Australian Press Council

Access to Justice -
The Media, the Courts and the Public Record

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Overview

It's a privilege and an honour to have been asked to address this public meeting organised by the Press Council of Australia. Since my appointment as Chief Justice of Western Australia last year, I have made it clear on a number of occasions that I regard improvement of access to justice as a key priority. The media, both print and electronic, have a critical role to play in improving public access to, and comprehension of, our justice system. In this address, I want to emphasise the way in which that role can be enhanced by the continuing development of a positive and co-operative working relationship between the courts and the media. The courts must accept and reinforce the importance of the role played by the press and broadcasters as the medium by which the public gather information about the workings of the courts. I will also address what has been described as "practical obscurity" which limits the capacity of the media to communicate effectively what is happening in our courts, and ways in which that might be addressed. I will touch upon the subject of suppression orders, and deal at some length with my views in relation to the desirability of increased broadcasting and webcasting of proceedings in our courtrooms.

Public Confidence, Accountability and Independence

Unfettered public access to proceedings in our courts, often described as the principle of open justice, has been accepted as a fundamental aspect of the conduct of our courts since they commenced operation upon the settlement of the various Australian colonies. The principle was, of course, inherited from Great Britain and is shared with other justice systems having common origins.

There are at least three aspects of the public interest that are of profound importance that are served by the principle of open justice. The first is accountability. The judicial system and the courts exist to serve the public and the community. They give effect to the community interest in the rule of law, including the enforcement of law and order in our community, and the peaceful resolution of disputes between members of the community and each other, and between members of the community and the State. The public has a very real and legitimate interest in knowing whether or not the courts do in fact achieve these vital objectives, and whether they do so fairly, in the sense of treating equally all who come before the Court, whatever their wealth, colour or creed, justly, in the sense of an adjudication that accords with law, and efficiently, having regard to the substantial public and private resources that are invested in our justice system. So open justice provides a mechanism by which the courts can be held accountable to the community which they serve.

The second vital interest served by open justice is that of public confidence. That great American Judge, Felix Frankfurter, famously observed:

> "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction."[2]

Public confidence depends upon transparency. No reasonable person could be expected to have confidence in a system or process which he or she cannot see in operation. That is why democracies born of the English tradition insist that their legislatures proceed in public. The public are naturally and reasonably suspicious of anything that they cannot see in

[2] *Baker v Carr* 369 US. 186 (1962) at 267.

operation. Courts that have operated behind closed doors, such as the much maligned Court of Star Chamber have always been the subject of public suspicion. In this State, the predecessor to the Corruption and Crime Commission was required, by its legislation, to generally operate behind closed doors. In my opinion, that was a significant source of the loss of public confidence which led to the demise of that body, and its replacement by a body which has generally operated in full public glare, more recently a spotlight, which has enhanced public confidence in its operations.

Chief Justice Diana Bryant has referred on a number of occasions to the adverse effect which the prohibition upon the identification of parties to Family Court proceedings has had upon the public awareness of the procedures and principles which are applied in that Court, because of the reduced reporting of those proceedings. I don't understand her to be suggesting that the prohibition should be removed, but rather to draw attention to the need to pursue other means of informing the public about the activities of her Court.

The third great interest served by the principle of open justice is the preservation of the independence of the judiciary. Chief Justice Spigelman recently drew attention to another significant observation of Justice Felix Frankfurter:

> "A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other, both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of

> the potent means for assuring judges their independence is a free press."[3]

In those fortunately few instances in which the independence of the judiciary has been threatened, it has generally been the media which has come to our aid, galvanising public opinion so as to prevent undue government interference with a free and independent judiciary.

Accountability, public confidence and independence are not merely cosmetic aspects of our justice system - they are fundamental to its successful operation - indeed, to its very existence in the form in which we know it. All depend upon the principle of open justice.

