CURTIN UNIVERSITY

SCHOOL OF MEDIA, CULTURE AND CREATIVE ARTS

Improving Access to Justice The Role of the Media

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Introduction

It's a privilege and an honour to have been invited to give this address organised by the School of Media, Culture and Creative Arts at Curtin University. I would like to commence my remarks by acknowledging the traditional owners of the lands on which we meet, the Noongar people of south-western Australia, and by paying my respects to their Elders past and present.

Access to Justice

The improvement of public access to justice has been the central theme of many of the public observations I have made since my appointment as Chief Justice. The compendious expression "access to justice" unifies a number of distinct concepts. They include the extent to which members of the community in general have the practical capacity to seek the protection of the courts. More pertinent to my remarks today is that component of "access to justice" which identifies the extent to which the general public have access to intelligible information about what is occurring in their courts. In contemporary Australia, most members of the public obtain information about what is occurring in their community through the printed and electronic media, including internet information providers. That is why the media has a vital role to play in improving public access to intelligible information about what is happening in the courts which exist to serve our community.

Open Justice

Unfettered public access to proceedings in our courts, often described as the principle of open justice, is a fundamental tenet of our justice system. Many jurists, scholars and public commentators have emphasised the importance of the principle of open justice. But why is it so important?

Open justice seems to me to underpin three principles which are fundamental to the proper working of our justice system, they are accountability, independence and public confidence.

Accountability

Courts exist to serve the community. They are ultimately responsible for the enforcement of law and order in our community, and for the peaceful resolution of disputes between members of the community. The public has a very real and legitimate interest in assessing the extent to which our 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. The courts must have a mechanism for accounting to the community in relation to the achievement of these vital objectives. Open justice provides that mechanism, provided that the information which is generally accessible provides a fair and balanced picture of what is occurring in our courts. That is a topic to which I will return.

Independence

Nobody would doubt the importance of the independence of the judiciary. In any justice system worthy of that description, adjudicators must have the independence necessary to impartially and fairly adjudicate without interference, or perception of interference, from powerful interests, including the interests of executive government. The great American jurist, Justice Felix Frankfurter, has drawn attention to the relationship between an independent judiciary and a free press, in the following passage:

> *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 indispensible 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.*

There are many examples of occasions upon which the independence of the judiciary has been vindicated by the media, galvanising public opinion so as to prevent government interference with a free and independent judiciary. Recent events in Pakistan are perhaps a topical example.

There is, of course, another aspect to the relationship between the independence of the judiciary and the media. That concerns the perception or risk that it is the media itself which is impinging upon the independence of the judiciary by a concerted programme of intimidation or vilification. Fortunately, examples of such programmes in contemporary Australia are rare. My perception, unjustified by any empirical data, is that such programmes are singularly ineffective in changing the attitudes or decisions of any individual judicial officer. However, there is, I think, a danger that subtly, imperceptibly and perhaps even subliminally over time, media expressions of sentiments that are taken to reflect community expectations (perhaps accurately, perhaps not), might have an effect upon the attitudes of the judiciary as a whole. Let me try to provide an example.

The general imprisonment rate in Western Australia has more than doubled over the last 20 years. That means that there are now more than

twice as many people, per head of population, in prison than there were 20 years ago. Over the same period, rates of offending per head of population have, with some exceptions, generally stayed constant or have fallen significantly. In some areas of offending, customarily dealt with by custodial sentences - such as home burglary and car theft, offending rates are now about half what they were 10 years ago. So why are there so many more people in prison?

There has been a recent change in policies relating to the grant and revocation of parole, which is responsible for some of the most recent increase. However, even before those changes in policy, the imprisonment rate had more than doubled. Those prisoners did not get into prison by themselves - they were sent there by Judges and Magistrates, who, contrary to popular opinion, are today sending more people to prison and for longer than ever before. This trend has emerged over a period during which there has been intense media focus on the so-called "law and order debate", in which public commentators have repeatedly called for more and longer terms of imprisonment. While it is hard to know just why the judiciary of Western Australia are sending more and more people to prison, and for longer, it is at least possible that there is a link between that trend and media commentary on these issues. It is, I think, a mistake to underestimate the power of the media in shaping public opinion, or to ignore the effect which that opinion is likely to have on all three branches of government - the parliamentary, executive and judicial.

