting of evidence that may be inadmissible at any new trial and thereby prejudice it?

We believe that the broadcast of the appeals process is just as vital to open justice as broadcasting matters at first instance and, again, no different from reports of the proceedings made in any other form of media.

How might courts, including courts hearing criminal appeals, protect against the unnecessary broadcasting or live-streaming of the horrific details of cases, including brutal murders and sexual assaults?

Open justice includes the most horrific of details. Rather than restraining their publication the better course would be for the media is to issue a warning to viewers that the footage contains material which some viewers might find disturbing – which is already a common practice.

Should any system be subject, as in New Zealand, to guidelines that do not have legislative force, do not create rights and should not be construed to create expectations?

Guidelines can be useful. However, as we state in our recommendation, directions from the Court on a case-by-case basis are better adapted to dealing with the specifics of each case on its merits.

Should any guidelines confirm that all in-court media coverage is at the discretion of the court?

Such a statement is unnecessary at least in respect of the District and Supreme Courts since control over filming necessarily falls within the inherent power of the court to direct proceedings in the best interests of justice.

We suggest that guidelines that articulate how the court is to exercise that discretion, emphasising the need for open justice, would likely prove more useful.

What controls can and should the court impose on the subsequent use of recorded or livestreamed material? Can it be restricted to news reporting unless prior approval is obtained, e.g. for a documentary purpose?

The court can already rely on to copyright infringement to prevent recorded material being deployed for any purpose that does not fall within a fair dealing defence or licensed use by the court.

How can the court prevent this material from being used out of context or to vilify a party, lawyer or other participant in the proceeding?

The existing laws of defamation and contempt are already well-adapted to this task.

ISSUES FOR DISCUSSION: ALTERNATIVE MEANS TO INFORM AND EDUCATE THE PUBLIC

One of the stated aims of the electronic publication of court proceedings is to better inform and educate the general public about the courts and the justice system in general. The question arises whether there are better methods of achieving this aim which avoid some of the risks outlined previously.

Are there systems, such as audio and video streaming, that will fairly report proceedings and educate the public, without introducing many of the concerns raised over the selective televising of 'sound bites'?

While we do not agree with the risks as outlined in the Issues Paper, if the Court was minded to ensure that the whole of proceedings were available it could publish the whole of proceedings on website/s.

We also note, however, that sound bites remain a useful tool because not all Australians have access to the internet or sufficient live streaming capabilities; and TV news (and other news utilising audio-visual recordings) will continue to inform the public about the fact the court proceedings are underway and the most salient points of what has occurred. It should be also noted that sound bites invite members of the public to access the full recordings of proceedings.

Can the fair and balanced reporting by the media and others of court proceedings be improved by other means, such as access to written submissions and audio recordings?

We believe that open justice is supported by providing access to written submissions and audio recordings.

Would recording for documentary purposes be more likely to educate the public than short extracts in news and similar broadcasts?

Implicit in this question is an assumption that recordings used for documentary purposes would be longer in duration than those used in news reporting, and therefore somehow 'better'. We do not accept such an implication.

The concept of open justice does not differentiate between different program types, purpose or duration. The examples used in the question – documentary and news – are undertaken over different timeframes and serve different, if adjunct, purposes – particularly, news and similar broadcasts can occur instantaneously, while documentaries take time and resources to edit and deploy. Both are subject to editorial decision making.

We repeat here that previously quoted of Lord Scarman:

> *'Whatever* [the media's] *motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them'.*[5]

Should the public resources required to install and operate cameras in the courtroom be better used to develop:

- ***a web page within the court's website where important information can be posted, such as:***
  - ***case summaries prepared by a court communications officer in consultation with the judge***
  - ***audio files of sentencing remarks (as occurs in Victoria)***
  - ***transcripts of sentencing remarks***
- ***media guidelines of the kind used in Victoria which educate judges and the media and improve working relations between them.***

We do not believe that the proposal of public resources being used to install and operate cameras or a website is an either/or question. A website that includes information available after the close of Court, or at the end of a proceeding does not serve the same purpose as recordings available from in-court cameras. Similarly, media guidelines may be helpful, but they do not form the same function – in fact do not provide information about cases at all – as recordings available from in-court cameras.