Justice must not only be done but be seen to be done

The aphorism that justice must not only be done but be seen to be done is usually attributed to the judgment of Lord Chief Justice Hewart in *R v Sussex Justices Ex parte McCarthy*, in which his Lordship held:

> "… it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[4]

I am indebted to Chief Justice Spigelman for pointing out the dubious provenance of this fundamental proposition. He has pointed out that Lord Devlin, writing in 1985, said this of Chief Justice Hewart:

> "Hewart … has been called the worst Chief Justice since Scroggs and Jeffries in the seventeenth century. I do not think that this is

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[3] Spigelman, *The Principle Of Open Justice: A Comparative Perspective* (Media Law Resource Centre Conference, London, 20 September 2005), citing Justice Frankfurter in *Pennekamp v State of Florida* 328 US 331 (1946) at 355.

[4] *R v Sussex Justices Ex parte McCarthy* [1924] 1 KB 256 at 259.

> quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever."[5]

A more evocative statement of the principle was employed by Lieutenant-Colonel John Lilburne at his trial for high treason in 1649 at the Guildhall of London, describing as "the first fundamental liberty of an Englishman" at his trial the principle that:

> "… by the laws of this land all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear, and have free access unto; and no man whatsoever ought to be tried in holes or corners, or in any place, where the gates are shut and barred, and guarded with armed men …".[6]

The Role of the Media

Well prior to my appointment I publicly observed that "simply leaving the door of the courtroom open is insufficient, of itself, to provide meaningful public access to the proceedings in that Court"[7]. One academic has described this as a concession habitually made by the courts[8]. So, as I have again previously written, "It is therefore trite to observe that if the Courts are serious about providing meaningful public

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[5] Lord Devlin: *Easing the Passing: The Trial of Dr John Bodkin Adams*, Bodly, London, 1985, quoted *supra* n.3.

[6] *Reprinted in Cobbett's Complete Collection of State Trials* (T.B. Howell ed., R. Bagshaw, London, 1809) vol IV, 1270 at 1273. A reference to this passage appears in McLeod "Wrestling with access: Journalists covering courts" (2004-05) 85 *Reform* 15 at 16.

[7] "A mutual contempt? – How the law is reported" (Dec 2005) 32(11) *Brief* 12 at 15.

[8] Rodrick, "Open Justice, the Media and Avenues of Access to Documents on the Court Record" (2006) 29(3) *UNSW Law Journal* 90 at 90, referring to, amongst other cases, *Re Guardian Newspapers Ltd* [2005] 3 All ER 155 at 162.

access to their proceedings, the media must be the means through which that access is provided"[9].

That rather obvious proposition has been more eloquently put by Justice Park in the United Kingdom, when he recently observed:

> "It is an excellent thing that any member of the public can walk into any courtroom, watch the proceedings and listen to what is said. But for the public as a whole to be informed about important or interesting matters which are going on in the courts the press is crucial. It is through the press identifying the newsworthy cases, keeping itself well informed about them and distilling them into stories or articles in the newspapers that the generality of the public secure the effects and, I trust, the benefits of open justice".[10]

It is therefore vital for the courts to recognise and appreciate that the media are precisely what the word connotes - namely, the medium by which the principle of open justice is communicated to the community which we serve. And the pool of media organisations which can provide information to the public about courts is significant - the information available to me suggests that there are now about 90 television stations, 130 ethnic newspapers, 300 radio stations, 700 newspapers and 1300 magazines in Australia. If open justice is to have the benefits to which I have referred, a healthy and co-operative relationship between the courts and the media is vital.

We must work co-operatively together to ensure that the community is given the greatest access possible to our justice system, consistent with

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[9] *Supra* n.7.
[10] *Re Guardian Newspapers* [2005] 3 All ER 155 at 162.

the legitimate needs and interests of each of the courts and the media. In the case of the courts, those legitimate needs and interests focus upon the need to ensure that justice is done. It follows that the only proper limitations upon full and unconstrained media access to the justice system are those necessitated by the need to ensure a just process, so that the only justifiable restrictions are those deriving from an adverse impact upon justice.

