Electronic Publication of Court Proceedings

Report – April 2016

SUPREME COURT
OF QUEENSLAND

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INTRODUCTION

1. The judges of the Supreme Court of Queensland published an Issues Paper to encourage discussion about the electronic communication of court proceedings.[1] This includes televising proceedings by traditional broadcast media, live-streaming and internet broadcasting.

2. The purpose of the Issues Paper was to assist the judges in their collective deliberations about what changes, if any, should be made by the Court to its current processes, and to assist individual judges to identify issues that may arise on any future occasion when an application is made to have "cameras in the courtroom" and to broadcast what is recorded.

3. Most submissions received in response to the Issues Paper opposed the electronic communication of court proceedings. The general view of those organisations and individuals who prepared submissions is that there is little evidence that broadcasting court proceedings will greatly enhance public awareness and understanding of the courts and the justice system.

4. Those respondents who opposed the recording and publication of court proceedings were concerned about the risk that it would compromise the administration of justice and not lead to any significant increase in public understanding of particular proceedings or the justice system in general.

5. Those respondents who favoured the recording and publication of court proceedings focused upon the principle of open justice and the potential for improved accuracy of reporting. They argued that the risks to the administration of justice identified in the Issues Paper did not outweigh the benefits to the public of broadcasting court proceedings.

6. The judges greatly appreciate the time and trouble to which individuals and organisations went in making submissions, and have benefitted from reading them.

7. Any changes to current practices should be governed by the fundamental principles discussed in the Issues Paper, which were not contested in submissions. These principles are restated below.

8. Any changes should also be informed by practical considerations, including the likely demand by the public to view most proceedings. Significant public resources would be required to record and regulate the broadcasting of proceedings in general.

9. Many cases in the superior courts are of no real interest to the general public. Few members of the general public attend them, the media do not report them and it seems unlikely that more than a few members of the general public would wish to view them if they were live-streamed. The resources required to establish a system to record and live-stream all proceedings and to apply appropriate restrictions on what is communicated to the general public cannot be justified in the light of anticipated demand.

10. The matters discussed in the Issues Paper and in submissions require possible changes to be considered on the basis of both principle and pragmatism. They do not suggest some simple rule which applies to all kinds of proceedings which are currently heard in open court. Different issues arise for different kinds of proceedings (trials, proceedings with juries, sentencing and appellate hearings).

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[1] Supreme Court of Queensland, *Electronic Publication of Court Proceedings*, Issues Paper – June 2015.

11. After restating certain fundamental principles and the position which currently applies in Queensland and some other jurisdictions, this report addresses concerns about the effect, on various participants in the justice system and the system in general, of recording proceedings and communicating what is recorded to the general public. It also discusses what can be done to avoid or minimise certain risks.

12. Having discussed legitimate concerns and what can be done to address them, the report considers whether the electronic communication of particular proceedings, subject to appropriate safeguards, is likely to significantly increase:

- public knowledge of particular proceedings;
- the accuracy of reporting; and
- public understanding of the judicial system.

It considers whether any benefits are likely to outweigh identified risks.

13. Finally, the report discusses other measures which will improve public knowledge about proceedings and the courts, and the accuracy of reports.

BACKGROUND TO THE REPORT

14. The Electronic Publication of Court Proceedings Committee was formed in September 2014 by a meeting of the judges of the Supreme Court. The Committee is chaired by Justice Margaret McMurdo, President of the Court of Appeal. Its other members are Justices Fraser, Atkinson, Martin and Applegarth. Because of the implications of the Committee's work for the District Court, and to obtain additional perspectives, the Chief Judge of the District Court was invited to nominate two District Court judges to attend Committee meetings. Chief Judge O'Brien and Judge Rafter SC did so and contributed greatly to the Committee's deliberations. The Committee met regularly and benefited from the research assistance provided by the associate to Justice Fraser, Ms Courtney Coyne, and the associates to Justice Applegarth, Ms Rebekah Oldfield (2015) and Mr Jack Siebert (2016).

15. The Committee consulted relevant academic research and considered the findings of similar reviews undertaken by other courts, principally in Scotland and New Zealand. Information was sought from judicial and court officers in jurisdictions that permit some form of recording and broadcasting of court proceedings.

16. An Issues Paper was published in June 2015. Submissions were sought from the general public, and from organisations and individuals with a known interest in the topic. Twenty-two submissions were received, principally from government departments, the legal profession and media organisations.

17. While the Issues Paper posed specific questions for consideration, most submissions addressed only those points relevant to the particular work of the organisation or individual. As such, the submissions do not lend themselves to a statistical breakdown. The approach taken in this report is to summarise broadly the submissions received and note any evident trends in the recommendations made by respondents.

18. This report was drafted by the Committee, and discussed and approved by a meeting of the Judges of the Supreme Court.

FUNDAMENTAL PRINCIPLES

19. The chief object of the courts is to ensure that justice is done according to law.[2] Associated with this aim are two important principles:

- The right to a fair trial; and
- The principle of open justice.

The right to a fair trial

20. The right to a fair trial extends to all parties to proceedings – plaintiffs and defendants in civil proceedings and the prosecution and the defence in criminal proceedings. It is protected by the law of contempt which governs conduct both inside and outside the courtroom. The right to a fair trial is protected by rules and practices which preserve order in the courtroom and which protect against prejudice by outside influences. Infringements of an accused's right to a fair trial, including prejudicial publicity, may lead to the adjournment of trials and to mistrials. Delays caused by those disruptions can have a devastating effect on accused persons and their families (particularly if an innocent person is held in custody pending trial), on witnesses and on victims. In extreme cases, prejudicial publicity may lead to a permanent stay of proceedings because a party is unable to obtain a fair trial.

21. The right to a fair trial may be affected if undue pressure is placed upon parties, witnesses and other participants in a proceeding. For example, if a witness is inhibited from giving evidence or in giving evidence, the quality of justice is affected, and an injustice may be the result.

The principle of open justice

22. Justice must not only be done; it must be seen to be done.[3] The principle of open justice is one of the most fundamental aspects of the justice system in Australia. Exceptions to the principle are few and are strictly defined.[4]

23. The courts have treated the right to report as an adjunct of the right to attend court.[5] In other words, the media acts as "the eyes and ears" of the general public.[6]

24. The principle of open justice ensures that courts are open to public scrutiny. It also enables the public to understand what happens in courts, the procedures by which justice is administered according to law and how justice is done in a particular case. By educating and informing the public about the administration of justice, public confidence in the court system is maintained. Fair and accurate reporting of proceedings helps avoid misunderstandings about what happens in courts, including misunderstandings fostered by fictional accounts of court cases and by individuals who misrepresent how the courts operate.

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2 *Scott v Scott* [1913] AC 417 at 437.

3 *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495 at 520.

4 *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10 at 44–45; *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at [17]–[20].

5 *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267 at 279.

6 *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 183.

Competing Interests

Privacy and the protection of witnesses

25. The principle of open justice means that information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment or distress.[7] However, this does not mean that parties and witnesses do not deserve protection. Appropriate protection of parties and witnesses is necessary to ensure a fair trial. A recent New Zealand report stated:

> "It is crucial to a fair trial that both the prosecution and defence are able to call what witnesses they say are relevant to their case without the possibility of extended media coverage dissuading such witnesses".[8]

26. That report, and others like it, have recognised that some witnesses facing the prospect of being filmed and their image being shown on television or in a still photograph will be discouraged from giving evidence. This concern was expressed by the Chair of the New Zealand Human Rights Review Tribunal ("NZHRRT") who said:

> "The experience of the Human Rights Review Tribunal is that most witnesses find giving evidence nerve racking and the presence of a camera can be a dangerous distraction. Dangerous in that the ability to concentrate on the questions being asked and on the accurate recollection of events can be jeopardised. In addition, the giving of evidence is for most witnesses a very personal affair. The discomfort of being photographed or filmed while giving evidence and the later publication of those images is seen as a serious invasion of their 'privacy'. Taking these interests into account is not inconsistent with open justice."[9]

27. A similar sentiment was expressed in a recent Scottish review of the policy of recording and broadcasting court proceedings.[10] In discussing the filming of criminal proceedings at first instance, it identified the risk that witnesses might become less inclined to engage with the process or reluctant to give evidence in the knowledge that they are being filmed, or that the quality of their evidence might be adversely affected. One respondent to that review remarked that for some witnesses:

> "The possibility of being filmed … could add strain and anxiety to an already difficult situation."[11]

28. Existing laws provide for the protection of special categories of witnesses, including children and victims of sexual offences. In rare cases, for example, blackmail cases, police informer cases, some extortion cases and some cases involving national security, exceptions are made to the principle of open justice and non-publication orders are made. These exceptions are made not so much to protect the privacy of individuals but to encourage witnesses to come

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7 *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10 at 45.

