

**‘COURT TV-COMING TO AN INTERNET BROWSER NEAR YOU  
(UPDATE, DEVELOPMENTS AND CURRENT ISSUES)’**

**Paper by Daniel Stepniak, UWA Law School,  
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**A INTRODUCTION**

In Australia, the last few months have witnessed a seemingly unprecedented public debate about several aspects of the relationship between the courts, the media and the public.

We have read criticism of judges who fell asleep on the job, who drank, drove and crashed, who failed to lodge income tax returns, who took too long to write judgments, and who attended conferences in exotic locations.<sup>1</sup> We have also followed or participated in public discussions about whether the transcript of a judicial ruling which caused an open trial to be aborted should be made public,<sup>2</sup> whether judicial officers have legal immunity while performing judicial duties,<sup>3</sup> whether judicial officers are overly protected from public and media criticism,<sup>4</sup> whether courts unjustifiably suppress the publication of information about court proceedings,<sup>5</sup> whether journalists should be held in contempt for refusing to disclose their sources of information,<sup>6</sup> and whether the judicial appointment process should be more transparent.<sup>7</sup> At the same time we followed the media circus of the Schappelle Corby

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<sup>1</sup> For a journalist’s overview of these issues see: Nicola Roxon ‘Protocol Needed in The Case of Public v. Unprofessional Judges’ *The Australian*, 1 July 2005, ‘Legal Affairs’, 29.

<sup>2</sup> Chris Merritt ‘Justice Jammed in First Gear’ *The Weekend Australian* 18-19 June 2005, 19; Chris Merritt ‘Academic Calls for Malcolm Transcript’ *The Australian*, 22 July 2005, Chris Merritt, ‘Prejudice’, *The Australian*, 12 August 2005, 24

<sup>3</sup> Jim Thomas ‘Courting an Injustice’, *The Australian*, 27 June 2005.

<sup>4</sup> Justice Ronald Sackville ‘Open Justice for “Third Arm”’, *The Australian*, 30 August 2005, (Edited extract of paper delivered at Monash University on 29 August 2005); Editorial, ‘Sound Judgment’, *The Australian*, 30 August 2005; Chris Merritt, ‘Judges should be put to “Real World” Scrutiny’, *The Australian*, 30 August 2005; Richard Ackland, ‘Why Judges Must Not Be a Protected Species’, *Sydney Morning Herald*, 2 September 2005.

<sup>5</sup> Chris Merritt, ‘Go Back To School Judges Urged’ *The Australian*, 18 August 2005; Alastair Nicholson ‘Korp Case Shows Media Has Nothing to Offer’, *The Australian*, 26 August 2005; Greg Barns, ‘Access Gets Thrown Out of Court’, *The Australian*, 26 August 2005; Natasha Robinson, ‘Victoria Courts Greater Openness’, *The Australian*, 9 September 2005, ‘Legal Affairs’, 27; The Hon JJ Spigelman AC, ‘The Principle of Open Justice: A Comparative Perspective’, (Paper presented at Media Resource Centre Conference, London, 20 September 2005) <<http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/Spigelman2000905>> ; Chris Merritt, ‘Dangers in the Freedom to Suppress’, *The Australian*, 22 September 2005.

<sup>6</sup> Samantha Maiden, ‘A-G Acts to Protect Journalists’, *The Weekend Australian*, 1-2 October 2005.

<sup>7</sup> Chris Merritt, ‘Panel Plan Sets the New Benchmark’, *The Australian*, 24 June 2005, ‘Legal Affairs’, 27 (Commenting on proposal by Chief Justice of Victoria, Marilyn Warren to restructure the judicial selection process); Chris Merritt, ‘Time to Tackle Canberra’s Role’ *The Australian*, 21 September 2005; Chris Merritt and Elizabeth Colman, ‘Court Choices too

trial in Bali<sup>8</sup> and the subsequent critical analysis and lament of the nature of media reporting<sup>9</sup> - criticism exacerbated by the media's treatment of the former New South Wales politician, John Brogden.<sup>10</sup>

These recent events and controversies provide reference points and illustrations for this paper on "Court TV via the Internet", which addresses some issues flowing from these debates – issues such as: the role of the media in reporting court proceedings, whether the publication of audio visual recordings of court proceedings is justified or required by the principles of open justice, and if so, whether it is appropriate that courts rely almost entirely on the media for such coverage.

In particular, I set out to challenge certain premises on which the cameras in courts debate has, and to some extent continues to be based. I argue for a need to move beyond seeing the issue of cameras in courts in terms of whether the media should be permitted to record and broadcast proceedings, and endeavour to outline a case for why courts should play a proactive role in facilitating public access to information about courts, including audio visual recordings of court proceedings.

The Internet, I will argue, provides a viable, proven and advantageous means for such court involvement. The focus of my paper is not on the technology and practical aspects of the recording and online streaming of recorded footage, in part because I'm not technically minded, but largely because suitable technology is readily available, and because the ever increasing number of courts which stream proceedings online provides a variety of models for how this may successfully be undertaken. Accepting that the practicalities are no longer a significant deterrent, my arguments will focus on why it is appropriate and vital that courts play a proactive role in facilitating such coverage.

## **B THE ENHANCEMENT OF OPEN JUSTICE AND MEDIA INTERESTS**

In the fifteen years that I have spent researching audio visual coverage of judicial proceedings in American, Canadian, British, New Zealand and Australian courts, I've never found reason to doubt that such technology ought to be utilised to enhance public access to and understanding of the judicial process.

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Secretive: Judges', *The Australian*, 22 September 2005 (Addressing calls by former Chief Justices of Australia, Anthony Mason and Gerard Brennan for a debate on how the process of appointing High Court Justices should be changed).

<sup>8</sup> Paul Toohey, 'Unlocking Schappelle', *The Bulletin*, 31 May 2005, 16; Patrick Carlyon 'There's Something About Schappelle', *The Bulletin*, 31 May 2005, 18.

<sup>9</sup> Sina Powell, 'The case against our Schappelle', *The Weekend Australian*, 21-22 May 2005, 19; Paul Kelly, 'A Fair Trial, But Not In Our Media', *The Australian*, 1 June 2005, 15; Janet Albrechtsen, 'Legal Reason Taken Prisoner by Compassionate Spin', *The Australian*, 1 June 2005, 15; Sian Powell, 'Pack Mentality', *The Weekend Australian Magazine*, 2-3 July 2005, 20; Collee Egan, 'Cry of the Hypocrites', *The Sunday Times* (Perth), 19 June 2005, 56; Paul Toohey, 'Bali Bombshell', *The Bulletin*, 7 June 2005, 19; Eric Ellis, 'The Damage Done', *The Bulletin*, 7 June 2005, 24; Paul Wilson, 'Fair Game or Fair Go?', *The West Australian Weekend Extra* (Perth), 20 August 2005, 6;

<sup>10</sup> Richard Ackland, 'Why Judges Must Not Be a Protected Species', *Sydney Morning Herald*, 2 September 2005.

The principle of open justice, which requires that judicial proceedings be open to public scrutiny,<sup>11</sup> cannot be said to be satisfied by merely allowing members of the public and the media to attend hearings. This will remain the case as long as few members of the public are able to attend proceedings and understand what they see and hear if they do attend;<sup>12</sup> as long as the reasons for decisions are written with only other judges and lawyers in mind, and are at best only decipherable by legally trained persons with an expertise in the particular area of the law; and as long as the permitted media presence is restricted to journalists only equipped with pens and notebooks.<sup>13</sup>

Those who maintain that current public and media access is sufficient, I would suggest, fail to give adequate weight to why such great stress is placed on the *open* administration of justice. It is not an end in itself but rather a means to an end. The required transparency is not an acknowledgment of unrelated media or free speech rights. Instead, the requirement that proceedings be conducted in public and be publicised is intended to ensure that the public are provided with information about proceedings sufficient for informed criticism. Thus Lord Scarman, observed that ‘Justice is done in public so that it may be discussed and criticised in public’, and that one reason for this is ‘so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification’.<sup>14</sup> In seeking to distinguish scurrilous or personal attacks on the judiciary from informed criticism of judicial decisions,<sup>15</sup> which is generally welcomed by courts,<sup>16</sup> judges have tended to emphasise the crucial significance and desirability of public scrutiny and its essential role in maintaining and enhancing public confidence in the law and judicial process. I would also suggest that informed public commentary serves another important role; that of reminding the legal fraternity that at times ‘justice according to law’ falls short of ‘substantive justice’.