The legitimate needs and interests of the media include considerations like news worthiness and presentability. They merit a little more attention. They are often misunderstood by Judges. But not by Chief Justice Gleeson, who recently observed:

> "The nature of news affects what is published about courts. The things that sustain confidence in an institution are not likely to be newsworthy. Things that shake confidence are more likely to be newsworthy. Inevitably, therefore, the public hear more about the latter than the former. But people understand that. There is nothing new about this. All people in public life, and all institutions, have to cope with it. Bad behaviour attracts attention. Commitment to the service of the public does not. Consumers of information have an appetite for bad news; naturally, commercial providers of information bear that in mind. If a bridge collapses, that is news. Why would anyone publish a story about a bridge that remains standing? If a victim of crime says that a sentence is outrageously lenient, that is newsworthy. If a victim says that a sentence is fair and reasonable, that is not newsworthy. Naturally, the public will hear more from people who criticise the system than from people

> who think it is working well. To complain about that is like complaining about the weather".[11]

It follows that as Judges we must not be unduly thin skinned or sensitive about media treatment of our decisions. We must accept, as part of the co-operative relationship to which I have referred, that the overwhelming bulk of the opinion expressed about our judgments will be critical. However, we are also entitled to expect that the media will neutrally present the facts upon which the opinion is based, in order that the audience may form their own view as to whether the opinion is justified or not.

And it is a serious mistake for Judges to think that media criticism of the judiciary is some recent phenomenon, or is more severe now than ever before. To take just two examples relating to the first Chief Justice of Western Australia, Sir Archibald Burt, in 1870 he was described by the Melbourne *Argus* as "a singular freak of a man dressed in a little brief authority".[12] About the same time, the Melbourne *Age* wrote of my predecessor in these terms:

> "The new theatre of operations, in the effort to silence the press and to crush public journalists, is the heretofore penal colony of Western Australia, and the angry potentate who hurls his thunderbolts against those who dare impugn the doings of official authority, is not the sovereign ruler of the state as represented by the local head of the Executive in the person of the Governor of the colony, but the Chief Justice in the Supreme Court of this

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[11] Gleeson, *Public Confidence in the Courts* (National Judicial College of Australia, Canberra, 9 February 2007) at pp 13 – 14.
[12] Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979*, University of Western Australian Press, Nedlands WA, 1980 at 86.

> despotically governed Little Pedlington. The Chief Justice, in a tone and style of speech the most intensely redolent of the Pecksniff spirit that our experience has ever been cognisant of at once commenced his bitter vengeance by extolling his own conscientiousness."[13]

I digress to observe that it is perhaps disappointing that the press no longer use colourful language of that calibre. But it is significant that the events which triggered this outpouring of vitriol was the imposition of a fine on a local newspaper for contempt of court. This reinforces my general theme that the courts and the media serve the public best when they work together co-operatively and one should not try to unduly constrain the other. And the courts must accept that the media can and will say things with which we disagree, and publish things we think should not be published. That is precisely what freedom of the press means. As Lord Justice Hoffman observed:

> "… a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible."[14]

Suppression orders

Orders suppressing the publication of proceedings in a court are, of course, a prime example of a circumstance in which the court constrains the capacity of the media to publish. Because of the importance of the

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[13] *Id*, at 86 - 87.
[14] *R v Central Independent Television plc* [1994] Fam 192 at 202.

open justice principle to which I have referred, such orders should only be made where absolutely necessary to enable justice to be done, and only for such time and to such extent as necessary to enable justice to be done. However, in its recent report, the Press Council has observed that "The impression that most observers have is that suppression orders are being issued by the courts with increasing frequency in many jurisdictions".[15] Prior to my appointment, I made the same observation myself.[16]

Turning to more empirical data to justify these impressions, the Press Council observed in its most recent report that in mid 2006 the News Limited database carried 971 active notifications of suppression orders, which was a growth of about 300 over the previous year. However, the Council has also acknowledged greater judicial recognition of the problem, and that the trend may be reversing.[17]

And, of course, nothing attracts the attention of the media to a case like the making of a suppression order. Any previously unremarkable case can be moved into the realm of newsworthiness by the making of such an order. There are avenues available whereby the media can challenge such orders, and experience suggests that appellate courts are more disposed to favour the principle of open justice than trial courts. However, appeal processes can take time, after which newsworthiness has evaporated. It seems to me that if the courts are serious about giving effect to the principle of open justice, steps must be taken to ensure that appeals from suppression orders are brought on for hearing at the earliest possible

[15] Australian Press Council, *State of the News Print Media in Australia Report 2006*, ch 9.
[16] *Supra* n.7, at 16.
[17] Australian Press Council, *supra* n.15.

opportunity. Otherwise, there is very little incentive for the media to pursue such appeals.