8 Courts of New Zealand, *Draft Report to Chief Justice on In-Court Media Coverage* ("New Zealand Report"), [132] http://www.courtsofnz.govt.nz/In-Court-Media-Review.

9 New Zealand Report, [131] quoting Rodger Haines QC, "Submission to the Consultation Paper on In Court Media Coverage", [2].

10 *Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and the Use of Live Text-Based Communications from Court* ("Scottish Report"), http://www.scotland-judiciary.org.uk/25/1369/Report-of-the-Review-of-Policy-on-Recording-and-Broadcasting-of-Proceedings-in-Court--and-Use-of-Live-Text-Based-Communications.

11 Ibid, [4.2.1.] quoting Victim Support Scotland, "Submission to Cameras and live text-based communication in the Scottish courts: a consultation", [5a].

forward in cases of that type.[12] Well-established exceptions to the principle of open justice recognise that it is in the public interest, and in the interests of the administration of justice, for witnesses not to be discouraged from giving evidence.

29. Leaving aside vulnerable witnesses and other witnesses who have such a high claim to the protection of their privacy as to justify non-publication orders, a broader public interest exists in not discouraging witnesses from giving evidence, and in not adding to their anxiety when they do. As a result, reviews in other jurisdictions have recommended different practices. These include preventing the filming and photographing of witnesses entirely and according any witness the right to be protected in the form of, for example, facial and voice anonymization, if requested.

Jurors

30. Trial by jury is a fundamental feature of criminal proceedings in the Supreme and District Courts. Jurors perform a vital public service. The *Jury Act* 1995 (Qld) and the courts provide protection against the unnecessary disclosure of the identities of jurors. Any system for the electronic publication of court proceedings must protect jurors from unwanted and unnecessary publicity.

Citizens in the public gallery

31. Presently, citizens exercise their right to attend open court proceedings on the basis that their presence in court will not be filmed or photographed, and then communicated to the general public. Whilst their presence in court and in the precincts of the court is not a private matter, they have interests worthy of protection and should not be deterred from exercising their rights as citizens to observe court proceedings. The filming of citizens while seated in the public gallery, for example, may give the false impression that they are associated with a party in a proceeding. Media guidelines in New Zealand prohibit filming or photographing members of the public in court.

Confidential information

32. On occasion, highly confidential information, including trade secrets and commercially confidential information, is the subject of evidence in proceedings. Exceptions are made to the open justice system by requiring such evidence to be given in closed court or for there to be non-publication orders.

Other matters heard in closed court or the subject of non-publication orders

33. In exceptional circumstances courts will make non-publication orders to protect the administration of justice. Non-publication orders are rare in Queensland courts, but are sometimes made to ensure a fair trial in another pending proceeding. There are many other examples of circumstances in which it is contrary to the public interest and the administration of justice for certain evidence or the identity of a witness to be published. Any system governing the broadcasting or live-streaming of proceedings must take account of the fact that sometimes proceedings need to be closed or non-publication orders made. Without appropriate safeguards, including the monitoring of recordings and broadcasts and delays in the publication of audio-visual recordings, non-publication orders may be completely undermined.

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[12] *R v His Honour Judge Noud; ex parte MacNamara* [1991] 2 Qd R 86 at 106.

Competing interests: summary

34. Any system for the electronic publication of court proceedings must reconcile the right to a fair trial and the principle of open justice, while also taking other interests into account.

35. Under existing laws and practices, courts are called upon to resolve the tension which exists between the right to a fair trial and the principle of open justice. The introduction of cameras into the courtroom, which then may be used to broadcast proceedings on television networks or to live stream proceedings, will increase this tension.

36. This introduction to some of the fundamental principles and the variety of interests which may be affected by the general publication of recordings of court proceedings, suggests the need for care in introducing new systems to communicate proceedings and the potential complexity of associated rules and guidelines.

THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE MEDIA

37. Responsible media outlets and professional journalists play an essential role in supporting the principle of open justice and in educating the public about the court system. Because of the role of the media in publicising court proceedings, "a symbiotic relationship between the courts and the media is necessary".[13] The working relationship between the judiciary and the media which report court cases is not always an easy one. The focus of a judge's work is to ensure that justice is done in a particular case and the parties to a proceeding are given a fair trial according to law. The focus of the media is on providing information, and sometimes entertainment, to viewers, listeners and readers. As a recent New Zealand report observed:

> "… there remains a tension between the goal of film in improving public understanding of the courts and objectively informing the public about court cases, and the commercially driven imperatives of the media."[14]

38. Queensland judges attempt to facilitate the fair and accurate reporting of proceedings. As explained below, the prohibition that relates to the recording and broadcasting of courtroom proceedings does not extend to "electronic real-time text-based communications and social media" by accredited media. The use of electronic devices in courtrooms is governed by Practice Directions of the Supreme and District Courts.[15] In some high-profile cases, the court has arranged for separate media rooms and the live-streaming of audio-visual recordings to them and to facilities in other towns at which members of the public have the opportunity to follow the proceedings.

39. Because judges are committed to the principle of open justice and the media has an interest in reporting proceedings, courts and the media have a shared interest in the reporting of court proceedings. However, on occasion, tension develops between courts and the media (including users of social media) if the right to a fair trial is threatened, if proceedings are unfairly or inaccurately reported, or if other conduct threatens the administration of justice.

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13 New Zealand Report, [4].

14 Ibid.

15 Supreme Court Practice Direction No 8 of 2014; District Court Practice Direction No 10 of 2014.

INTERNATIONAL INSIGHTS

40. The International Association of Judges (IAJ) has Study Commissions that are composed of delegates from national associations and which deal with a range of matters. In 2014, a study commissioned into judicial administration and the status of the judiciary produced a questionnaire on "Media (including social media) in the Courtroom and Effect on Judicial Independence".[16]

41. The national questionnaire responses formed the basis of discussion at the IAJ Meeting held in Brazil from 9 to 13 November 2014. The delegates considered the media in three different categories:

    a. written press (newspapers);

    b. broadcast media (radio and television); and

    c. various forms of social media (Twitter, Facebook, blogging etc.).

42. The delegates identified the following problems as common to all three media categories:

    a. inadequate training of journalists;

    b. a lack of trust between the media and the judiciary;

    c. inaccurate and/or biased reporting;

    d. an attitude that the judiciary as an institution should speak only through their judgments and decisions;

    e. infringement on the privacy of parties, witnesses, jurors and protected evidence (such as trade secrets, financial data); and

    f. potential influence of and diminution in respect for judicial proceedings.[17]

43. In considering solutions to these problems, the delegates had regard to the considerations laid down in the Madrid Principles on the Relationship between the Media and Judicial Independence.[18] It was noted that both the judiciary and the media have obligations with regard to court reporting. The judges have a responsibility to recognise and give effect to freedom of the media by applying a basic presumption in favour of full access by the media and permitting only such restrictions as are authorised by the *International Covenant on Civil and Political Rights* ("ICCPR") and as are specified in particular laws of the respective countries. The media has an obligation to respect the rights of individuals protected by the ICCPR and to respect the independence of the judiciary.

44. The delegates acknowledged that many countries currently have rules and regulations prohibiting or limiting some or all forms of media in the courtroom and sometimes limiting

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16 For the responses to this questionnaire, see: http://www.iaj-uim.org/?document-argument=&document-author=&document-year=2014&document-type=report-for-the-1st-study-commission&document-nation.