Clearly, in seeking to make the judicial process more transparent, great care needs to be taken to ensure that the fairness of trials is not likely to be undermined or jeopardised. As Justice Spigelman has pointed out, the increasing accessibility to information regarding proceedings, facilitated by new technologies and in particular the internet, appears to be undermining what his Honour describes as the “practical obscurity” on which the balancing of the interests of a fair trial and that of open justice, inherent in the regulation of media reporting, is premised.<sup>17</sup> This factor alone,

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<sup>11</sup> For an insightful comparative analysis, see: The Hon JJ Spigelman AC, ‘The Principle of Open Justice: A Comparative Perspective’, (Paper presented at Media Resource Centre Conference, London, 20 September 2005)

<<http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/Spigelman2000905>>

<sup>12</sup> This is particularly the case in increasingly common paper trials, which are addressed further below.

<sup>13</sup> And recording devices, where permitted, but only as an aid to accurate note taking rather than to be broadcast.

<sup>14</sup> *Home Office v Harman* [1982] 1 All ER 532, 547.

<sup>15</sup> See for example Justice Ronald Sackville ‘Open Justice’ *The Australian* 4 February 2005, Letters to the Editor, 12.

<sup>16</sup> Justice McHugh notes how informed public debate and criticism is ensuring that common law developments reflect the values of courtesy.

<sup>17</sup> The Hon JJ Spigelman, AC ‘Open Justice and the Internet’ (Address at The Law via the Internet 2003 Conference, 28 November 2003)

I would submit, provides a pressing rationale for reconsidering the bases of the regulation of media reporting and the role of courts in facilitating the publication of court proceedings.

In controversially calling for a relaxation of the rules which shield judges from public criticism, Justice Sackville has emphasised that the judiciary is an arm of government and that certain judicial decisions have broad and significant public impact which may at times challenge or frustrate the work of elected governments.<sup>18</sup> To suggest that judges are accountable because they conduct proceedings in open courts and are required to provide reasons for decisions, I would suggest, *in practice* falls far short of the level of public accountability currently expected of public institutions and officers. As the British judiciary, at least formally, recognised in scrapping the Kilmuir Rules,<sup>19</sup> public debate and criticism are crucial elements of open justice and essential to the maintenance of public confidence, and judicial involvement plays an important role in enhancing the public understanding required to facilitate informed debate of judicial matters. This line of argument suggests that any discussion of public and media criticism of the judiciary ought not only focus on appropriate responses and means of stifling uninformed or inappropriate criticism, but that courts should take pre-emptive steps to ensure that the media and public have access to sufficient information for them to engage in informed debate.

In the course of my research, I became increasingly conscious of the Achilles' heel of my pro cameras in courts arguments – 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. In seeking to reconcile the desirability of audio visual coverage with the recognition that interests of the media don't always coincide with those of the administration of justice, it is helpful, in my view, to first consider the reasons for and implications of audio visual coverage of proceedings being associated with and becoming practically synonymous with the interests of the media. A number of reasons may be put forward as to why this has occurred:

The first and perhaps most readily apparent reason is that it is largely electronic media organisations which have argued and lobbied for permission to access courts in order to record and broadcast court proceedings. This has certainly been the case in the United States, Canada and Britain<sup>20</sup>, though I would suggest to a lesser extent in NZ,<sup>21</sup> and to surprisingly little extent in Australia.<sup>22</sup>

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<[http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches\\_index#cj](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches_index#cj)>; Louise Milligan, 'Top Judge Says Electronic Age Risks Right to a Fair trial' *The Weekend Australian* (Perth) 29-30 November 2003, 7.

<sup>18</sup> See articles listed above n 4.

<sup>19</sup> Which, through a convention of judicial reticence had since 1955 sought to protect judicial reputation impartiality and to protect judges from public criticism. See: AW Bradley, 'Judges and the Media – the Kilmuir Rules' (1986) *Public Law* 383.

<sup>20</sup> See further discussion in: Daniel Stepniak, 'Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions' (2004) 12(3) *William & Mary Bill of Rights Journal* 791.

<sup>21</sup> Where, arguably the influence of the senior judiciary, and in particular the Chief Justice Sir Thomas Eichelbaum and Justice Sir Ivor Richardson, played a decisive role.

The association of media interests with audio visual coverage was further enforced by the media's reliance on entrenched or legally enforceable media or media related rights, in arguing for a right of access. Thus, while forcing courts to address the issue, the presence of rights has proven to be a double edged sword, in that it served to further associate audio visual coverage with media interests.<sup>23</sup>

It may be said that the media's championing of camera access, coupled with negative perceptions of media excesses and of the disruptive and distracting nature of early recording technology<sup>24</sup> forced courts into playing the role of protectors of the rights of those appearing before the courts and of the interests of the administration of justice, which appeared to be actually or potentially threatened by such media coverage.

The association of media interests with audio visual coverage was further reinforced by the manner in which access came to be granted. While the electronic media and proponents of audio visual coverage pointed to potential benefits such as the enhancement of open justice, public understanding and scrutiny of courts, such touted benefits were seen by many courts and opponents of camera access merely as convenient justifications for the media's pursuit of commercial interests through ratings. The suggested benefits were also deemed to be outweighed by perceived dangers of such coverage - that recordings would unduly disrupt proceedings, distract participants, and deter witnesses from coming forward, and that broadcasts would trivialise, sensationalise and misrepresent the nature of proceedings or of evidence presented, and in numerous other ways adversely affect the administration of justice.<sup>25</sup>

The absence of evidence conclusively substantiating the alleged benefits of such coverage, caused the presence of cameras in courts to be widely perceived as being superfluous to the requirements of open justice – the requirements of which, as I noted above, many deemed and some still do deem to be satisfied by court doors being left open to the public and members of the media being permitted to attend proceedings but not to record them for broadcast.

With the broadcast of proceedings deemed unnecessary to the attainment of open justice and thus a potentially dangerous optional extra, it is not surprising that the response of most courts has been to regulate, restrict or simply prohibit audio visual coverage. Media organisations seeking to undertake such coverage came to be required to conclusively establish that their coverage would not adversely affect proceedings as a precondition to such recording and broadcast being permitted. This requirement remains the prerequisite to coverage in a number of jurisdictions, perhaps most notably in Scotland<sup>26</sup> and in the courts of some Canadian provinces.<sup>27</sup> As the

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<sup>22</sup> The relative lack of media interest and dominant role played by the judiciary in Australia is discussed below.

<sup>23</sup> See further discussion in: Daniel Stepniak, 'A Comparative Analysis of First Amendment Rights and the Televising of Court Proceedings' (2004) 40(2) *Idaho Law Review* 315.

<sup>24</sup> Discussed below.

<sup>25</sup> For a detailed outline of competing arguments see: *Electronic Media Coverage of Courts: A Report Prepared for the Federal Court of Australia by Daniel Stepniak* (1998).

<sup>26</sup> See: Daniel Stepniak, 'British Justice: Not Suitable for Public Viewing?' In Mason P (ed) *Criminal Visions: Media Representations of Crime and Justice* (2003).

effects of courtroom televising are only capable of being measured in terms of subjective perceptions (being incapable of precise replication), the requirement of conclusive proof has proven to be virtually tantamount to the imposition of a de-facto prohibition.