It must be acknowledged that some would not see this phenomenon as impinging upon judicial independence, but rather as providing a means by which the judiciary can properly reflect and give effect to community

expectations. However, such a view appears to me, with respect, to place too narrow a view upon the notion of the independence of the judiciary. It is the function of the judicial branch of government to fairly and impartially apply and enforce the law. While the courts perform this function on behalf of the community, in doing so they do not reflect or give effect to community expectations in the same way as, for example, the parliamentary branch of government represents the people through the democratic process. The reason why Judges, in Australia at least, are not elected and are given security of tenure is to enable them to apply the law "without fear or favour". Parliamentary representatives can reasonably be expected to respond to a gathering of 5000 people on the steps of parliament agitating for a particular issue, but the courts are, and must remain free from such interference.

So it seems to me that perhaps curiously, at one and the same time, the media is a vital bulwark for the protection of the independence of the judiciary, but also a possible threat to that independence.

Public confidence

Every day, Australian courts make decisions which profoundly affect many individuals within our community. Liberty, wealth, property and family composition are affected by those decisions. While there are, ultimately, forceful means available to give effect to those decisions, force is seldom required. That is because almost all members of our community accept the authority of the court and voluntarily obey court orders.

Once again, Justice Felix Frankfurter has said this better than I can when he observed:

> *The court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction.*

In contemporary Australia, public confidence depends upon transparency. People cannot be expected to have confidence in a system which they cannot see or understand. People are naturally and understandably suspicious and resentful of things which happen behind closed doors. Courts in Western Australia always sit with their doors open, but, of course, very few members of the public have the time, inclination or opportunity to walk through those doors and observe our justice system in action. It is the responsibility of the media to give practical effect to the open justice principle, by providing the public with the information upon which public confidence in the integrity of our justice system depends.

In summary, accountability, independence and public confidence are not incidental or peripheral aspects of our justice system - they are fundamental and essential components of it. As I have endeavoured to demonstrate, they, and therefore the justice system itself, depend critically upon the principle of open justice, and its effective operation, for which the media is largely responsible.

The Nature of News

There are, however, practical limits upon which the courts can expect the media to fulfil the important function of providing information to the public in relation to individual court cases. Issues like newsworthiness and the limitations of space (in the printed media) and time (in the electronic media) place natural limitations upon the amount of information that can be conveyed to the public.

The nature of news will affect the nature of the information that is likely to be conveyed. This was best expressed by former Chief Justice Gleeson who 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.

While I would not want to be seen to be complaining about the weather (there are quite enough people doing that), there is, I think, a difficulty which arises from this inherent characteristic of media reporting. The difficulty is that people will take the cases about which they read or hear as representative of the justice system as a whole when, in fact, they are only representative of cases which have this character of "newsworthiness". The most avid consumer of news in Western

Australia might read or hear about, say, 50 cases each year in which it might be suggested that a sentence imposed upon an offender was lenient. They will not hear or read of the 90,000-odd cases in which there is no such suggestion. But they will take the 50 cases of which they know to be representative of the system as a whole, when in fact they are anything but.

It may explain why there is a chasm between community perception and the facts in the area of crime and punishment. Many in our community consider that our community is being swamped by a wave of crime of tsunami-like proportions, to which the judiciary is responding insipidly with increasingly lenient sentences. Neither of these things is true.

There is nothing terribly novel about a gap between reality and public perception. Of itself, it is not a cause for alarm. However, in the area of criminal justice, alarm arises from the fact that public perception appears to be driving public policy, and in particular driving the parliamentary branch of government to respond to perceived problems which do not in fact exist. This provides another explanation for the exponentially increasing rate of imprisonment.

Practical Obscurity

The principle of open justice is impeded by what I describe as the "practical obscurity" of court proceedings, even to a person, or media representative, who is sitting in the courtroom.

There are a number of causes of this obscurity. Some are as mundane as poor sightlines and audibility within our courtrooms. That is why it is important that contemporary courtroom design make proper provision to

enable representatives of the media to occupy a space which reflects their significance as representatives of the public, and which facilitates the effective performance of the important function of informing the public about what occurs in that courtroom.