17 International Association of Judges, *Report and Conclusions of the 1st Study Commission* (2014).

18 See also amongst others, Opinion No. 7 of the Consultative Council of European Judges (CCJE); The Bangalore Principles of Judicial Conduct, ch. 28, 44, 74, 75; Recommendation CM/Rec (2010) 12 of the Committee of Minister to member states of the Council of Europe on judges: independence, efficiency and responsibilities, annex chs. 19 and 40; Opinion no. 3 of the CCJE, ch. 50; Mt. Scopus Approved Revised International Standards of Judicial Independence, ch. 6.2.

reporting on cases that are in progress. These are often administered on a case-by-case basis with the direct involvement of the presiding judge. With these considerations in mind, the Study Commission articulated the following principles and recommendations to improve relationships with the media:

a. The judiciary acknowledges the important role the media plays in a democratic society in conveying information about court proceedings and court-related matters to the public.

b. The judiciary could offer to be involved in informing journalists about general matters of court procedure and administration, and general issues of substantive law.

c. The judiciary should use state of the art communication strategies and methods to convey accurate information regarding the role of the judiciary in society and, when allowed by law, the nature of specific judicial proceedings (for example, this could include court press officers, who may be judges not connected with a particular case, press releases that may be issued at appropriate times during proceedings or after a case is concluded, and the use of social media by the courts).

d. The judiciary should offer help to establish and foster mechanisms outside the judiciary for addressing problems with the media such as sloppy or inaccurate reporting. This could include encouraging the establishment of a separate commission that works with the media or an ombudsman to help resolve such problems.

COURTS AND THEIR COMMUNICATION WITH THE PUBLIC

45. Proposals for "cameras in the courtroom" should be viewed in the broader context of developing practices to ensure that the public is accurately informed about the work that courts do, the justice system in general and particular proceedings which are open to the public.

46. Some of the matters raised by the IAJ concern broader issues about how courts convey accurate information about the role of the judiciary in society and, when allowed by law, the nature of specific judicial proceedings. Many Australian courts facilitate the provision of accurate information to the media and the general public through court communication officers who act on behalf of the judiciary and in accordance with guidelines for the media which are approved by the judges. For example, the Supreme Court of Victoria has a Media Policies and Practices document which facilitates dealing with the media.[19] The policies and practices contained in that document are designed to facilitate full and accurate reporting of what the court does, and to further the community's understanding of the court's function and its work. The County Court of Victoria has similar guidelines for the media, which were published in March 2015.[20] Some courts also have their own websites and Twitter accounts.

47. The issue of how courts better communicate with the general public has been the subject of books and articles by respected academics, conferences and seminars.[21] A recent paper by Judge Judith Gibson entitled "Social Medial and the Electronic 'New World' of Judges" canvasses issues about how courts might use social media to communicate with court users

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19 Supreme Court of Victoria, "Media Policies and Practices" (2014).

20 County Court Victoria, "Guidelines for the Media" (March 2015).

21 P Keyzer, J Johnston and M Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media*. (Canberra: Halstead, 2012); J Johnston, *Setting the Table Doesn't Mean the Guests Will Come to Dinner: Televised Courts in Australia* (International Communication Association, 2005); Jane Johnston, "Communicating courts: a decade of practice in the third arm of government" (2005) 32(3) *Australian Journal of Communication* 77.

and others.[22] These are large issues and beyond the scope of this Report. They raise fundamental concerns about the use by courts of interactive forms of communication. However, the broader issue of how courts communicate with the general public raises the issue of whether the public can be better informed about proceedings and educated about the justice system by means other than the introduction of "cameras in the courtroom" and the broadcasting of audio-visual images to the general public.

48. Some respondents submitted that the public resources associated with having "cameras in the courtroom" and monitoring the material which is recorded before it is broadcast could be better spent on alternative means to inform and educate the public. This report returns to the topic of alternative means to inform and educate the public in its final section.

CURRENT POSITION IN QUEENSLAND

49. The electronic recording of court proceedings is generally not permitted. Exceptions exist, for example, when approval is given to record and broadcast ceremonial occasions. The use of electronic devices in courtrooms is governed by Supreme Court Practice Direction No 8 of 2014 and District Court Practice Direction No 10 of 2014 which are in identical terms ("the Practice Direction"). The broadcasting of image and sound recordings of Queensland court proceedings is prohibited, with exceptions, by that Practice Direction. The use of electronic devices[23] in any courtroom is prohibited unless permitted by the judicial officer or the Direction. The Practice Direction goes on to specifically prohibit the use of electronic devices to "take photographs or video images" or to "record or digitally transcribe" court proceedings.

50. The prohibition that relates to the recording and broadcasting of courtroom proceedings does not extend to the use of "electronic real-time text-based communications and social media", such as Twitter and Facebook, by accredited media.[24] This permission, however, is granted only to the extent that it does not interfere with or interrupt the proceedings,[25] and that court reporting laws are adhered to.[26]

51. Under the Practice Direction accredited media may make a private audio recording for the purpose of ensuring the accuracy of subsequent reporting. This audio content must not be published or broadcast.

52. Live-streaming of court proceedings within or between court precincts has taken place on occasions. For example, 'overflow courts' for high-interest matters are used as additional public galleries with the recording from the main court being live-streamed into another courtroom. Proceedings are occasionally live-streamed between different courthouses, for example proceedings in the Patel trial in Brisbane were transmitted by CCTV to Bundaberg.

53. Various Acts restrict or prohibit the identification of certain parties, for example, the identity of victims of sexual offences through publication of those details to the general public.[27]

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22 The Hon Judge J Gibson, "Social Media and the Electronic 'New World' of Judges" (2016) 27(2) *International Journal for Court Administration* 1.

23 An "electronic device" is defined as "any device capable of sending, receiving or recording data or any combination of those functions": Practice Direction, [3(c)].

24 "Accredited media" are those media personnel "who are accredited pursuant to the Supreme Court's *Media Accreditation Policy*": Practice Direction, [3(a)].

25 Practice Direction, [8].

26 Ibid, [9].

27 *Criminal Law (Sexual Offenders) Act* 1978 (Qld), s 6.

JUDICIAL CONTROL OF IN-COURT RECORDINGS

54. Courts should control the audio-visual recording of court proceedings because of its potential to imperil a party's right to a fair trial and to prejudice other important public interests, such as the protection of vulnerable witnesses. An academic commentator who has written extensively in this field, Associate Professor Stepniak, considers that retaining this control is necessary in order to minimise any potential detrimental effects of publication and to ensure that the benefits of publishing proceedings are attained.[28]

55. The notion that the court should control audio-visual recording of court proceedings does not necessarily mean that courts will undertake the recording, let alone the editing, of what is recorded. To do so may impose very substantial burdens on courts, judges and court staff. Further, it would be inappropriate, distracting and foreign to the judicial function for a judge to assume the role of a producer or editor in deciding what part of a day's recording should be included in that night's television news.

56. Judicial control over the audio-visual recording of proceedings does mean, however, that the conduct of the media and others in recording court proceedings, and in communicating what is recorded, will be governed by guidelines and agreed practices and be subject to orders of individual judges in particular proceedings. The New Zealand In-Court Media Coverage Guidelines do not have legislative force, do not create rights and are not to be construed to create expectations.[29] They reiterate that all matters relating to in-court media coverage are at the discretion of the court.

57. Placing the audio-visual recording of court proceedings under the control of the courts may be said to create an appropriate and flexible system by which to facilitate the fair, full and accurate reporting of proceedings and to advance the community's understanding of the courts. Such a system is better able to respond to technological and other developments in the media, including social media, than legislation which may become outdated and ill-suited to contemporary needs and the interests of justice in a particular case.

58. The submissions received in response to the Issues Paper supported the principle that courts should control in-court recording of their proceedings.

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[28] D Stepniak, *Audio-Visual Coverage of Courts: A Comparative Analysis* (Cambridge: Cambridge University Press, 2008) 316.

[29] See further, New Zealand Media Guide for Reporting the Courts and Tribunals: Edition 3.1 – Appendix C ("New Zealand guidelines").