Practical obscurity

"Practical obscurity" is a term increasingly referred to by authors and commentators in this area. In some cases, it has been used to signify the privacy concerns flowing from on-line access to court documents and records and the loss of their previous "practical obscurity". That is an issue to which I will return later in this speech. I am also concerned about the "practical obscurity" identified by authors and commentators increasingly evident in the conduct of court proceedings, impeding the effective operation of the open justice principle. They observe that a representative of the media sitting in a court may be unable to fathom what is actually happening because of increasing reliance upon documentary materials which are not made available to the media. The difficulty has been exacerbated by increasing reliance upon documentary materials in recent procedural developments. The adverse consequences of these procedural developments were noticed as long ago as 1983 by Lord Scarman in the House of Lords, who observed:

> "Reasonable expedition is, of course, a duty of the Judge. But he is also concerned to ensure that justice not only is done but is seen to be done in his court. And this is the fundamental reason for the rule of the common law, recognised by this House in *Scott v Scott* [1913] AC. 417, that trials are to be conducted in public. Lord Shaw of Dunfermline referred with approval, at p.477, to the view of Jeremy Bentham that public trial is needed as a spur to judicial virtue. Whether or not judicial virtue needs such a spur, there is also another important public interest involved in justice done openly, namely, that the evidence and argument should be publicly known, so that society may judge for itself the quality of justice

> administered in its name, and whether the law requires modification. When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition: and, if the price of expedition is to be the silent reading of the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done."[18]

More recently, the New Zealand Law Commission observed:

> "There is an increasing trend in both civil and criminal cases for material to be placed before the court in written form, and for much of it not to be read out, despite the fact it is taken into account by the court in making its decision. Examples include expert witness statements, depositions and submissions. At a trial, documentary evidence will not normally be read out in full to the judge, though there may be references made to it during argument or in cross-examination. This trend creates serious practical problems for the media: material that would previously have been read aloud in open court is now not available to them, and trying to gain access to material through the court record rules during the hearing results in delays and can be costly, and the application may ultimately be unsuccessful."[19]

Other commentators have made the same observation:

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[18] *Home Office v Harman* [1983] AC 280 at 316.

[19] (New Zealand) Law Commission, *Access to Court Records* (Report 93, June 2006, Wellington) at par 7.18. See also Finkelstein J in *Australian Competition & Consumer Commission v ABB Transmission and Distribution Limited (No 3)* (2002) ATPR 41-873.

> "Today, there is far less reliance on what takes place orally in open court, and a correspondingly greater emphasis on documentary evidence and written submissions and arguments."[20]

Justice Byrne of the Supreme Court of Victoria has observed:

> "This serves to make the curial and adjudicative process less and less comprehensible to the person in the public gallery."[21]

Swannie comments:

> "In order to make sense of proceedings, the media often requires access to documents filed with the court in the course of a proceedings."[22]

The perspective of the media on this issue has been eloquently expressed by a member of the Press Council, Chris McLeod, who has written:

> "How can a journalist sitting in court understand proceedings being conducted by way of written evidence and written submissions if the journalist does not have access to those documents?
>
> If the journalist sitting in court cannot understand the proceedings, the journalist cannot fairly and accurately report the proceedings to the public."[23]
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> "The press, like the judges, is trying to deal with complex legal matters. Unlike judges though, the press doesn't always get access to all the material presented to a court. Add to that suppression

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[20] Rodrick, s*upra* n.8, at 90.

[21] *McCabe v British American Tobacco Australia Services Ltd No 3* [2002] VSC 150; BC200202143 (unreported, Byrne J, 7 May 2002) at par 19.

[22] Swannie, "Open Justice in the Balance" (December 2006) 31(4) *Alternative Law Journal* 206 at 206 (see also at 210). See also Rodrick, "Open Justice, the Media and Avenues of Access to Documents on the Court Record" (2006) 29(3) *UNSW Law Journal* 90 (esp at 92).