Further, regarding audio files of sentencing remarks (as occurs in Victoria) – while useful, audio only does not give the full impression of how proceedings unfold; and regarding transcripts of sentencing remarks – this information is already available to any member of the public who asks for it.

ISSUES FOR DISCUSSION: GENERAL

Cost – Benefit Analysis – The expected demand

If any new system reflected practices in some comparable jurisdictions where recording for live transmission and news broadcasting is limited to certain categories of cases, then what demand would there be from the news media and others to record such proceedings?

That is likely to depend on the categories of cases the media is granted access to.

If, for example, any scheme excluded the recording of witnesses, then what demand would there be from the news media and others to record such proceedings?

See answer above.

If any scheme, developed to aid public education and the fair and balanced reporting of proceedings, included the kind of requirements introduced in New Zealand in 1994, including the 'two minute rule', then what demand would there be from the news media and others to record such proceedings?

We have provided response to our lack of support for the 'two minute rule' or any other stipulation regarding minimum timeframes for recordings in news reporting.

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[5] http://www.judcom.nsw.gov.au/publications/benchbks/civil/media_access.html#p1-0200

Taking the recommendations of the Scottish Report as an indicative guide, what demand would there be to record and broadcast civil cases at first instance, civil appeals, criminal cases at first instance, and/or criminal appeals?

Without knowing what cases are going to be newsworthy, it could be assumed that it is most likely that criminal trials would be most in demand followed by high profile civil trials, then criminal appeals with civil appeals likely to have the least demand unless they were high profile cases.

What demand would there be to record and broadcast sentencing remarks in Queensland?

It is difficult to predict this. Again, we note that it will depend on decisions made in the course of news gathering and reporting.

<u>Cost – Benefit Analysis – Risks and Rewards</u>

Based on the experiences in other jurisdictions and current practices there, is the recording and publication of in-court proceedings in Queensland likely to:

- ***Significantly improve the fairness and accuracy of the reporting of court proceedings?***

  This is addressed above.

- ***Significantly improve education of the public about the court system?***

  We believe that there is no better way to educate the public about the court system than to broadcast it.

- ***Focus instead on atypical cases and give a distorted picture of the court system?***

  We are unsure of what the Committee considers an 'atypical' case. Regardless, we believe that showing what happens in the court room can never be a distorted view.

- ***Focus on the sensational and the 'best sound bites' at the expense of the full, fair and accurate reporting of proceedings?***

  This is addressed above.

- ***Give rise to some of the perceived problems discussed in this Issues Paper and thereby unduly risk the right to a fair trial?***

  Below we address some of the perceived problems included in the Issues Paper.

  - *Some of the issues raised in both the NZ Report, and in its earlier Consultation Paper, and the similar reports produced by the Scottish Judicial Committee, identify concerns about the recording and publication of courtroom proceedings, particularly by television stations. Critics contend that this leads to 'sound bites that concentrate on prurient or sensational material'. This is said to exacerbate the tendency to 'catch attention rather than provide balanced reporting'. This does not help the public understand how courts work, and may, in fact, further perpetuate myths about court processes and the types of matters that are hear. In its submission to the New Zealand Panel, the Bar Association of New Zealand suggested*

that many of its members considered that the effect of in-court media coverage 'is to trivialise, to focus on the sensational and the best sound bites'. This was said to be happening more frequently than at any earlier time. The Bar Association submitted that 'far from seeing how a court case proceeds, what the in-court media coverage shows is selective sound bites and out of context exchanges, selected by the media deliberately for dramatic effect and ratings rather than public education or balanced presentation'.

This is addressed above.

- *The New Zealand Bar went on to identify the risk that in-court media coverage, instead of increasing understanding and respect for the courts, brings the justice system into disrepute, which includes the courts being wrongly criticised for permitting filmed excerpts to be replayed in the name of 'open justice'?*

  This criticism is biased since televising trials is one of the surest ways barristers' work can be tested. Further, defence barristers are most likely to raise the criticism suggested above when their client loses a case.