OPPORTUNITIES AND PERCEIVED PROBLEMS

59. The electronic publication of court proceedings is one means of increasing community engagement with the justice system and educating the general public about the work of the courts. Advocates of the electronic publication of court proceedings argue that the increased use of technology promotes "transparency" in the justice system and public confidence in the courts. They also argue that a failure on the part of the court to use the technology available to it could isolate the justice system from sections of the public, and inhibit the efficient and effective delivery of justice.

60. Dr Pamela Schultz OAM, who has written extensively about the challenges courts face and "discourses of disapproval", submitted to the Committee that courts are "on trial", and must be in control of the information that is available to the public. The recommendations in her submission include:

- Courts being in control of media releases and being aware of modern media practices and aspects of the 24 hour media cycle;
- Courts working hard to explain their work;
- The appointment of a "Press Judge", being a retired, highly-respected person who can explain the basics of what happens in courts and why; and
- Courts considering having their own channels for live-streaming so that "cherry picking of comments made in courts can be prevented by the courts being seen by the general public as they would if they attended personally."

61. As for the problems of "cherry picking", Lord Neuberger, the President of the Supreme Court of the United Kingdom, has stated that inaccurate and unfair reporting in order to make a good story is an abuse of the freedom of expression accorded to the media and undermines the rule of law. He continued:

> "Of course, one cannot be too precious in one's definition of 'inaccurate' or 'unfair' in this context. Journalists reporting on a court decision are almost always bound to simplify what a judge has said: it would be impossible not to do so. But journalistic licence goes further than that: it is unrealistic not to accept that there will be a degree of exaggeration, one-sidedness, even 'spin' in newspaper reports of some controversial cases."[30]

62. Professor Mark Pearson of Griffith University observed in his submission that concerns about selective reporting have been expressed by politicians and judges in the centuries since the media first took on the role as the Fourth Estate in a democracy. Complaints about sensationalised or inaccurate reporting are said to be the price for media freedom in systems where editors and news directors, rather than politicians and judges, decide upon the newsworthiness of a story. Professor Pearson noted that there are numerous devices available to the courts to address the potential for sensationalised or inaccurate reporting, including contempt of court, the loss of fair and accurate reporting defences in defamation actions and the withdrawal of reporting privileges. Professor Pearson proposed what he described as a relatively cheap and simple system to enable all citizens who might enter a courtroom in public session in the Supreme Court to be able to tune in online to the same proceedings, and for such recorded material also to be available for the mainstream media.

[30] Lord Neuberger, "The Third and Fourth Estates: Judges, Journalists and Open Justice", Speech delivered to the Hong Kong Foreign Correspondents' Club, 26 August 2014.

He proposed:

- The installation of inexpensive webcams in all courtrooms showing only the judge;
- The live-streaming of all courtrooms, using a single camera angle to a designated court website which citizens can access;
- The introduction of measures to halt live-streaming, based on the judge's decision.

Professor Pearson submitted that any concern at the potential for the selective recording and rebroadcasting of any material could be avoided by an on-screen warning asserting copyright in the material and the condition that it "not be recorded or rebroadcast without the permission of the presiding judge". A system which allowed the judge control of the live-streaming of material was said to enable citizens, both in the physical courtroom and in the virtual one, to view proceedings which are held in open court, "with all the ensuing public benefits of education and allowing justice to be seen to be done".

63. The New Zealand Report did not address live-streaming. Its review was of the system which allows television cameras to record proceedings. It commented in its draft report to the Chief Justice of New Zealand:

> "In our view the case for cameras in court has become stronger in the digital age. New Zealanders are now familiar with the concept of being filmed and recorded, in public and private places. Digital information of public interest is instantly shared in our community. We consider there is force in the proposition that the justice system runs the risk of becoming out of step with the expectations of the public, and therefore less meaningful to those who might otherwise engage with the court system, if the public cannot see the operation of the courtroom unless they go to court. We have the technology to transport members of the public into the courtroom."[31]

64. The Report stated that the most important practical reason for introducing cameras and recording in New Zealand courts "is that it takes the pressure off parties when outside the court".[32] It wrote:

> "If the media do not have the opportunity to record and take photographs in court, the 'media scrum' frenzies outside the court seen in the 1980s and early 1990s, before extended coverage, might resume. Occasionally they have resumed, and have been checked by the proposed withdrawal of in-court privileges."[33]

The issue of facilitating access by parties and witnesses and the problem of a "media scrum" forming in the immediate precincts of the Supreme and District Courts in Brisbane was addressed by Practice Direction 17 of 2014. Its purpose is to ensure the safe and orderly entry into, movement within, and exit from the Supreme Court precincts at Brisbane by all persons and vehicles.

65. The Report did not recommend any fundamental change to the In-Court Media Guidelines which were revised in 2012. It concluded that the audio-visual recording of New Zealand court proceedings facilitated a more open and accessible court system for the New Zealand public. It identified a number of issues which required attention, including an increased role for the Media and Court Committee in monitoring

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31 New Zealand Report, [76].
32 Ibid, [78].
33 Ibid.

compliance with existing guidelines. It proposed an ongoing investigation of fixed cameras and live-streaming.[34]

66. Some of the issues raised in both the New Zealand Report, and in its earlier Consultation Paper, and the similar reports produced by the Scottish Judicial Committee, identify concerns about the recording and publication of courtroom proceedings, particularly by television stations. Critics contend that this leads to "sound bites that concentrate on prurient or sensational material".[35] This is said to exacerbate the tendency to "catch attention rather than provide balanced reporting".[36] This does not help the public understand how courts work, and may, in fact, further perpetuate myths about court processes and the types of matters that are heard.[37]

67. Critics of televising court proceedings include leaders of the legal profession in this country and abroad.

68. In its submission to the New Zealand Panel, the Bar Association of New Zealand suggested that many of its members considered that the effect of in-court media coverage "is to trivialise, to focus on the sensational and the best sound bites".[38] This was said to be happening more frequently than at any earlier time. The Bar Association submitted that "far from seeing how a court case proceeds, what the in-court media coverage shows is selective sound bites and out of context exchanges, selected by the media deliberately for dramatic effect and ratings rather than public education or balanced presentation".

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

70. A leading English barrister, Baroness Helena Kennedy QC, has stated:

> "Television is constantly looking for new terrain to inhabit, but it seeks the salacious and the sensational, not the arcane arguments of the highest court. It wants the sight of a celebrity in the dock. It wants the image of Stuart Hall being sentenced for sexual offences."[39]

Her concerns were based on a distrust of the commercial imperatives of the owners of media organisations and the potential impact on victims, defendants, witnesses, jurors and other participants in court proceedings.

71. In 1995, the *New Zealand Law Journal* commented:

> "TV is not merely a neutral eye … The camera is selective … What the viewer sees is not what he or she would see had they been there … It is the nature of the TV medium in a technological sense, although it can be and often is, also affected by

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34 Ibid, [5].

35 Courts of New Zealand, *In-Court Media Coverage – A Consultation Paper* ("NZ Consultation Paper"), [63], http://www.courtsofnz.govt.nz/In-Court-Media-Review.

36 Ibid.

37 A Finlay, "Televised Court Proceedings: The Relationship between the Media, Punitive Public Perceptions and Populist Policy" (2010) *Flinders Journal of History and Politics* 26, 71.

38 New Zealand Bar Association, "Submission to Media Review Panel", [7].

39 Helena Kennedy, "Cameras in court are a threat to justice" *The Guardian* (4 November 2013, London) http://www.theguardian.com/commentisfree/2013/nov/03/cameras-in-court-threat-justice.