[23] McLeod, "Wrestling with access: Journalists covering courts" (2004-05) 85 *Reform* 15 at 16.

> orders and various statutory prohibitions … and a reporter can end up with a Swiss cheese story – full of holes."[24]

I had the opportunity to observe first-hand the beneficial impact which enhanced access to documentary materials had upon the fairness and accuracy of reporting during the course of the Royal Commission into the Collapse of the HIH Group of Companies. The Royal Commissioner, Justice Neville Owen, accepted that a fundamental purpose of the Royal Commission was to provide information to the public as to the circumstances surrounding the collapse. He therefore put in place arrangements which provided the media with access to real time transcript while evidence was being given (and corrected transcript was placed on the Commission's website not later than 6 pm that day), access to screens which displayed the documents about which witnesses were being questioned and an audio feed of the evidence given on request. The extent, and the accuracy of the reporting of the events in that Commission was of the highest calibre.

If we are serious about the principle of open justice, for my part I believe that general approach to media access should be adopted by the courts wherever possible. Often the technology will not be available to provide access with the efficiency available to a Royal Commission, but the basic principle of open access to all documents used in court should, in my view, be accepted as a necessary and fundamental aspect of the principle of open justice.

Access to Court Documents

However, it is important to remember that:

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[24] McLeod, "Reporting the courts" (May 2006) *Australian Press Council News* 10 at 11.

> "The 'principle of open justice' is a *principle*, it is not a freestanding right. It does not create some form of freedom of information Act applicable to courts. As a principle, it is of significance in guiding the court in determining a range of matters including, relevantly, when an application for access should be granted pursuant to an express or implied power to grant access. However, it remains a principle and not a right."[25]

Accordingly, guidelines and standards for the provision of access to court documents are necessary to ensure that the media do have access to the information which is required to enable their role in the provision of public access to justice to be adequately performed.

There have been reviews of the guidelines governing access to court documents in a number of jurisdictions recently - including New Zealand, New South Wales and Victoria. An informal review of those guidelines is under way in Western Australia, at my request. The outcome of those reviews has generally been an acknowledgement of the desirability of providing general access to any and all documents received by the Court and which form a part of proceedings in open court, unless there are compelling reasons to deny access.

I have already observed that, in my view, the only legitimate constraint upon the principle of open justice is the attainment of a just outcome. However, sometimes other considerations are suggested as justifying restricted access to court documents. For example, the New South Wales review suggested:

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[25] *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at 521, par 29; (2005) 220 ALR 248 at 254-5: (2005) 152 A Crim R 527 at 535 (per Spigelman CJ, with whom Mason P and Beazley JA agreed).

> "Access to court documents will only be refused and the making of non-publication orders will only be available where disclosure of information contained in court documents will substantially prejudice the attainment of a just outcome in court proceedings, or unreasonably affect the welfare of a person involved in court proceedings.
>
> Private and personal information will be protected to the extent that it does not significantly infringe upon the principle of open justice."[26]

These views, while superficially distinct from my own, are, I think, substantively the same. Access which could unreasonably affect the welfare of a person involved in court proceedings is very likely to prejudice the attainment of a just outcome, by discouraging persons from participating in court proceedings. And the protection of private and personal information only if it does not significantly infringe upon the principle of open justice would usually only result in the protection of that information if entirely peripheral and irrelevant to the judicial proceedings.

I agree with the recommendations of the Law Reform Commission of New South Wales:

> "To enable the public to exercise their right to scrutinise and criticise courts and court proceedings, and to make fair and accurate reports of what occurs in the courtroom, it is arguably a logical extension to allow public access to, and reporting on, court documents",[27]

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[26] Attorney-General's Department of NSW, *Review of the Policy on Access to Court Information* (April 2006) at 19 – 20 emboldened in text.
[27] Law Reform Commission (NSW), *Contempt by Publication* (Report No 100, 2003) at par 11.2.

and of the Law Commission of New Zealand:

> "Written material that features in proceedings in open court such as pleadings, affidavits, witness statements that have been confirmed and stand as evidence in chief and written submissions, should be regarded as documents that have been read in open court, and, subject to any statutory restrictions or confidentiality orders, the media should be given access to them once they have been produced into the court hearing."[28]
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> "To be effective, open justice requires presumptively open access to court records, at least from the start of a hearing";[29] "the presumption should be that court information about particular judicial proceedings should be accessible to the public at any time."[30]

The Professional Obligations of Legal Practitioners

The views I have expressed about the desirability of substantially enhanced public access to the proceedings in our courts are not blinding revelations received by me on the road to Damascus following my appointment to the Bench. They have all been expressed by me on a number of occasions prior to my appointment. Prior to my appointment, I also moved a motion which was intended to constrain the circumstances in which Western Australian barristers could speak to the media about cases in which they were engaged. It has been suggested on a number of occasions that there is a tension between these two positions. However, in fact there is complete consistency in my position on these issues.

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[28](New Zealand) Law Commission, *supra* n.19, at par 7.19.
[29] *Id*, at par 2.4.
[30] *Id*, at par 2.100.

Improved public access to court proceedings is all about providing the community with accurate and impartial information - ideally a virtual experience of what occurs in our courts. They are unlikely to get that information from a legal practitioner who is being paid to promote the partisan views of his or her client. And there is a very real tension between the personal benefits which some practitioners might seek to derive from acting as the public spokesperson for their client, and that practitioner's obligations to the Court and to their client, which include obligations of confidentiality and to further their client's best interests, which will in many cases be served by not attracting media attention. There are many lawyers who can provide the media with appropriate commentary on the events in our courts. In my view, it is better if that commentary is provided by a disinterested legal practitioner, than by a partisan, whose personal interests may conflict with those of the client.

Internet Access

It is, of course, tempting to utilise the modern technology to make information readily available online to the general public. While this is, of course, consistent with the open justice principle to which I have referred, the particular nature of internet information needs to be considered before too generally embracing this course. Once information has been placed on the internet, it is, generally speaking, there for all time, because, for example, it may be downloaded and electronically stored. And the ease with which material can be retrieved from the internet makes it susceptible to misuse and abuse. There are very real dangers of misuse of personal and private information for such things as identity theft, harassment and intimidation. The speed with which the internet has been taken up has meant that we are still discovering some of

the unexpected consequences of its use, and I think we need to be a little cautious before going too rapidly down this road.

Broadcast of Court Proceedings

Reality television has become one of the most popular forms of public entertainment. And it has included law enforcement. One of last year's highest rating programmes was a programme showing Australia's customs and immigration officers at work. It was gripping television, as was "The Force" - a reality programme showing the WA Police Force in action, and "The Code" showing the Victorian Magistrates' Court at work - both in and out of Court. Each of those programmes gave the public an unprecedented insight into how law enforcement agencies actually work, which, in my opinion, is enormously beneficial - and much more effective than advertising or promotional material. In fact, the Supreme Court of WA was the first jurisdiction in the country to allow the filming of a criminal jury trial for a documentary.

Public broadcast of court proceedings has been tried to a greater or lesser extent in most jurisdictions. I have been favoured with an advance copy of the text of a book by Dr Daniel Stepniak of the University of Western Australia, which is to be published later this year and which very thoroughly reviews the steps that have been taken in jurisdictions comparable to our own in relation to the broadcast of court proceedings. As it would be difficult to synthesise the many issues which are addressed in that scholarly work, I will instead refer to observations made by Justice Robert French of the Federal Court of Australia, in which he identified

three concerns that are recurrently expressed by the judiciary when electronic media coverage of their proceedings is suggested. They are:

(a) the possibility of distraction to those involved in proceedings, because of the hardware located in the courtroom;

(b) "the subtle and not so subtle effects of electronic media coverage upon participants in the court process", particularly parties, witnesses and lawyers. (not, of course, Judges!);

(c) "cultural abhorrence of tabloid television journalism whose distorting effects may be the more powerful because of their access to visual and sound imagery."[31]