Such a reluctant and distrustful attitude to cameras in courts inevitably and in hindsight predictably resulted in the failure of audio visual coverage to live up to expectations. Thus courts and commentators have expressed dismay at the media not always been interested in covering legally significant cases. Media coverage has also been accused of favouring visual style over substance and of focusing on aspects of cases other than those which the legal fraternity regarded as legally significant.<sup>28</sup>

This dissatisfaction with media coverage has been further exacerbated by the media's periodic overstepping of prescribed limits of what courts are willing to allow be recorded and broadcast.

I would submit that rather than being evidence of the incompatibility of audio visual coverage and the judicial proceedings, the perceived failure of the media's coverage to live up to expectations flows largely from the flawed assumption that it is the media's role to provide the public with extended audio visual coverage of court proceedings irrespective of viewers' likely interest, available resources and costs involved, and the failure to appreciate that the media could do so without the court's assistance.

The perpetuation of the association of audio visual coverage with the media also served to delay the recognition that the attainment of the potential benefits of public access to recordings of court proceedings – greater public understanding, scrutiny, informed debate of proceedings promoting confidence in law – was not a vested interest of the media, and that no set of guidelines or rules for such coverage would ever ensure that potential benefits would be attained.

The resulting search for the magic formula of the right guidelines, established by conclusive proof of the absence of adverse effects on proceedings and the administration of justice, has led to a stalemate.

## **C DETERMINATIVE FACTORS**

My comparative study of the experiences of five common law jurisdictions - Australia, the United States, New Zealand, Canada and the United Kingdom - has led me to conclude that while the cameras in courts debate has been dominated by arguments over the effects of the recording and broadcasting of court proceedings, all

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<sup>27</sup> See for example: The Supreme Court of British Columbia: *Policy on Television in the Courtroom* (2001)

<<http://www.courts.gov.bc.ca/sc/TV/TV%20in%20the%20Courtroom.html>>

<sup>28</sup> For perhaps the most eloquent and persuasive case against cameras in courts see: Leonard E Noisette, 'Minority Report' in New York State Committee to Review Audio-Visual Coverage of Court Proceedings, *An Open Courtroom: Cameras in New York Courts* (1997).

evidence gathered in studies, experiments and the experiences of those jurisdictions suggests that such effects are incapable of being established conclusively.

What discernible evidence arguably does suggest is that appropriate regulations and controls are capable of minimising if not eradicating potentially detrimental effects, and that personal experience of televised court proceedings tends to make participants more favourably disposed to such coverage.

Recognising that the effects of audio visual coverage are intrinsically incapable of being conclusively established (as effects can only be measured in terms of perceptions) and that they constitute an inappropriate and ill conceived focus or determining factor has implications not only for how the effects of audio visual coverage are assessed but also for whether, and the manner in which such coverage is introduced, by whom it is introduced, and the basis on which it is regulated and controlled.

The continuing insistence on a conclusively substantiated absence of effects as a prerequisite to audio visual recording and broadcast of court proceedings, may also be said to be incompatible with the principle of open justice, which recognises inherent costs and dangers of the public administration of justice.<sup>29</sup>

Whether proceedings are subject to audio-visual coverage and whether the benefits of audio-visual coverage are attained, I believe, has been shown to be ultimately determined by three factors: first, the recognition of a legally enforceable right to record and broadcast and/or access audio-visual footage of court proceedings (a culture of rights); second, the availability of technology capable of ensuring that such coverage is compatible with judicial proceedings; and three, above all by the presence of judicial attitudes deeming such coverage to be in the interests of the administration of justice and not merely a media right.

On this basis, I also argue that whether audio-visual coverage of court proceedings is permitted and how it is regulated ought to be determined not as a media right acceded to on the basis of conclusive evidence that it will not affect judicial proceedings, but rather in terms of the application of a medium of public information capable of enhancing public access and understanding of judicial proceedings.

On the issue of culture of rights I note the impact of the 1<sup>st</sup> and 6<sup>th</sup> amendments of the *US Bill of Rights*, section 2 of the *Canadian Charter of Rights and Freedoms*, Articles 10 and 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* as incorporated into British domestic law by the *Human Rights Act 1998*, and sections 14 and 25 of New Zealand's *Bill of Rights Act 1990*.<sup>30</sup> The absence of legally enforceable rights, able to be called on in seeking access to record and broadcast proceedings, has arguably enabled Australian judiciary to avoid having to confront the issue. In this respect, I note that to my best knowledge Justice Cummins' ruling in *Quentin Roberts v Nine Network*<sup>31</sup> remains the only occasion on

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<sup>29</sup> See in particular *Scott v Scott* [1913] AC 417, 463 per Lord Atkinson.

<sup>30</sup> See discussion in: Daniel Stepniak, 'A Comparative Analysis of First Amendment Rights and the Televising of Court Proceedings' (2004) 40(2) *Idaho Law Review* 315.

<sup>31</sup> (Unreported, Supreme Court of Victoria, Cummins J, 18 December 1995)

which an Australian superior court has specifically considered the legality of the televising of court proceedings.

Turning to the availability of suitable technology, I note that the state of early communication/information technology provided an understandable basis for the exclusion of television and still photography in courts. This was graphically illustrated in the 1935 *Hauptmann* trial<sup>32</sup> in New Jersey, where high intensity bulbs installed to light up the dim courtroom were said to ‘boost temperatures in the gallery to uncomfortable levels’,<sup>33</sup> and during the Nuremberg trials, where: “Lighting equipment used to film the trials was so intrusive that several defendants in the dock wore dark glasses’.<sup>34</sup> In 1965 the Supreme Court of the United States examined televised pre trial hearings, and found that:

The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings....It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings’<sup>35</sup>.

This led the Court to find the recording of proceedings by television cameras to be inherently prejudicial and to declare that television in its then ‘present state’ and ‘by its very nature’ had intrinsically violated the petitioner’s Sixth Amendment rights to a fair trial.<sup>36</sup>

There is no doubt that current technology ensures that courtroom televising need no longer be intrinsically disruptive or distracting. This was acknowledged by the Supreme Court of the United States 24 years ago in the 1981 case of *Chandler v Florida*.<sup>37</sup> Not only is recording equipment (particularly where permanently mounted in courtrooms) unobtrusive and not disruptive, but a population increasingly accustomed to the presence of microphones and cameras in courtrooms and aware of being recorded by closed circuit cameras in public areas is clearly less likely to be adversely affected by the knowledge that they are being videorecorded in a courtroom.

As for the significance of judicial attitudes towards camera coverage, the evidence clearly suggests that of the three determinative factors, judicial attitude is the pivotal factor. Thus while a recognition of the unsustainability of blanket prohibitions in light of constitutional or other legally enforceable legal rights caused American, Canadian and New Zealand courts to regulate the admission of cameras into courts, in Australia the main motivating factor appeared to be judicial concerns concern regarding the level of public confidence and the nature of criticism levelled at the judiciary

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<sup>32</sup> *State v Hauptmann*, 180 A 809 (NJ, 1935)

<sup>33</sup> Marjorie Cohn and David Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* (1998) 15.

<sup>34</sup> Ronald Goldfarb, *TV or Not TV: Television, Justice, and the Courts* (1998) 9.

<sup>35</sup> *Estes v Texas* 381 US 532, 536 (1965)

<sup>36</sup> See: *ibid* 544.