- *A leading English barrister, Baroness Helena Kennedy QC, has stated: 'Television is constantly looking for new terrain to inhabit, but it seeks the salacious and the sensational, not the arcane arguments of the highest court. It wants the sight of a celebrity in the dock. It wants the image of Stuart Hall being sentenced for sexual offences.' Her concerns were based on a distrust of the commercial imperatives of the owners of media organisations and the potential impact on victims, defendants, witnesses, jurors and other participants in court proceedings.*

  There are no enough celebrity cases on a day-to-day basis to make this view sustainable in the Australian context.

- *In 1995, the New Zealand Law Journal commented: 'TV is not merely a neutral eye ... The camera is selective ... What the viewer sees is not what he or she would see had they been there ... It is the nature of the TV medium in a technological sense, although it can be and often is, also affected by the preferences, prejudices and ideological or political views of the producer. A 'televised trial' is like confusing a slice of ham with a pig, without realising that one is a dead, partial and processed version of the living other'.*

  This criticism is equally applicable to any form of reporting which – due to spatial limitations – must exercise editorial selection as to which cases and how much content is reported.

- *A commentator in The Washington Post observed that the presence of video cameras in courts alters reality: 'The pen may be mightier than the sword – and a picture may be worth a thousand words – but video cameras alter reality. Their very presence changes the people and events they seek to capture. And, just to keep those clichés rolling, although seeing is believing, what we project for others to see is influenced – and reality is altered – by the fact that a camera is recording that projection. ... When lawyers and witnesses hear their own performances critiqued – and evidence is evaluated by one of the legions of former prosecutor turned-experts – suddenly the audience is directing the play.'*

  We do not believe that video cameras alter reality. Rather, the fact of being in court does that all by itself. It's a solemn occasion to be under oath so it is unsurprising that witnesses and others involved in proceedings would, for the most part, choose their words wisely.

As to the second part of the 'issue', this is the exact process opposing junior Counsel already engages in every night after a day in court when reviewing the transcript for the following day's questions and what every newspaper reader and TV viewer does in the privacy of their home on reading/watching court coverage. Further, unlike the US, Australian contempt law limits commentary on a case until after it has concluded.

- *Another criticism of allowing broadcasters to televise selected trials is that it does not provide a true coverage of the work of the courts. The New Zealand Consultation Paper captures this point as follows: 'Most court matters are just too dull. In those that are newsworthy the coverage is often too short and too focused to give the public much of a view of the work of the courts.'*

  If the courts play a role in rolling out cameras then they can select the duller cases to film and broadcast via the court's website.

- *Filming defendants and witnesses, particularly at critical moments of a trial, can affect the delivery of their evidence and their demeanour. The presence of cameras in courts, and the movement of camera crews leaving courts, may distract participants, including jurors, from the performance of their important duties.*

  In the New Zealand experience, filming in court has not lead to any aborted trials or miscarriages of justice (see Media Freedom Committee submission). Cameras can be pre-positioned at the back of the court and a standing direction given that operators cannot move equipment until the proceedings are adjourned.

- *Controlling the conduct of the media, deciding applications by the media, monitoring compliance with guidelines and other tasks may be said to place additional burdens on judges and court staff, distract them from their duties and use valuable court and judicial resources.*

  An application to film proceedings is no more complex than the consideration of a suppression order application currently is. Further, if a Practice Direction about filming is put into place from the outset the court can simply refer to that once the decision is made to permit cameras into the courtroom.

- ***Can the risk posed to the right to a fair trial and other public and private interests be reduced to an acceptable level by rules, directions and guidelines?***

  We believe that this can be so, and best dealt with on a case-by-case basis by the Court.

- ***If so, by whom and how is compliance with those rules to be monitored and policed?***

  We believe it is appropriate that this role be undertaken by the Supreme Court.


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