> the preferences, prejudices and ideological or political views of the producer. A 'televised trial' is like confusing a slice of ham with a pig, without realising that one is a dead, partial and *processed* version of the living other."[40]

72. A commentator in *The Washington Post* observed that the presence of video cameras in courts alters reality:

> "The pen may be mightier than the sword – and a picture may be worth a thousand words – but video cameras alter reality. Their very presence changes the people and events they seek to capture. And, just to keep those clichés rolling, although seeing is believing, what we project for others to see is influenced – and reality is altered – by the fact that a camera is recording that projection. … When lawyers and witnesses hear their own performances critiqued – and evidence is evaluated by one of the legions of former prosecutor-turned-experts – suddenly the audience is directing the play."[41]

73. Another criticism of allowing broadcasters to televise selected trials is that it does not provide a true coverage of the work of the courts. The New Zealand Consultation Paper captures this point as follows:

> "Most court matters are just too dull. In those that are newsworthy the coverage is often too short and too focused to give the public much of a view of the work of the courts."[42]

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

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

76. Respondents to the Issues Paper who supported the recording and communication of court proceedings argued that increased public knowledge and understanding of the work of courts can contribute to improved community confidence in the justice system. It permits those who are unable to attend court in person to view proceedings. This is beneficial, particularly to persons in regional areas and for practitioners with "watching briefs". Because proceedings generally are open to the public, they argue that there should be a presumption in favour of their communication by way of broadcasting or live-streaming. Live-streaming or timely access to unedited recordings is said to be the best means to promote accurate reporting, and to counter misinformation.

77. Other respondents, by contrast, argued that it is unlikely that those who do not currently have an interest in court proceedings will take up any opportunity offered by internet broadcasting or live-steaming on a court network. They submit that the public will probably continue to consume information about proceedings through mainstream media. They also contend that broadcasting proceedings will not necessarily lead to a significant enough increase in community confidence to outweigh associated risks.

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40 Editorial, "Televising Trials" [1995] NZLJ 101 at 102 (emphasis in original).

41 K Parker, "Trial TV presents an altered reality" *The Washington Post* (9 July 2013, Washington DC).

42 NZ Consultation Paper, [71].

78. Any new system for the recording and broadcasting of proceedings would need to control the content of broadcasts of certain proceedings, including those involving vulnerable witnesses, sexual offences or horrific evidence. Typically in trials, counsel and judges refer to the names of witnesses, including victims and vulnerable witnesses, such as children. This is natural and the use of pseudonyms or "Witness X" designations would have the potential to complicate and confuse. As a result, opening and closing statements by counsel and a trial judge's summing up could not be broadcast if to do so disclosed the identity of victims or vulnerable witnesses whose identity should not be disclosed to the general public because of a statutory or other prohibition. In cases involving sexual offences and vulnerable witnesses, this would severely restrict the content of counsel's statements and the summing up which would be permitted to be broadcast. The simpler course, which accords with the recommendations of the Scottish Report, would be for cases involving children, sexual offences and vulnerable witnesses to not be recorded.

79. Many court proceedings include evidence that is horrible. This includes evidence about violent crimes, including images of horrifying injuries. Some restrictions on reporting control what can be published about some of these things, including the identity of certain victims. However, some of those restrictions do not prevent details of the evidence being reported to the general public, provided there is no identification.

80. Under present arrangements the media is generally free to report all of the evidence given in open proceedings, including horrific evidence, provided it does so fairly and accurately. However, in practice responsible journalists and editors show restraint in publishing unnecessarily distressing details. Obscene, horrific or unnecessarily distressing evidence is filtered from reports of the proceeding. No similar filter would exist upon the continuous telecasting or live-streaming of proceedings.

81. Horrific evidence is not confined to cases of sexual abuse. The problem of horrific details being unnecessarily published to the general public is not confined to coverage of trials and sentences. Many unsavoury details are necessarily canvassed at appeal hearings.

82. In oral evidence given to the House of Commons Justice Committee on 27 January 2015, the Lord Chief Justice of England and Wales, Lord Thomas, answered questions about the broadcasting of some Court of Appeal cases. His Lordship noted that the media had been asked not to put the detail of certain cases on public websites. Lord Thomas observed that in the context of a hearing before the Court of Appeal, one can organise a hearing and be quite careful. It was said to be much more difficult in a Crown court. Lord Thomas observed:

> "We want to make certain that we have thought through the problems before we move."

83. A similar need for caution arises in the electronic publication of court proceedings in Queensland. Courts should not unwittingly be involved in the unnecessary publication to the general public of obscene, horrific or unnecessarily distressing evidence.

84. The need for caution exists because of the risk of such evidence being communicated to vulnerable viewers, including children. Caution suggests a restriction on the live transmission of most, if not all, criminal trials and also of certain appeals, so as to guard against the unnecessary publication to the general public of obscene, horrific or unnecessarily distressing evidence, including reference to such evidence by counsel or the trial judge.

85. Some categories of cases, such as those involving sexual offences, children and other vulnerable witnesses, may be the subject of a prohibition on recording. In the remaining

cases there may be a need to limit certain types of evidence from being broadcast. Some categories of evidence are hard to define in advance in the form of a Practice Direction or guidelines. For example, concerns have been raised about the recording and broadcasting of horrific evidence. How is such evidence defined? Who is to raise the issue and when?

86. A practical issue arises in the case of delayed continuous broadcasting or near-contemporaneous news reporting as to the process by which horrific or unnecessarily distressing evidence is withheld from being broadcast. Should it fall to counsel for one of the parties to seek such a restriction? Should the trial judge be required to raise the issue? Such a process has the potential to distract counsel and judges from their important duties in the course of a trial.

87. One respondent cautioned that electronic publication of court proceedings may have ramifications that prejudice national security and investigations into criminal activity. The increased exposure that would be given to matters involving, for example, high-level police operations could result in criminals having a greater insight into investigation methodologies. Although such information is typically within the public domain, its electronic broadcast would increase the size of the audience viewing that information and the ease with which that information is available. Another respondent suggested that concerns about increased accessibility to certain information could be addressed by the wider use of non-publication orders, with parties at liberty to make pre-trial submissions about publication.

88. An increase in applications for non-publication orders comes at a cost. Should any non-publication orders be the subject of pre-trial rulings at which interested parties, such as media organisations, are entitled to make submissions by leave? If, instead, they are made in the course of a trial they may prove distracting and interfere with the efficient conduct of the trial. The hearing and determination of issues in relation to non-publication orders comes at a cost to the parties and also a cost to the public which funds courts, prosecution services and legal aid.

EXPERIENCES IN OTHER JURISDICTIONS

The Pistorius Case

89. The most significant recent example of the use of cameras in the courtroom is the *Pistorius* case in South Africa. Views differ about whether it was an advertisement for, or an indictment against, allowing criminal trials to be televised.

90. In response to a pre-trial application brought by major South African media outlets, Mlambo JP allowed the media to broadcast audio recordings of the full trial, and to televise parts of it, including opening arguments, the testimony of prosecution expert witnesses, police and assessors, and the evidence of other prosecution witnesses, unless they objected. Defence counsel opposed filming of the trial and the judge ruled that no defence witnesses could be filmed.

91. This was a controversial decision. Judge President Mlambo justified this ruling on the basis that it struck an appropriate balance between the competing "rights" of Pistorius and the "public". In reaching this conclusion, Mlambo JP noted that acceding to Pistorius' objection in its entirety would "jettison the noble objectives of the principle of open justice when one takes cognizance of our development in the democratic path" and considered that in "this day

and age [he could not] countenance a stance that [sought] to entrench the workings of the justice system away from the public domain."[43]

92. Whether the sought after balance was achieved is questionable. A different judge, who tried the case, Judge Masipa, remarked that the extent of the publicity and media coverage and particularly the "real-time" coverage of in-court proceedings had adversely affected the credibility of the testimony of many of the prosecution witnesses. Judge Masipa noted that almost every witness stated that they had followed the media coverage relating to Ms Steenkamp's death. In addition, a number of witnesses admitted that, upon hearing that they had been referred to in court, they had watched the relevant footage *before* giving their evidence.

93. Lord Thomas, the Lord Chief Justice of England and Wales, was reported in May 2014 to have ordered a full report on the impact on criminal trials of cameras in court, in the light of the *Pistorius* case. In October 2013, the Lord Chief Justice had allowed the broadcasting of cases in the Court of Appeal in London and in other centres. In a statement made before the House of Lords Constitution Committee, his Lordship advised that he had ordered a halt to any further moves to televise trials in England and Wales, in the light of the *Pistorius* case, pending a formal review.

Commissions of inquiry

94. Commissions of inquiry in Australia, New Zealand and the United Kingdom have allowed live-streaming of proceedings or the use of a camera in a hearing room with a direct feed to a media pool. A good example is the Leveson Inquiry in the United Kingdom into the "Culture, Practices and Ethics of the Press". The quality of recording and reporting depends on the number and quality of any fixed cameras, and the participants who a fixed or transportable camera are allowed to record.