<sup>37</sup> 449 US 560 (1981)

Wherever and while audio visual coverage has been seen by judges purely in terms of media rights or as peripheral or superfluous to the requirements of the principle of open justice, audio visual coverage has been either completely denied, reluctantly given, or granted only on the establishment of substantiated absence of adverse effects. Such negative judicial attitudes have kept cameras out of courtrooms in spite of the presence of entrenched or enforceable legal guarantees of media and public rights to publish or access such recordings.<sup>38</sup> The 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, bears testimony to the crucial importance of this determinant. The New Zealand experience arguably suggests that judicial attitudes favourably disposed to the promotion and facilitation of public access to audio visual recordings have overcome concerted opposition to such coverage, while the Australian judiciary has proactively facilitated television coverage of proceedings, albeit restricted in scope and confined to selected cases.

On the other hand, last November's experimental recording (but not broadcasting<sup>39</sup>) of appeal proceedings in the Royal Courts of Justice<sup>40</sup> and subsequent public consultation<sup>41</sup> as to whether the statutory prohibition should be amended to permit the recording and broadcast of appeal proceedings revealed significant hesitation and reluctance on behalf of the authorities, reflecting a continuing perception of camera coverage as a media interest which the courts needed to reluctantly confront. In my view, the proposal was presented to the public with barely concealed scepticism and a dominant message that the government was merely seeking advice on how to respond to broadcasters and others pressing for reform.<sup>42</sup>

However as Victorian Chief Justice Marilyn Warren was recently reported to have observed, attitudes towards media coverage have undergone significant change in recent years.<sup>43</sup>

## **D DEVELOPMENTS AND CHANGING ATTITUDES**

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<sup>38</sup> For illustrations from the US, Canada, and UK see: Daniel Stepniak, 'A Comparative Analysis of First Amendment Rights and the Televising of Court Proceedings' (2004) 40(2) *Idaho Law Review* 315.

<sup>39</sup> As such would be in breach of section 41 of the *Criminal Justice Act* 1925 (England and Wales)

<sup>40</sup> See: 'OJKO as Pilot Allows Cameras into Court of Appeal' *Law Gazette* 9 September 2004 <<http://www.law.gazette.co.uk/news/pressroundup/view=newsarticle.law?GAZETTNEWSID=191539>>

<sup>41</sup> Department for Constitutional Affairs, 'Broadcasting Courts: A Consultation by the Department for Constitutional Affairs' (2004) <<http://www.dca.gov.uk/consult/courts/broadcasting-cp28-04.htm>>

<sup>42</sup> See for example the speech by the Lord Chancellor Lord Falconer, in opening a Broadcasting seminar during the public consultation, *Broadcasting Courts Seminar: Introduction from Lord Falconer, Speech by Lord Falconer, the Lord Chancellor and Secretary of state for Constitutional Affairs* (2005) Department for Constitutional Affairs <<http://www.dca.gov.uk/consult/courts/speeches/falconer.htm>>

<sup>43</sup> Natasha Robinson, 'Victoria Courts Greater Openness' *The Australian*, "Legal Affairs", 27.

The most significant recent changes in attitudes to cameras in courts may be summed up as follows:

### **United Kingdom**

In the United Kingdom, statutory provisions continue to impose absolute bans on the taking of photographs in courtrooms in England and Wales<sup>44</sup> and in Northern Ireland.<sup>45</sup> As the statutory prohibition has not been deemed to apply to the House of Lords, since 1989 the Law Lords have on occasion granted the media permission to record and broadcast the Appellate Committee delivering their opinions to the House of Lords, most notably in the three Augusto Pinochet hearings.<sup>46</sup> The statutory prohibition also does not apply to public inquiries, which have been regularly and successfully recorded and broadcast.<sup>47</sup>

In the absence of governing statutory provisions, the exercise of the judiciary's inherent power to control proceedings and the law of contempt have served to keep cameras out of Scottish courts. Since 1992 the issue has been governed by a rule of practice issued by Lord Hope, the Lord President of Scotland.<sup>48</sup> A number of proceedings have been broadcast under Lord Hope's guidelines, most notably the hearing and decision of the Lockerbie bombers' appeal<sup>49</sup>, conducted in the Netherlands but under Scottish law. The entire appeal proceedings and decision were broadcast live by BBC television and streamed live in English and Arabic on the BBC's website<sup>50</sup> and via a number of overseas websites.

At the time of writing the Lord Chancellor had not released the findings of the public consultation conducted between 15 November 2004 and 28 February 2005, nor announced whether the British government proposes to repeal or amend the current statutory ban on cameras in courts.

### **New Zealand**

I have followed NZ developments with great interest and some envy. Following an extensive study by the Court Consultative Committee's Working Party on Televising Court Proceedings, in spite of significant opposition from the legal profession, the press and the police force, and thanks to a committed senior judiciary, a three year pilot project with television coverage (later extended to encompass press photography

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<sup>44</sup> Section 41 of the *Criminal Justice Act 1925* (England and Wales)

<sup>45</sup> Section 29 of the *Criminal Justice Act 1945* (Northern Ireland)

<sup>46</sup> *Ex parte Pinochet Ugarte (No 1)* [1998] 3 WLR 1456; *Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272; *Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272. See discussion in Rozenberg, 'The Pinochet Case and cameras in Court' (1999) *Public law* 178.

<sup>47</sup> Perhaps most notably in the recent *Shipman Inquiry*, see <<http://www.the-shipman-inquiry.org.uk>>

<sup>48</sup> See text reproduced in Department for Constitutional Affairs, 'Broadcasting Courts: A Consultation by the Department for Constitutional Affairs' (2004) Annexure C <<http://www.dca.gov.uk/consult/courts/broadcasting-cp28-04.htm>>

<sup>49</sup> *Abdelbast Ali Mohamed Al Megrahi v Her Majesty's Advocate* [2002] SCCR 509.

<sup>50</sup> See British Broadcasting Corporation, *Watch/Listen to Lockerbie Appeal* (2002) <<http://news.BBC.co.uk/1/hi/world/1766508.stm>>

and radio) was undertaken in four courts<sup>51</sup> between 1 February 1995 and 31 January 1998. The favourable findings of the formal evaluation of this experiment led to the rules governing the experiment being made permanent and extended to other New Zealand courts in 1999. Guidelines governing 'expanded media coverage' were subsequently revised and relaxed in 2000 and 2003<sup>52</sup> on the recommendation of the Media in Courts Monitoring Committee chaired by Justice Robert Chambers. The most recent significant New Zealand development of which I am aware (prior to attending this conference) was the Supreme Court's issuing in September 2004 of media guidelines stating that 'all applications to televise or otherwise record proceedings of the Supreme Court will be deemed to be approved unless a party indicates within 3 days of being advised by the registrar of the application, that the party objects to it'<sup>53</sup>

Though Australian courts have arguably underutilised the lessons, experiences and findings of New Zealand's evaluation of its pilot project, the New Zealand pilot programme was followed with great interest by the Federal Court of Australia and State courts - particularly those of Victoria, South Australia and Western Australia - which have drawn on the New Zealand experience in developed their own policies and media programs.

### **Australia**

In the absence of entrenched or legally enforceable rights supportive of audio visual coverage (which Sylvia Kriven, the Communications Manager of the South Australia's Court Administration Authority, I think, persuasively suggests would force Australian courts to confront the issue, as they have done in the United States, New Zealand, Canada, and Britain) the audio visual media's access to Australian courts has remained severely limited and virtually unchanged since the mid 1990s.

The televising of proceedings has, however, ceased to be newsworthy in itself, in sharp contrast to the front page treatment afforded to Justice Teague's decision to allow television cameras to record his sentencing remarks in the Victorian Supreme Court case of *The Queen v Nathan John Avent*.<sup>54</sup>

On regular occasions Federal Court judges permit cameras to record their delivery of judgment summaries, as well as file and overlay footage.<sup>55</sup> Victorian judges also increasingly permit cameras to record footage of proceedings and decision, though largely in civil cases. It is no coincidence that the Victorian and Federal Courts' media liaison work is overseen by Prue Innes<sup>56</sup> and Bruce Phillips,<sup>57</sup> both of whom deserve

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<sup>51</sup> The High Court in Auckland, Wellington and Christchurch and the District Court in Auckland.