Another source of this obscurity is the use of technical language or jargon, including Latin terminology. Use of that language is actively discouraged by contemporary Judges, and by judicial education bodies, such as the National Judicial College of Australia (which I chair) in training courses provided to Judges.

But perhaps most significantly of all, this obscurity arises from the modern tendency to place much greater reliance upon documentary evidence and written submissions rather than oral. If the oral debate in court takes place by reference to written pleadings which are not publicly available, or affidavit evidence which is not publicly available, or by reference to a document in evidence, the proceedings are likely to be obscured to even the most assiduous observer seated in the body of the court.

Courts must address and resolve this problem. It is not the media's problem, it is the court's problem. It is our problem because the obscurity of proceedings to an observer from the media will either discourage a report entirely, or result in an inaccurate report. Either outcome detracts from open justice.

In the recent proceedings involving the late Mr Christian Rossiter, and which understandably and predictably attracted a great deal of media attention, the limits upon Mr Rossiter's endurance imposed by his

physical condition meant that there was every reason to make the oral hearing as brief as possible. To that end, I encouraged the parties to present their submissions mainly in writing. However, with notice to the parties, I arranged for copies of those submissions to be circulated to media representatives attending the court hearing. If this had not been done, much of what occurred that morning would have been unintelligible to those reporters, and therefore to their audience.

These considerations have motivated the Heads of the various Western Australian courts to review the policy concerning public access to documentary materials and evidence used in the course of proceedings in open court. As a result of that review, we have unanimously resolved and recommended to Government that all relevant legislation should follow the form enacted in the *Magistrates Court Act*, in which there is a statutory presumption of public access to any document or evidence used in the course of a hearing in open court, subject to a judicial power to constrain that access in the interests of justice. That residual power is only exercised in exceptional cases, and only when exercise of the presumptive right of public access would interfere with the course of justice. We are yet to receive a response to our recommendation from government.

Broadcasting of court proceedings

Contemporary Australians increasingly rely upon electronic media - broadcasters and webcasters, for information. This raises an obvious question with respect to the extent to which the courts should utilise those means in order to implement the principle of open justice to which I have referred. There are a number of ways this could be done including the provision of access to third party broadcasters (such as occurs in New

Zealand) or webcasting by the court itself (as occurs in a number of jurisdictions in North America and Europe). Anybody interested in the various techniques of broadcasting utilised by courts around the world should read "*Audio Visual Coverage of Courts*", recently published by Dr Daniel Stepniak (Cambridge Press 2008)).

As with most things in life, there are advantages and disadvantages in the different methods available. The disadvantage of third party broadcasting is that it may mean the presence of a large camera or cameras within the courtroom which might subtly or even dramatically influence the behaviour of participants in the trial process. An example of that phenomenon is provided by the trial of OJ Simpson. Another problem with third party broadcasting is that criminal cases are inevitably the cases in which it is most likely that the media would be sufficiently interested to incur the expense and trouble of sending a camera team to court. But criminal cases are the area of the court's jurisdiction in which the greatest sensitivities arise in relation to privacy interests properly protected in the interests of justice. There is a legal prohibition upon the publication of the identity of any member of the jury, which necessarily restricts camera angles and necessitates controls over publication. Witnesses being asked to describe intimate moments may be sensitive to do so in the presence of a camera. Victims, or in homicide cases their families, may be offended by the public revelation and broadcast of precisely what occurred in the course of the offence. These are very real issues, but not insurmountable. They have been overcome in New Zealand, where the long white cloud has not fallen in as a result of the presence of cameras in criminal courts.

Webcasting by the court overcomes some of these disadvantages. That is because the court itself can install unobtrusive equipment which can record and broadcast proceedings without being evident in the courtroom. And, by means of a broadcast delay, the court itself can control precisely what goes out.

However, experience in other jurisdictions has shown that the broadcast or webcast of unedited content is almost always spectacularly boring, and loses viewers in their droves. In most proceedings, there are often significant delays, and without explanation of content, or access to written materials, the mere observation of what is occurring through a broadcast will often be unintelligible.