95. Similar principles about openness and the need for public scrutiny of the conduct of proceedings apply to both courts and commissions of inquiry. However, some different considerations apply to the publication of their proceedings. Commissions of inquiry do not finally determine the rights and liberty of individuals. In addition, publicity of their proceedings may be necessary to inform the public about a matter of immediate, widespread public concern. Broader considerations about the public's right to be informed about matters of legitimate public interest arise and are not outweighed by the right to a fair trial in the proceeding which is being broadcast.

[43] *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* [2014] ZAGPPHC 37 at [22].

Australia

96. Courts in all Australian jurisdictions have admitted television cameras into their courtrooms on an *ad hoc* basis, but in many jurisdictions, including Queensland, this has only been for ceremonial proceedings. Specific guidelines dealing with electronic media coverage have been developed and implemented in Western Australia. They allow for the recording and broadcasting of court proceedings upon application to the presiding judge. Despite making provision for this, its use has been, at best, sporadic.[44]

97. The New South Wales Parliament enacted the *Courts Legislation Amendment (Broadcasting Judgments) Act* 2014 (NSW), which amended the *Supreme Court Act* 1970 (NSW) to allow for the recording and broadcasting of court proceedings. This enactment creates a presumption in favour of granting applications by the media to record and broadcast "judgment remarks" delivered in open court.[45] Despite this apparently liberal approach, the substance of what can be recorded and broadcast is very limited. The *Supreme Court Act* 1970 (NSW) defines "judgment remarks" as "in relation to a criminal trial – the delivery of the verdict, and any remarks made by the Court when sentencing the accused person, that are delivered or made in open court, and … in relation to any other proceedings – any remarks made by the Court in open court when announcing the judgment determining the proceedings."[46]

98. In New South Wales the recording is done by a camera which is supplied and operated by a television network for use by it and other networks. It is commonly described as a "pool camera". The camera simply films the judge reading from written sentencing remarks. As a result, the images are essentially the top of a judge's wig. It is questionable whether the broadcasting of those images adds greatly to the public's understanding of the court system or what was said in a particular case. Some would argue that, despite Atkinson J's refusal to allow television cameras to record her sentencing remarks in the *Cowan* case, those remarks were fairly and fully reported by professional journalists who were able to observe the sentencing hearing in person or by a live stream and report them almost immediately.

99. Televising of proceedings in the Supreme and County Courts in Victoria is rare, and then only in high-profile cases. For example, the Victorian Supreme Court recently allowed the live-streaming of a civil case involving a Formula One driver. It seems that only high-profile cases are likely to attract requests for them to be recorded for broadcasting purposes, as occurred with the decision of Middleton J in the Federal Court involving the Essendon Football Club and the Australian Sports Anti-Doping Authority.[47]

100. Since October 2013, the High Court of Australia has published audio-visual recordings of Full Court hearings online via an archive on the court's website.[48] These recordings are generally published a few business days after the hearing. In addition to these recordings, the court also provides access, again via its website, to detailed case-specific information, including the submissions of the parties and transcripts of oral argument.

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44 D Stepniak, *Audio-Visual Coverage of Courts: A Comparative Analysis* (Cambridge: Cambridge University Press, 2008) 239.

45 *Supreme Court Act* 1970 (NSW), s 128(1).

46 *Supreme Court Act* 1970 (NSW), s 127.

47 *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019.

48 http://www.hcourt.gov.au/cases/recent-av-recordings.

Canada

101. The Canadian experience with the broadcasting of court proceedings, though extensive, is mixed. Between 1993 and 1995 the Supreme Court of Canada ran a trial program allowing the recording and broadcasting of court proceedings. Since 1995, the court has permitted television coverage of all its hearings, however, there have been only a small number of applications from commercial stations to broadcast particular proceedings. In the main, these hearings are broadcast by the Canadian Parliamentary Affairs Channel[49] and, since 2009, have been webcast live on the court's website.[50] The court retains control over these proceedings through its published guidelines which not only specify that the court retains control over the process, but also the actual recording. This approach to broadcasting is based upon the view that it allows the "fundamental principle of great importance — the principle that the courts should be open, subject only to narrow and judicial exceptions."[51]

102. This preparedness to allow the recording and broadcasting of court proceedings does not extend to trials. As a general rule, both at the federal and provincial levels, trial courts do not permit their hearings to be recorded or broadcast where there are witnesses. This position can be attributed to the fear that televising proceedings does little to "foster the public confidence in the administration of justice", impinges upon the privacy of victims and witnesses and tempts witnesses, consciously or unconsciously, to "tailor their evidence to what the TV audience expects or how they wish to be seen".[52]

New Zealand

103. Following a successful pilot program, New Zealand has permitted the recording and broadcasting of court proceedings since 1999. Under that system, should a media outlet wish to record proceedings in court for broadcast either on radio or television, it must apply to the court. This application is then forwarded to the parties involved and, following the receipt of submissions, the application is determined by the trial judge. Any permission is regulated by the extensive guidelines which outline both how this footage is to be recorded and how it is to be distributed. New Zealand courts do not, however, publish or provide this footage on their own website or via a public broadcaster.

104. The Chief Justice of New Zealand recently commissioned and has received a draft report on "In-Court Media Coverage". The New Zealand Report reviews the existing guidelines and practices relating to cameras and recording in court. The draft report concludes that the presence of film recording, cameras and audio recording has "facilita[ted] a more open and accessible court system", but also has given rise to some procedural challenges. Ultimately it was considered that the present level of coverage was to be preferred over none at all, and no fundamental changes to the 1995 reforms or the guidelines are recommended. Greater accuracy and balance in reporting was desired by both the judges and lawyers.[53]

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49 A non-commercial channel, set up to provide coverage of parliamentary proceedings and committees and public hearings.

50 B McLachlin, "The Relationship between the Courts and the News Media", in P Keyzer, J Johnston and M Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Canberra: Halstead, 2012) 24, 32.

51 Ibid.

52 http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2012-01-31-eng.aspx; see also D Stepniak, *Audio-Visual Coverage of Courts: A Comparative Analysis* (Cambridge: Cambridge University Press, 2008) 162.

53 New Zealand Report, [5(a)]-[5(t)].

Scotland

105. In October 2012, in response to the "development of social media, the use of instant text-based communication and the broadcasting of proceedings before the UK Supreme Court",[54] the Lord President commissioned a review of the Scottish policy on recording and broadcasting proceedings in court and the use of live, text-based communications ("LTBC") from court. At that time, the broadcasting and publication of court proceedings was regulated by a practice direction, which overturned the previous absolute ban on the use of television cameras within the precincts of the court, and allowed the televising of appellate level proceedings in civil and criminal cases, subject to the approval of the presiding judge and, subject to the consent of all parties, the recording of proceedings, including at first instance, for use at a later date for educational or documentary purposes. A report on the findings of this review was published in January 2015. This report recommended:

- that the filming of civil and criminal appeals and legal debates in civil first instance proceedings should be allowed for live transmission, subsequent news broadcasting and documentary film-making;
- criminal and civil trials could only be filmed for documentary purposes, subject to restrictions where parties were particularly vulnerable; and
- filming of the delivery of sentencing remarks of the judge should be allowed, however the filming should focus on the judge.[55]

England and Wales

106. The United Kingdom Supreme Court has allowed its hearings to be broadcast since 2009 via a live-streaming service through Sky News and, more recently, through the uploading of videos of its members delivering opinions to YouTube.[56] The lower courts have not been as amenable to the use of cameras in their courtrooms, filming having been banned in all courts in England and Wales since 1925. In October 2013 this position was partially reversed and cameras are now allowed into the Court of Appeal for England and Wales.

107. In March 2016, the Justice Minister announced a three month pilot scheme to record sentencing remarks by judges in eight Crown courts in England and Wales. The films recorded in the pilot program will not be broadcast. Under the pilot program, cameras will film the sentencing remarks of nominated judges, but the filming of victims, witnesses, defendants, lawyers and court staff will remain prohibited. News organisations, Sky News, the BBC, ITN and the Press Association, which currently record proceedings in the Court of Appeal, agreed to support the pilot program at no cost to the public. The Lord Chief Justice said that he would work with the Ministry of Justice to see how the pilot scheme worked and to assess its impact.[57]

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54 Scottish Report, [1.2].