<sup>52</sup> See New Zealand Ministry of Justice, *The In-Court media Coverage Guidelines 2003* (2004) <<http://www.courts.govt.nz/media/>>

<sup>53</sup> See New Zealand Ministry of Justice, *Supreme Court Media Guidelines* (2004) <<http://www.courts.govt.nz/supremecourt/SUPREME%20COURT%20-%20Media%20guidelines.pdf>>

<sup>54</sup> (Unreported, Supreme Court of Victoria Criminal Jurisdiction, Teague J, 17 May 1995)

<sup>55</sup> See Federal Court of Australia, *Video Archives of Judgment Summaries*, <[http://www.fedcourt.gov.au/judgments/video\\_jdg.html](http://www.fedcourt.gov.au/judgments/video_jdg.html)>

<sup>56</sup> Court Information Officer, Supreme Court of Victoria

<sup>57</sup> Director Public Information, Federal Court of Australia

much of the credit for engineering and pioneering numerous innovations in their Courts' relationships with the media.<sup>58</sup>

Somewhat surprisingly, in view of the nature of its proceedings, and the statutory prohibition of the publication (including 'by radio or television or by other electronic means',) of any account of proceedings under the *Family Law Act* that identifies a party to such proceedings, a person associated with a party, or a witness in such proceedings,<sup>59</sup> under the leadership of its relatively recently appointed Chief Justice Diana Bryant<sup>60</sup> the Family Court has taken significant steps towards opening family law proceedings to public scrutiny. On select occasions the Court has approved the broadcast of proceedings by exempting the broadcasters from liability.<sup>61</sup> Most recently this has enabled the recording and broadcast of a particularly insightful three part series titled 'Divorce Stories'.<sup>62</sup> While Western Australia remains the only Australian jurisdiction to have developed specific guidelines for audio visual coverage,<sup>63</sup> the Australian judiciary appears to have enthusiastically embraced new information and communication technology. Even in the relatively small jurisdiction of Tasmania, following the appointment in December 2004 of judicial software innovator Peter Underwood as Chief Justice, the Supreme Court of Tasmania has installed digital audio-visual, voice activated recording equipment, and last time I checked was considering the option of utilising the automatically editing multi-camera recordings to stream recorded proceedings on the Internet.

The ever increasing number of high tech courtrooms and the judiciary's embracement of the technology for research and to enhance in court presentations (which has also seen the High Court and Federal Court of Australia trial the streaming of proceedings), when coupled with later discussed factors such as the relative lack of media interest in court reporting and current judicial innovations designed enhance the openness of courts and court relations with the media,<sup>64</sup> would appear to make the prospect of court proceedings being streamed quite high.

## **Canada**

Canadian developments reveal a Supreme Court which since at least 1995 has successfully and without any notable mishaps authorised its proceedings to be

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<sup>58</sup> In acknowledgment of the work of Prue Innes, in its 2003 *Contempt by Publication, Report 100*, the Law Reform Commission of NSW noted that 'representatives of the media have referred to Victoria as the most congenial state in which to work, because of the co-operative relationship that exists between the media and the courts'. (at [15.15]) The Report also recommended the adoption of several Victorian practices (recommendations 36-38 at [15.22]).

<sup>59</sup> *Family Law Act 1975 (Cth)* s 121

<sup>60</sup> Diana Bryant was appointed Chief Justice of the family Court of Australia on 5 July 2004

<sup>61</sup> Pursuant to *Family Law Act 1975 (Cth)* s 121(9)(g).

<sup>62</sup> Broadcast on the Special Broadcasting Service's *Storyline Australia* program on the 15<sup>th</sup>, 22<sup>nd</sup> and 29<sup>th</sup> of September 2005.

<sup>63</sup> *Guidelines for Electronic Coverage of Judicial Proceedings* (1996).

<sup>64</sup> See: Justice Ronald Sackville 'Open Justice for "Third Arm"', *The Australian*, 30 August 2005, (Edited extract of paper delivered at Monash University on 29 August 2005); Natasha Robinson, 'Victoria Courts Greater Openness', *The Australian*, 9 September 2005, 'Legal Affairs', 27.

recorded and broadcast by the Canadian Parliamentary Affairs Channel (CPAC),<sup>65</sup> *Charter* jurisprudence clearly suggesting that blanket prohibition or excessive regulation of electronic media coverage is unsustainable,<sup>66</sup> and a withdrawal of opposition to the televising of at least appeal proceedings by the Canadian Judicial Council.<sup>67</sup> The Canadian experience also reveals rarely mentioned studies and experiments providing evidence supportive of the introduction of audio visual coverage.<sup>68</sup> While the courts of a number of Provinces have relaxed total bans on televising, the guidelines appear to evidence continuing reluctance to admit cameras, concerns regarding the broadcast of trials, and through their insistence on the establishment of evidence that coverage will not have an adverse effect on proceedings, and a continuing view of audio visual coverage as a media interest and unnecessary to the requirements of the principle of open justice.<sup>69</sup>

### United States

In theory, all 50 American State jurisdictions currently permit at least some electronic media coverage.<sup>70</sup> Even US federal courts, which in 1994 rejected the positive findings and recommendation of its Judicial Center<sup>71</sup> which had evaluated a 3 year pilot program restricted to civil proceedings and eight courts, undertaken from 1991 to 1994,<sup>72</sup> have partially readmitted cameras.<sup>73</sup> Only the Supreme Court of the United States and the Courts of the District of Columbia prohibit camera coverage of all proceedings.

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<sup>65</sup> See Canadian Parliamentary Affairs Channel, *Canadian Political Channel* <<http://www.cpac.ca/>>

<sup>66</sup> *Dagenais v Canadian Broadcasting Co* [1994] 3 SCR 835; *R v Mentuck* (2001) 158 CCC (3d) 449 (SCC).

<sup>67</sup> See Canadian Judicial Council, *Council Modifies Position on Cameras in the Courts* (2002) <[http://cjc-ccm.gc.ca/english/news\\_releases/2002\\_03\\_28.htm](http://cjc-ccm.gc.ca/english/news_releases/2002_03_28.htm)>

<sup>68</sup> See: *Electronic Media Coverage of Courts: A Report Prepared for the Federal Court of Australia* by Daniel Stepniak (1998), Chapter 6.

<sup>69</sup> See for example the policies of the Quebec Superior Court: *Régle 38 des Règles de pratique de la Cour supérieure du Québec en matière civile, RRQ 1981 cC-25, r 8.*, Manitoba Courts: *Court Policies/Practices Affecting media Coverage*

<<http://www.manitobacourts.mb.ca/english/media.htm#policies>>, the Supreme Court of British Columbia: *Policy on television in the courtroom* (2001) <<http://www.courts.gov.bc.ca/sc/TV/TV%20in%20the%20Courtroom.html>>, and the Provincial Court of British Columbia: *Media Access Policy* (2004) <<http://www.provincialcourt.bc.ca/downloads/pdf/MediaPolicyApril2004.pdf>>

<sup>70</sup> See Radio-Television news Directors; Association & Foundation, *Cameras in the Court: A State-by-State Guide*, <<http://www.rtnda.org/foi/scc.shtml>>

<sup>71</sup> See Molly Treadway Johnson and Carol Krafka, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals* (1994).

<sup>72</sup> When the Federal Judicial Conference voted to discontinue the experiment and keep cameras out of courtrooms.

<sup>73</sup> On 12 March 1996 the Judicial Conference adopted a resolution that 'Each court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate argument, subject to any restrictions in statutes, national and local rules and such guidelines as the Conference may adopt' see: Henry Reske, 'A repeat performance: Judicial Conference Allows Cameras Back in Appeals Courts' (1996) 82(5) *American Bar Association Journal* 38.