While Stepniak has noted that there is a "continuing resistance to the admission of cameras in Britain, somewhat reluctant and selective admission in Canada, and the prevalent exercise of judicial discretion to prohibit or severely restrict camera coverage in the United States jurisdictions which authorise such admission",[32] he also notes that "[a]n increasing number of courts around the world permit proceedings to be recorded and broadcast by media networks".[33] In New Zealand, for example, courts have routinely since 2000 permitted both broadcasting and photographic media coverage of court proceedings.[34] He writes: "[T]he Australian judiciary has proactively facilitated television coverage of proceedings, albeit restricted in scope and confined to selected

[31] French, "Television and radio broadcasting in the Federal Court of Australia – A personal perspective" (June 2005) 32(5) *Brief* 11 at 14.
[32] Stepniak, "Court TV: coming to an internet browser near you (update, developments and current issues) (2006) 15 *JJA* 218 at 224.
[33] Stepniak, "The broadcast of court proceedings in the Internet age: The role of courts" (Summer 2004-05) 85 *Reform* 33 at 34.
[34] *Id*, at 35, referring to The In-Court Media Coverage Guidelines 2003 issued by the NZ Ministry of Justice. See also Mount, "The Interface Between the Media and the Law" [2006] *New Zealand Law Review* 413 at 417, 440ff.

cases".[35] "Cameras have been allowed in various Australian courts, mainly broadcasts of judgments and sentencing decisions, footage taken at the start of proceedings, and ceremonial occasions".[36] "The televising of proceedings has… ceased to be newsworthy in itself".[37]
However, Dr Stepniak has also described as the "Achilles' heel" of broadcasting court proceedings, "the inescapable reality that the media's interests and motivation in seeking to record and broadcast court proceedings do not always coincide with the interests of the administration of justice and the right to a fair trial".[38]

I have come to the conclusion that the courts must be more proactive in the use of the technology which will enable audio visual images to be recorded without interference to the judicial process, and in providing the public with the information and explanation needed to comprehend what occurs in our courts.

One of the concerns identified by Justice French, that of intrusion by cameramen and bulky cameras into the courtroom itself can be eliminated by the use of contemporary technology, such as voice-activated ceiling-mounted cameras. That technology enables audio visual images to be recorded entirely unobtrusively - indeed, without the conscious awareness of the participants in the process that is occurring.

Modern technology makes it possible for the court to become its own publisher of proceedings either on the internet, or potentially through

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[35] Stepniak, *supra* n.32.
[36] Gregory, *Court Reporting in Australia*, Cambridge University Press, Cambridge, 2005 at 173.
[37] Stepniak, *supra* n.32, at 225.
[38] *Id*, at 220.

public access television, or one or other of the digital television channels which are shortly to become available.

The advantage of webcasting is that the audio visual images can be made available to the public on an almost live basis - transmission being deferred for only so long as the Court itself needs to determine whether any part of the material should not be webcast. The material can then be made publicly available while there is maximum interest in the case - especially if the case is topical - and is available in a substantial form, so people see for themselves the court in action. The disadvantage of webcasting includes the possibility of subsequent misuse of the material, given that it is likely to endure in a permanent or semi-permanent form once placed on the internet, and it is difficult to provide explanatory or informative material with an almost live webcast. The advantage of deferred reality style documentary broadcasts or webcasts is that they can be accompanied by explanatory or informative material via voiceover or text.

However, despite the substantial experience which has been gained in both broadcasting and webcasting court proceedings, both domestically and internationally, it remains appropriate to proceed with some caution. That is because there is still distinct judicial reluctance to fully embrace either or both of webcasting or broadcasting, and, because of the many vital interests involved in the justice process, particularly the criminal justice process, we must be confident that the processes protect those vital interests.

I am keen to pursue these possibilities in the Supreme Court of Western Australia. I am currently looking at ways in which the Court can evaluate

for itself, in a practical way, the various options, with their advantages and disadvantages.

Because of my view as to the very real and important public interests that are served by increasing meaningful public access to the courts and our processes, I am firmly of the view that this is an area in which the courts must be proactive, rather than reactive. It is very much in our interests, and in the public interest, for the courts to use the technology which is now available to bring a real courtroom experience to a breadth of audience which our predecessors could not have imagined.