55 Ibid, [6.1]-[6.3].

56 Kyu Ho Youm, "Cameras in the Courtroom in the Twenty-First Century: the U.S. Supreme Court Learning From Abroad?" (2012) 6 *Brigham Young University Law Review* 1989, 1990.

57 Press Association, "TV cameras to be allowed in English and Welsh crown courts" *The Guardian* (20 March 2016, London) http://www.theguardian.com/law/2016/mar/20/tv-cameras-to-be-allowed-in-english-and-welsh-crown-courts-for-first-time.

United States of America

108. The filming and broadcasting of court proceedings is more common in the various State courts of the United States than in many other jurisdictions, including Canada and the United Kingdom. It is also more common than in the Federal Courts of the United States. Notably, the Supreme Court of the United States continues to refuse to allow any visual recording of its proceeding. Despite this complete prohibition on visual footage, the Supreme Court publishes audio recordings of all oral arguments on its website. These recordings are generally uploaded at the end of each sitting week.

109. The case against having television cameras recording hearings of the Supreme Court was powerfully articulated by Kennedy and Breyer JJ at a congressional hearing.[58] The judges were concerned about how televising proceedings might interfere with how judges interact with each other in testing arguments, allow questions and statements to be taken out of context for a "sound bite" on network television news and alter the way judges engage with counsel. Recently Kagan and Sotomayor JJ also expressed concerns that allowing cameras might lead to grandstanding that could fundamentally change the nature of the court. Justice Kagan was wary that "it might upset the dynamic of the institution" and was reported as saying:

> "If you look at different experiences, when cameras come into a place, the nature of a conversation often changes."[59]

110. Starting in September 1990, the United States Federal Judicial Conference authorised the running of a three year pilot program allowing electronic media coverage – filming, recording and broadcasting – of civil proceedings in trial and appellate courts in six federal districts. At its conclusion those carrying out this program recommended its continuation and expansion across all federal districts.[60] This recommendation however, was not followed by the Judicial Conference of the United States, which justified its position by reference to "the intimidating effect of cameras on some witnesses and jurors was cause for concern".

111. In 2011 a new, three year pilot program was authorised to be undertaken in fourteen federal districts. In this program, the cameras were to be operated by the courts, the consent of all parties was required and no filming of jurors was allowed. This program was extended. The data collection part of the pilot program concluded in July 2015. A report was published in March 2016. Though a relatively small study, it provided "a fair amount of information about providing visual recordings of courtroom procedures through court-operated cameras." The data collected indicated the following:

- The principal reason why parties declined to participate was out of a desire to preserve confidentiality and avoid publicity.
- Judges and attorneys generally considered that video recording had limited (if any) effect on jurors, witnesses, attorneys, and judges, though approximately a third of the judges who participated considered that it did distract witnesses to a moderate or great extent.

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58 CSPAN, "Justices Kennedy & Breyer on Cameras in the Supreme Court" (15 March 2013) https://www.youtube.com/watch?v=8cRDBVxdJIY.

59 Associated Press, "Two Justices Once Open to Cameras in Court Now Reconsider" *The New York Times* (2 February 2015, New York)

60 See Federal Judicial Center, *Electronic Media Coverage of Federal Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeal* (Washington DC: Federal Judicial Center, 1994).

- The majority of judges who participated in the project considered it had a moderate to great effect on increasing public access to the federal courts and educating the public about courtroom procedures and legal issues.
- The process of obtaining consent and the operation of the equipment was time-consuming for court staff, particularly for IT staff. However, this varied according to the procedures adopted by the district. (Individual courts and judges were given significant leeway over how to implement the project).
- Over a 12 month period viewers accessed the recordings 21,530 times and (of those that answered the accompanying survey) the vast majority accessed the recordings for educational or work-related reasons.

112. To varying degrees every State allows cameras in their courtrooms. Forty-four allow television coverage of both trials and appellate proceedings, while the rest restrict courtroom coverage to appellate arguments.[61]

[61] Kyu Ho Youm, "Cameras in the Courtroom in the Twenty-First Century: the U.S. Supreme Court Learning From Abroad?" (2012) 6 *Brigham Young University Law Review* 1989, 1994.

THE LIKELY EFFECT OF BROADCASTING ON PARTICIPANTS IN TRIALS

113. This section addresses the likely effect of publication of in-court recordings of proceedings upon participants in a matter before the court, including witnesses, jurors and parties.

WITNESSES

114. Serious concerns have been raised about the effect that the recording of witnesses will have on the quality of their testimony and the chilling effect it may have on their willingness to report and give evidence. The knowledge that their evidence is being filmed may make witnesses more nervous and hesitant and this, in turn, may affect an assessment of the witness's credibility or reliability. Even where the witness becomes accustomed to the filming, the first impression of the witness on the factfinder is often important. In addition to these concerns, were the footage to be broadcast "live" there is the potential for the evidence of a witness to be viewed by and to influence another witness. Other concerns include the potential for some participants to perform to the camera.

115. Many submissions raised concerns that the reliability of a witness's testimony may be compromised if other testimony is available for viewing prior to the witness giving evidence. Social media was noted by one respondent as potentially exacerbating this problem as public coverage on sites like Facebook or Twitter during the course of a proceeding may cause witnesses to consciously or unconsciously alter their evidence.

116. Many submissions supported the view that most witnesses find giving evidence nerve-racking and that the presence of a camera and the knowledge that their evidence will be broadcast to the world at large would be a source of stress. Various respondents expressed concern that the broadcasting of court proceedings would increase witnesses' anxiety when testifying and may affect their decision to give evidence or the quality of their evidence if they choose to testify. For example the Office of the Director of Public Prosecutions in Queensland reported that its experience is that witnesses are usually reluctant to testify and often anxious about court procedures and the consequences of testifying. It submitted:

> "It is often the case that a witness will become particularly alarmed and sometimes very anxious when they understand that their name will be used in Court and may be published. The prospect of any broadcast of their voice and/or image must only heighten the prospect of those types of reactions. Witnesses who usually do not have a real choice about testifying should not be placed in a position where they are subject to more discomfort than is necessary".

117. By contrast, a submission by the Australian Broadcasting Commission suggested that unobtrusive camera equipment and the possibility of a wider audience are unlikely to add significantly to the existing stress of testifying in court. A submission by Ms Tessa Scott on behalf of Nine Network Australia stated that there is "little difference between witnesses who are currently quoted, named and photographed/filmed as they are walking out of the court and them being filmed inside the court". Filming witnesses giving evidence simply reduced "the margin for error of the media incorrectly reporting their evidence". Mr John Taylor, a journalist from the Australian Broadcasting Corporation, argued against an absolute ban on the in-court filming and photographing of witnesses. He argued that there is no evidence for or against the proposition that the possibility of being filmed could add strain and anxiety to witnesses. Rival positions simply reflected people's beliefs. Mr Taylor submitted:

> "Not only what witnesses say but how they say it is … an important part of communication, and understanding their evidence, and evidence put before the court".

A huge and distracting camera need not be used. Mr Taylor and others argued that a remotely-operated small camera of the kind that is currently used in courts and correctional centres for giving evidence via video link would suffice.

118. Another issue raised in reviews of in-court media coverage undertaken in other countries is the increased possibility for witnesses to be recognised and potentially subjected to intimidation and harassment. This matter warrants consideration, particularly in respect of criminal matters where the threat of intimidation may place a witness at risk of physical harm. However, the identity of witnesses is often communicated in media reports, sometimes accompanied by images of the witness recorded in the precincts of the court. It may be said that the communication of in-court recording of witnesses would not significantly elevate the risk to witnesses compared to current recording of out of court images of them and reports of their evidence**.**

119. The most significant issue raised in submissions and in overseas reviews, however, is the effect that the presence of cameras and the apprehension of the contemporaneous or near contemporaneous broadcasting of their evidence may have upon witnesses and the quality of their evidence. The Scottish Report recognised the additional strain of knowing that their evidence may be subsequently broadcast on television, and that this strain will affect the ability of many witnesses to give the best possible evidence, thereby adversely affecting the system of justice. It noted that:

> "… those who become involved as jurors or witnesses, through no actual choice of their own, and even though under compulsion of citation, already find the whole process highly stressful, and there must be a real risk that it will be more stressful if their evidence is to be filmed and broadcast live or in an evening news broadcast. They may to some extent be conscripts rather than volunteers but that is no reason to add to the stress of performing what remains a civic duty."