The theoretical position does not, however, accurately reflect the extent to which audio-visual coverage of courts is actually permitted in the United States. Restrictions and guidelines governing electronic media access vary significantly, often restricting coverage to civil proceedings<sup>74</sup>, appellate proceedings<sup>75</sup>, or photography<sup>76</sup>, or even requiring the consent of all parties<sup>77</sup>. The discretion of presiding judges, which ultimately determines whether cameras are admitted, is in some jurisdictions expressed so broadly as to leave the decision almost entirely to judicial discretion.<sup>78</sup> Thus, for example, while the popular image of California trials is that they are commonly and routinely televised, judges in some counties have in fact been found to only grant 'as few as 59 per cent of media requests'.<sup>79</sup>

American developments which have largely escaped notice, relate to how state courts have responded to the public outcry over media excesses in the reporting of high profile cases, and to judicial concerns relating to lack of public knowledge and understanding of court proceedings and inaccurate, inadequate or misleading media reporting. Thus a number of state courts have embarked on programs to foster cooperation with the media and offer assistance designed to enhance media awareness of cases and of factual and legal issues pertaining to proceedings. Perhaps most significantly, since 1997 a growing number of state courts have begun to stream recordings of proceedings on their websites.

## **E THE STREAMING OF COURT PROCEEDINGS IN US COURTS**

### **Florida**

Florida's Supreme Court pioneered this development. Craig Waters, the Public Information Officer and Deputy Webmaster of the Supreme Court of Florida, has explained the motivation for this innovation:

In early 1996, the Florida Supreme Court for the first time conducted a scientific survey of its customers. The results showed Floridians were unhappy with their judiciary, but for reasons that had less to do with judicial performance than access to courts and court-related information. Floridians, for example, overwhelmingly could not answer basic questions about how courts work. Most had serious misconceptions about the limitations on judicial power...The vast majority said they got their information about courts from the news media, though most would prefer to get it directly from the courts themselves... The central problem was clear: Information

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<sup>74</sup> See eg Rule 16-109, *Maryland Rules Annotated* (1999)

<sup>75</sup> As is the case in 10 States, see: See Radio-Television news Directors; Association & Foundation, *Cameras in the Court: A State-by-State Guide*, <<http://www.rtnda.org/foi/scc.shtml>>

<sup>76</sup> See Rule 4-402, *Utah Code of Judicial Administration* (2000)

<sup>77</sup> As is the case in Alabama and Minnesota.

<sup>78</sup> For example, Vermont, see Radio-Television news Directors; Association & Foundation, *Cameras in the Court: A State-by-State Guide*, <<http://www.rtnda.org/foi/scc.shtml>>

<sup>79</sup> Judicial Council of California, *Cameras in the Courtroom: Report o Rule 980* (May 2000)

was available but not accessible by most people...So the Florida Supreme Court began an unprecedented effort to directly reach out to its customers.<sup>80</sup>

A question often asked in discussions of proposals to introduce the streaming of proceedings is whether the public would watch court proceedings online. Florida's eight years of experience suggests that public demand for webcasting is often only confined by the capacity of servers. Waters illustrates this by noting that '[o]ne of the two duplicate Websites maintained on a server owned by the Court is accessed more than 7 million times a year' and that in addition the Court's satellite transmissions enable three million Florida households to view Florida Supreme Court proceedings on local cable channels.<sup>81</sup>

Significantly, Florida's experience reveals that rather than replacing media reporting the streaming of proceedings has been welcomed by and has enhanced the media's court reporting.

Craig Waters suggests that streaming has addressed not only public but also media misconceptions. He points out that:

News media who once could only read secondhand reports of court cases now watch them on the Web. These have included editorial page writers and reporters with low budget news organizations that cannot afford to travel to the capital. Television news routinely uses satellite broadcasts.<sup>82</sup> And even reporters who come to court for arguments report that they use the archived cases – typically available the same afternoon – to check the accuracy of their quotations and their impressions of arguments. By the same token, reporters who get information wrong in their news accounts can be *shown* that they made a mistake, rather than simply being told...the result has been not merely greater coverage of the Court, but also more positive and more accurate reporting.<sup>83</sup>

Streaming has been shown to alter not only who broadcasts proceedings but to ensure the provision of an entirely different form of coverage than that provided by television news media. Arguing that the 15 to 30 seconds allocated for a single news item in the United States does not permit the conveyance of the gist of even relatively simple court cases, Waters also maintains that 'prior to the Florida Supreme Court's complete and unedited broadcasts television news articles about court proceedings were often

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<sup>80</sup> Craig Waters, 'Netcasting Court Arguments' (Paper presented at the 7<sup>th</sup> National Court technology conference, National Center for State Courts, Florida, August 2001: National Center for State Courts, *Knowledge and information Services* <<http://www.ncsconline.org/WC/Education/IntCtsGuide.htm>>

<sup>81</sup> Ibid.

<sup>82</sup> The Court's webpage notes that 'broadcasts of oral arguments are provided free of charge to local cable systems, though the Court has no control over whether or when these systems will use the broadcasts': see Florida Supreme Court, *Court Arguments in Video & Audio & Satellite Downlink*, Supreme Court Public Information <[http://www.floridasupremecourt.org/pub\\_info/index.shtml](http://www.floridasupremecourt.org/pub_info/index.shtml)>

<sup>83</sup> Craig Waters, 'Netcasting Court Arguments' (Paper presented at the 7<sup>th</sup> National Court technology conference, National Center for State Courts, Florida, August 2001: National Center for State Courts, *Knowledge and information Services* <<http://www.ncsconline.org/WC/Education/IntCtsGuide.htm>>

rife with errors and created serious public misconceptions'. The 'complete and unedited' webcast of proceedings, on the other hand, Waters maintains

lessens the impact of errors and misconceptions created by the limitations of television news. It allows me to readily demonstrate when a news account is wrong. It puts the press on notice that errors or slanted coverage can be easily exposed. And it allows the Court to reach the public directly without the media middleman.<sup>84</sup>

This point was also made in the 2001 streaming by *The Independent Media Centre (Indymedia)*<sup>85</sup> of the British Columbia Supreme Court hearings in *Metalclad Corp. v Mexico*<sup>86</sup> (an appeal of a NAFTA tribunal decision ordering Mexico to pay damages to a Californian waste disposal company). The presiding judge permitted the recording and streaming on condition that the hearings were covered in their entirety. As a result ten days of hearings were recorded and some 40 hours of video together with background documents and interviews were made publicly available on Indymedia's webpage.<sup>87</sup> Subsequently, a director of television news conceded that the nature and extent of public exposure of proceedings and information about the case was 'something we would not have been able to do'.<sup>88</sup>

Other benefits identified in Florida's experience include the avoidance of potential disruption when courts record their own proceedings. Working in conjunction with its partner, Florida State University's Television School of Communications, the Florida Supreme Court use its own cameras and audio recording equipment to produce broadcast quality audio-visual feed which can also be accessed by the public and media via satellite or from the Court's press room.<sup>89</sup>

### **Mississippi**

The Florida courts are not the only US courts to successfully utilise Internet technology to webcast proceedings. The courts of Mississippi (the second last state to admit cameras into its courts) have also embraced the use of Internet technology. In April 2001 Mississippi Chief Justice Ed Pittman began to webcast live oral argument in the Supreme Court and the Court of Appeal followed in August 2001. Following the successful experimentation with the webcasting, the Mississippi Supreme Court began to allow media networks to access and broadcast video and audio recorded by the court.<sup>90</sup>

### **Washington State**

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<sup>84</sup> Ibid. See also Daniel Stepniak and Paul Mason, 'Court in the Web' (2000) 25(2) *Alternative Law Journal* 483.