In the Supreme Court of Western Australia, we are endeavouring to overcome these various problems in the course of a project suggested by Dr Daniel Stepniak, who I have already mentioned. In the course of this project, the court will use its inbuilt and unobtrusive cameras to record different types of proceedings which can then be provided to the University of Western Australia (UWA) for editing and presentation in a packaged format of much shorter duration. That packaged format will contain explanatory voiceovers, captions and other explanatory material to inform the viewer of what is occurring and why. These edited video records will be available on a structured website provided by UWA, linked to the court's website, which will enable visitors to identify cases or topics which may be of interest.

There are a number of advantages of this course, including the fact that the court can retain ultimate control over content, the material is edited to make it entertaining, and the provision of explanatory information

provides the viewer with a purpose for and benefit from his or her experience. The disadvantage is that the editing process necessarily takes time, with the result that publication will often be delayed after the hearing in question. A project of this kind will not therefore satisfy the media desire for broadcast material as and when a trial occurs.

Nor have we set our face against the provision of access to third party broadcasters on appropriate occasions. To give some examples, we have entered into an agreement with Channel 7 in relation to the provision of access to video recorded sentencing remarks in cases covered by that Channel's programme "*The Force*". Similar arrangements with the same channel have enabled a series of segments in *Today Tonight*, covering the respective roles of the prosecution, defence counsel and the judiciary. In addition, in what I consider to be a significant development, a camera crew from *Today Tonight* was allowed to spend an entire week in a Magistrates Court, recording material which will be presented in three different segments of that programme over the next three weeks.

We have also entered into arrangements with radio broadcasters to enable the provision of audio feed of remarks made by a sentencing Judge at the time of passing sentence. That feed has been taken up not only by radio broadcasters, but also by news-oriented websites, who have provided the opportunity for visitors to their site to download the audio.

We are also making a much greater use of the court's website in order to provide information to the public. The transcript of remarks made by a sentencing Judge at the time of passing sentence are placed on our website for public access usually within 24 hours of sentence being passed. This means that any member of the public with a particular

interest in the reasons why a particular sentence was imposed can access a full explanation of those reasons from our website, rather than be limited to the necessarily limited information available through the printed and electronic media.

There is also a wealth of material relating to the operation of the court available on our website. Up to date statistical data relating to the number of cases lodged with the court, their disposition and the timeliness of disposition, the number of hearings held, the number of documents lodged and so forth is all available on our website for those with an interest in such things.

Perhaps more interesting is the criminal case inventory of the criminal cases pending in the trial division of our court, which is also available from our website. This enables any member of the public to access our website in order to assess the progress of any case in which they may have an interest. This is not a facility which is generally available from other court websites and reflects our strong desire to use all forms of media to make the operations of our court as transparent and accessible to the public as possible.

At the Supreme Court of Western Australia, we are actively encouraging greater community interaction with the court and the judiciary. We are opening the court, including the public and private areas of the court - such as Judges' chambers and cells - to the public this Sunday, and Judges will be on hand to provide information and answer questions. At least once each year we regularly make our public areas and heritage foyer available for community events, including theatrical performances, mock trials and functions. I speak publicly about the justice system and issues

arising in that system on every occasion I get, to groups as diverse as rotary clubs and teachers' conferences. My addresses are published on the court's website. I am generally accessible to the media and happily appear on radio and television - in fact I am doing talkback radio tomorrow morning on the ABC. Anything that improves access to information about our justice system deserves a try.

Conclusion

From time to time, Judges make statements that may not be seen as overly sympathetic to the media and their representatives. While one can understand the exasperation that sometimes induces those comments, perhaps driven by a failure to appreciate the nature of news, it is, I think, vital for the judiciary to realise that we are in a partnership with the media, in which we rely heavily upon the media to fulfil the vital function of providing information to the public about what is occurring in our courts. All partnerships involve mutual responsibilities and obligations. It is the obligation of the courts to do all that we can, consistently with the obligation to provide justice to the parties, to provide the media with the facilities and the means to fully and fairly report on court proceedings. It is the corresponding obligation of the media to exercise the rights conferred by the courts fairly and responsibly having regard to the vital public interest in the provision of accurate and intelligible information about our justice system. In the Supreme Court of Western Australia, we are taking a number of initiatives aimed at fulfilling our side of the bargain, and look forward to the media responding in kind.