<sup>85</sup> <<http://www.indymedia.org/en/index.shtml>>

<sup>86</sup> *United Mexican States v Metalclad Co* 2001 BCSC 664.

<sup>87</sup> Vancouver Independent Media Centre, *Metalclad v United Mexican States NAFTA Appeal - Hour 1* (2001) <<http://vancouver.indymedia.org/news/2001/02/645.php>>

<sup>88</sup> Charles Wright, Director of VTV's *News at Six*, quoted in Bettina Teodor, 'Cameras Before the Courts' (2001) 3(4) *The University of British Columbia Journalism Review* <<http://www.journalism.ubc.ca/thunderbird/archives/2001.04/cameras.html>>

<sup>89</sup> Ibid.

<sup>90</sup> For 'Rules for Electronic and Photographic Coverage of Judicial Proceedings', see <<http://www.mssc.state.ms.us/rules/AllRulesText.asp?IDNum=41>>

The courts of Washington State were not content to merely admit television cameras. They have taken active steps to ensure that recordings of the most significant proceedings are made available to the public. Since 1995 TVW Washington State's Public Affairs network has recorded and broadcast gavel to gavel coverage of Supreme Court proceedings. In addition to TVW's 1.3 million subscribers, members of the public may also access online video of TVW's television signal, archive footage and live webcasts<sup>91</sup>

### **Indiana**

The Indiana Supreme Court has also made extensive use of the technology installed in 2001.<sup>92</sup> The Court webcasts recordings live and provides public access to archived recordings which can be viewed at any time. The popularity of Indiana's webcasting is evidenced by the fact that '[f]requently, [Indiana] Supreme Court webcasts dominate the "top 20 list" of all Indiana webcasts in terms of viewers'.<sup>93</sup> As has been the case in Florida, reports from Indiana indicate that an 'unexpected benefit has been an improvement in relations with the news media in general'. Osborn notes that: 'Most are impressed that we embraced this technology and some have already made direct use of our webcast capabilities.'<sup>94</sup>

### **Michigan**

Another jurisdiction which has been streaming its court proceedings is Michigan where the Supreme Court has been webcasting since 2002, when it moved into new high tech premises.<sup>95</sup>

### **New Hampshire**

The New Hampshire Supreme Court is expected to begin streaming and archiving audio visual recordings of its oral arguments on 19 October 2005.<sup>96</sup> This is not a surprising development in view of the Court's previous acknowledgement of the significance of technological developments. In December 2002 while setting out a new rule requiring trial judges to 'permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public',<sup>97</sup> the Court observed that where once cameras were bulky and could cause distraction and take away from the integrity of proceedings, advances in technology now allowed a trial 'to be photographed and recorded in a dignified, unobtrusive manner'.<sup>98</sup>

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<sup>91</sup> See TVW, *Washington States Public Affairs Network: Audio & Video* <<http://www.tvw.org/>>

<sup>92</sup> See Elizabeth Osborn and Craig Waters, 'Courts in the Classroom' (Paper presented at the Court Technology Conference in Kansas City, 28-30 October 2003) <<http://www.ctc8.net/sessdesc.asp#e03>>

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Vickie Eggers, 'Full Stream Ahead: The Michigan Experience' (Paper presented at the Court Technology Conference in Kansas City, 28-30 October 2003).

<sup>96</sup> See: <[www.courts.state.nh.us](http://www.courts.state.nh.us)> at

<sup>97</sup> New Hampshire Supreme Court, *Petition of WMUR Channel 9* (13 December 2002) <<http://www.courts.state.nh.us/supreme/opinions/2002/0212/wmur156.htm>>

<sup>98</sup> See Barbara Wartelle Wall, *Cameras Allowed at all Open Court Proceedings, New Hampshire Court Rules* (2003) Gannett <<http://www.gannett.com/go/newswatch/2003/january/nw0117-11.htm>>

## Minnesota

Minnesota Supreme Court has also advised that it will commence webcasting audio visual footage of oral arguments in October 2005.

## F FROM PERMITTING MEDIA RECORDING TO FACILITATING AUDIO VISUAL COVERAGE

Several reasons may be stated as to why the issue of audio visual coverage needs to move from being one of courts permitting media coverage to becoming one of courts facilitating public access to recordings - regardless of media interest, and in a form and content not solely determined by the media.

### 1 Current Regulation is No Longer Adequate

Developments in communications and information technology, such as the Internet, are increasingly recognised to be undermining key presumptions on which current regulation of court reporting is premised. In particular, Justice Spigelman has emphasised the impact which ready access to information via the internet is having on measures which had previously shielded jurors from prejudicial publicity prior to and during trials.<sup>99</sup> By marginalising the relevance of geographic (jurisdictional) boundaries and challenging the former transience of media reports, the Internet appears to threaten the effectiveness of publicity restrictions, and makes greater suppression of media reports appear futile.

The *Managing Prejudicial Publicity Report*, an empirical study which in examining the impact of media publicity on jury trials in Sydney identified two cases in which 'prejudicial material was accessed on the internet' by jurors, noted that

in sharp contrast to material broadcast on television and radio, prejudicial material on the internet may be accessible to jurors over a significant period of time and may not be easily detectable by criminal trial lawyers or others concerned with the administration of criminal justice.<sup>100</sup>

The increasing ease of accessing internet information pertinent to hearings suggests that restrictions on publicity may one day no longer be sufficient to guarantee fair trial, and that common law courts may arguably need to consider shifting their focus from imposing restrictions on media publicity to ensuring that publicity regarding proceedings is fair, balanced and designed to promote informed public debate.<sup>101</sup>

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<sup>99</sup> See The Hon JJ Spigelman AC, 'Open Justice and the Internet' (Address at The Law via the Internet 2003 Conference, Sydney, 28 November 2003) (2004) *Judicial Officers Bulletin* 1; <[http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches\\_index#cj](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches_index#cj)>; The Hon JJ Spigelman AC, 'The Internet and the Right to a Fair trial' (Address to the 6<sup>th</sup> World Wide Common Law Judiciary Conference, Washington DC, 1 June 2005)

<[http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches\\_index#cj](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches_index#cj)>; See also: Justice Virginia Bell (Speech to Australian Supreme and Federal court judges, Darwin, 25 January 2005) <[http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches\\_index#bell](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches_index#bell)>

<sup>100</sup> Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity* (2001), [200] See also New South Wales Law Reform Commission, *Contempt by Publication Report 100* (2003)

<sup>101</sup> See Clive Walker, 'Fundamental Rights, Fair Trials and the New Audio-Visual Sector' (1996) 59 *Modern Law Review* 517.

## 2 It is too important to be left entirely to the media

For a number of reasons dissemination of information regarding court proceedings may be said to be too important to be left entirely to the media. In this respect, South Australian Chief Justice John Doyle has noted that the

confidence of the public in the courts depends upon the public having access to the courts, in the sense of being able to observe and understand what the courts are doing...If the courts are going to leave it to others, the media in particular, to determine how much and what sort of information the public gets about their workings, then the courts are saying that they are content to leave it to others to shape the public understanding and perception of the courts. That to me is not acceptable. I believe that the courts are well placed to explain their function. I consider that experience shows that leaving that task to others is, in the long term, unsatisfactory.<sup>102</sup>

Specific reasons for why it is inappropriate that the publication of information regarding courts (including the broadcast of courtroom proceedings) ought not to be left to the media include:

a) The media's lack of interest in providing in depth coverage of a range of proceedings.

In Canada this lack of interest was vividly illustrated during the Federal Court's pilot project where after lobbying for access to the court and for the pilot project to be undertaken the media only sought permission to televise four cases out of an estimated one thousand cases heard by the Federal Court of Appeal during the two years of the pilot project (January 1995 to December 1996).<sup>103</sup>

In Australia, the lack of media interest in covering the proceedings of the High Court, has witnessed the demise of the High Court correspondent and the virtual vacation of the media rooms, and has drawn the criticism of judges.<sup>104</sup> Media interest in securing access to trial proceedings is not significantly greater.

Lack of media interest was also an issue during New Zealand's pilot programme – especially in the early stages when stricter rules governed coverage and the media were required to choose between in and out of court coverage. This was most notably illustrated during the Barlow trial in which television networks deemed the conditions imposed on the coverage by Justice Neazor to be too onerous and chose instead to rely on out of court footage.<sup>105</sup> The lack of interest led JG Miles QC to observe:

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<sup>102</sup> The Hon Chief Justice John Doyle, 'The Courts and the Media: What Reforms Are Needed and Why' (1999) 1 *University of Technology Sydney Law Review* 25, 28.

<sup>103</sup> See: *Electronic Media Coverage of Courts: A Report Prepared for the Federal Court of Australia* by Daniel Stepniak (1998), [6.11-6.23].

<sup>104</sup> See John Henningham, 'The High Court and the Media' in Peter Cane (ed) *Centenary Essays for the High Court of Australia* (2004), 59; The Hon Justice Michael Kirby 'Media and Courts – The Dilemma' (Speech delivered at the Southern Cross University Graduation Ceremony, 27 April 2002), 3

<[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_dilemma.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_dilemma.htm)>

<sup>105</sup> See: 'TV Pulls Out' *The Evening Post* 27 May 1995.

It will come as no surprise that the primary interest shown by the two television networks has been the three most controversial murder trials staged in New Zealand over the past 15 months...The Reithian doctrine of obligation to educate, inform and entertain have long been amended; while New Zealand networks would still recognise an obligation to inform, the dominant drive is to entertain.<sup>106</sup>

b) Lack of media resources to cover all the cases about which arguably the public ought to be informed.

This is a factor which is often overlooked by those who criticise the media for only being interested in covering cases which are likely to secure a large viewing audience.

c) The unreasonableness of expecting the mass media to act as a de facto reporting service for courts.

While it may be the media's role to inform and scrutinise court decisions of public interest, acting as 'surrogates for the public'<sup>107</sup> does not make the media a publishing or broadcasting service for the courts.

d) The unreasonableness of expecting the media to adequately and correctly report on cases which are often lengthy, highly specialised, complex and particularly in view of the decreasing reliance on oral evidence, difficult to follow, without court assistance and information.

As courts are increasingly recognising, accurate and timely reporting of proceedings requires courts to offer assistance.

### **3 Current Court Sponsored Information is Inadequate and Arguably Offered in an Inappropriate Form**

Courts' current provision of public information regarding proceedings tends in most cases to stop short of providing access to audio visual recordings. The posting of text rather than recordings of judicial decisions and transcripts of proceedings is in practice of little interest and assistance to the lay public because it fails to provide information in a manner to which the public are accustomed and in a form which is comprehensible to the public.

### **4 From Time to Time the Media Does Something Which Suggests That They Cannot Be Trusted**

Finally, the media's reporting of some recent cases provides ammunition to who doubt whether the media can be relied on to provide fair and balanced court reporting.

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<sup>106</sup> JG Miles QC, 'Ceras in the Courtroom: Will Televising Trials Educate the Public or Create Injustice? – Commentary on a paper by Selene Mize (Paper presented at the New Zealand Law Conference, Dunedin, 9-13 April 1996) (1996) 2 *New Zealand Law Conference Papers* 178.

<sup>107</sup> In *Richmond Newspapers Inc v Virginia* 448 US 555 Chief Justice Burger had observed: 'Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public'.(at 575)

Thus, former Chief Justice of the Family Court of Australia, Alastair Nicholson was recently moved to observe:

Let us be frank about this: the Australian media has an unimpressive track record in protecting the rights or privacy of individuals. When there is a good story to write about they will publish it...too many members of the media, if left unchecked, are prepared to publish anything, whatever the consequences may be...<sup>108</sup>

The media's coverage of the Schapelle Corby's Bali trial would appear to suggest that unless closely regulated, media's interests are incompatible with the fair administration of justice. The reporting of the Corby trial appeared to expose many potential dangers of unrestricted media coverage. Particularly troubling to those of us who have advocated increased media access to courts were: the (deliberately) uninformed reports, the acknowledged tailoring of reports to what the media perceived the public wanted to read, and generally, the negative and prejudicial impact of the reporting.

Consequently, in recognising the importance of fair and balanced information about court proceedings being provided to the public, it is difficult to avoid the conclusion that the courts need to play a more active role.

## **G STREAMING AS A MEANS OF ADDRESSING CONCERNS WITH CURRENT REPORTING**

Streaming of recorded court proceedings by courts would appear to provide a suitable means of addressing the main concerns with current court reporting by the electronic media.

First, streaming may be said to provide a means of redressing the current less than open administration of justice by providing a means of not only extending the public gallery beyond the courtroom but of enabling those watching the proceedings to actually be able to understand what they observe.

Increasing emphasis on efficiency has witnessed the reduction in evidence and argument physically presented and tested in court. I would submit that when Justice Sandra Day O'Connor observed that to permit televising of the US Supreme Court would create a misconception that the Court made decisions on the basis of the oral argument rather than on the written submissions which the public do not see,<sup>109</sup> her Honour was not presenting a persuasive case for keeping television out of the courtroom but rather acknowledging that the current level of open justice falls far short of that required for public scrutiny.

The Internet and digital interactive television have the capacity to enable the public to access such additional information as would be required for them to understand the

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<sup>108</sup> Alastair Nicholson 'Korp Case Shows Media Has Nothing to Offer' *The Australian*, 26 August 2005.

<sup>109</sup> Australian Broadcasting Corporation, Interview with Justice Sandra Day O'Connor and Justice Stephen G Breyer, *This Week*, 6 July 2003. A Washington Post editorial described the arguments put in defence of the Court's prohibition on cameras as "not persuasive". See Editorial, 'Cameras in the Court', *The Washington Post* (Washington), 11 July 2003.

nature of proceedings. The proposal that the public be afforded the opportunity to see all the evidence and submissions is not far removed from what some courts already do in utilising courtroom technology to enable the public gallery to see the evidence presented to a jury.

## **H CONCLUSION**

A court committed to facilitating public access to recordings of court proceedings may do so without relying on the media. It may enter into an agreement with a public broadcaster to ensure a reliable and comprehensive coverage. The Supreme Court of Canada and the Supreme Court of Washington State are two successful examples of this option. Alternatively, or in addition, a court may record its own proceedings for streaming on its website. It may also choose to make such footage available to the media in order to promote media coverage of the proceedings. The Florida Supreme Court provides a proven precedent of this option.

The streaming of proceedings by courts provides a means of broadcasting proceedings which has been found to be acceptable even to courts otherwise reluctant to permit television networks to record and broadcast proceedings. Streaming clearly removes the need for courts to rely entirely on media interest and capacity for specific proceedings to be broadcast, ensures that the public may access archived recordings of proceedings at any time, eradicates concerns relating to disruptive recording, selective, sensationalist or misleading coverage, enables the public to view entire, unedited proceedings, and most importantly enables the court to retain control of the recordings. As Justice Spigelman observed, in outlining the difficulties of removing prejudicial material from the internet when juror access to such materials would be prejudicial: 'One area within the control of the Court is its own website'.<sup>110</sup>

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<sup>110</sup> See discussion of how Australian courts currently deal with prejudicial material on the internet in The Hon JJ Spigelman AC, 'The Internet and the Right to a Fair trial' (Address to the 6<sup>th</sup> World Wide Common Law Judiciary Conference, Washington DC, 1 June 2005) <[http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches\\_index#cj](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches_index#cj)>.