120. The knowledge that their evidence will be broadcast to the general public even may discourage some expert witnesses from testifying for fear of being subject to unfair criticism and harassment. In the *Pistorius* case, the defendant's lawyer reported a difficulty in engaging expert witnesses because of their concern that images of them giving their evidence would be broadcast to the world. Whilst they did not mind their opinions being scrutinised and criticised by their professional peers and tested under cross-examination, they were not prepared to run the risk of having to defend themselves and their opinions in public from people who had seen their evidence on television. Some of the experts who were prepared to give evidence in that case declined to be filmed. If experienced, expert witnesses are reluctant to have their evidence recorded and televised, then one would expect most lay witnesses to have a similar or even greater reluctance to give evidence, knowing it may be the subject of contemporaneous or near-contemporaneous broadcasting.

121. One respondent submitted that commitment to the principle of open justice entails that there should be a presumption of recording if a witness agrees to testify in open court. However, any system which allowed witnesses to "opt out" of having their evidence electronically recorded for the purpose of broadcasting or live-streaming would have complications. Prosecutors, defence lawyers and judges would be distracted by explaining the system and ascertaining the witness's response to the possibility of not being recorded. Would the witness have to justify a preference to not be recorded in order to reverse the default

position? When and how would this be done? Would this delay the efficient conduct of a trial and distract the judge and the lawyers from the task at hand, namely securing a fair trial?

122. If a witness could "opt out" as of right, without giving a reason, then a distorted and incomplete record of the evidence in the proceeding might be broadcast. Only the evidence of some witnesses on a topic, including those prepared to "play up to camera", would be broadcast.

123. We do not consider that such a default position is a suitable one. Its implementation would be practically inconvenient and its operation may give a distorted, rather than a fair, account of proceedings.

Recommendation – witnesses

124. The crucial issue then is whether witnesses should be recorded in court for the purpose of contemporaneous or near contemporaneous broadcasting of their evidence. We consider that the concerns expressed by many respondents about the effect of such a system upon the preparedness of many witnesses to give evidence and the quality of their evidence are legitimate. Like the Scottish Report, we do not favour the introduction of a system for the recording of the evidence of witnesses for either live transmission or news broadcast.

125. We leave open for future consideration, on a case by case basis, the recording of witnesses and other trial participants for documentary purposes. A proceeding which is recorded only for the purpose of a documentary which will be broadcast after the proceedings are concluded may not imperil a fair trial. It may be more educative than a short extract which is broadcast on an evening television program. Nonetheless, recording for the purposes of a documentary raises significant issues. The January 2015 Scottish Report noted concerns about the recording of proceedings at first instance, in particular criminal trials, even for documentary purposes. The primary concern was in relation to the potential effect on witnesses. The greatest concern was the possibility that witnesses might be less inclined to engage with the criminal justice system if the proceedings in which they were involved were to be filmed.[62] Any recording for documentary purposes should be the subject of an application in a particular case. An application might be allowed subject to suitable safeguards, including the protection of witnesses from unnecessary pressure arising from the knowledge that their evidence may be subsequently broadcast in a documentary. This would require the careful consideration of the wishes of witnesses in a particular case, and how the documentary would fairly report the proceedings if the evidence of some witnesses was not recorded.

VICTIMS AND VULNERABLE PERSONS

126. If a system for the recording of witnesses had been recommended, then special consideration would have been required of the position of victims and vulnerable witnesses.

127. The law currently protects the interests of victims and vulnerable witnesses in a number of ways. The identity of the victim of a sexual offence is protected from disclosure in the course of reporting proceedings to the general public. Vulnerable witnesses, such as affected children, are protected under the *Evidence Act* 1977 (Qld). These mechanisms provide for certain witnesses' evidence to be pre-recorded and for a support person to be present. Protection of the legitimate interests of victims of sexual offences and vulnerable witnesses, including children, would seem to dictate that their evidence not be broadcast, save in

[62] Scottish Report, [5.2.1].

exceptional circumstances. Any broadcasting of their evidence would need to comply with existing protections afforded to special witnesses and vulnerable persons. In practical terms compliance would prevent substantial parts of their evidence being communicated to the public, lest it identify the witness or otherwise adversely affect their welfare.

128. Other witnesses, such as undercover police and police informants, are protected by a variety of mechanisms which limit the general publication of their identity.

129. The implementation of a system so as to control the broadcasting of the evidence of certain victims of crime and vulnerable witnesses would require significant resources. A mode of recording that was passive (for example, a fixed camera that continuously recorded proceedings with the footage later being edited to omit the protected footage) would require a high level of scrutiny before what was recorded was released for broadcast.

130. Witnesses may be protected by suppressing their identity through the use of voice substitution technology, pixelation or simply editing out the relevant content. However, such measures, if successful, would render the witness almost unrecognisable. What greater value would such a recording have over an accurate quotation of his or her testimony? The costs of substantially editing the recorded footage would not seem to be justified by any such benefit.

131. The need to protect certain victims of crime and vulnerable witnesses is an additional reason why we do not favour a system for the recording of the evidence of witnesses for either live transmission or news broadcast.

JURORS

132. Knowledge that they are being filmed and that this footage may be broadcast may have a chilling effect on the willingness of individuals to serve as jurors. It may also affect their willingness to come to an unpopular verdict, where there is a fear that their role in that decision is public knowledge.

133. Under the New Zealand guidelines no juror may be deliberately filmed and no publication or broadcast of a juror may be shown.

134. Respondents were agreed that there is no public interest in identifying jurors. Media interests noted in submissions that there is currently the potential for jurors to be identified when they leave the court building and are inadvertently captured on camera. However, it was accepted that in such circumstances, the footage would not be used or the juror would be edited out of the broadcasted content. The risk of jurors being identified may be reduced if fixed-position cameras are adopted. These cameras would be angled to capture the judge and perhaps the Bar table and so would not record the jury box, which is to the side of the courtroom. Still, in some courtrooms any fixed camera might capture images of jurors entering or leaving the courtroom.

135. Nine Network Australia submitted that audio-visual equipment could be fixed away from the jury or the media could de-identify the members of the jury. It submitted that it would be "in the public's interest to be able to watch a recording of the speaker of a jury reading out its verdict", and this could be done by fixing the camera away from the speaker but recording the audio of the verdict and "de-identifying the voice if that was a distinguishing feature that could lead to identification".

136. It is difficult to see how a fixed camera could be directed without capturing images of jurors when they stand in the well of a court in the course of delivering their verdict. Any images of them would need to be pixelated to avoid the risk of identifying any member of the jury. The proposal to, in effect, audio record the speaker delivering the jury's verdict should recognise the demanding role played by the Speaker. The Speaker has important duties to perform, both in court and during deliberations. As ordinary members of the community, the Speakers must feel great pressure when delivering verdicts. They should not have to consider the prospect of inadvertently being identified by their voice or image or how the announcement of their verdict may sound when communicated to the general public. Jurors should not be discouraged from accepting the role of Speaker, and many jurors will be discouraged from doing so if they perceive that there is any risk of being identified. This will particularly be the case where a jury knows that a verdict is unlikely to be "popular". To avoid the risk of identification and to avoid jurors being deterred from accepting the role of Speaker, any audio recording would need to be heavily distorted in every case. There is little in terms of legitimate public interest in members of the general public hearing a heavily distorted audio recording of the verdict. Any slight public interest is outweighed by the concerns noted above. The public interest is adequately served by the practically instantaneous reporting of the jury's verdict in cases which the media chooses to report.

Recommendation – jurors

137. Current laws and practices, for good reason, seek to protect the identity of jurors from public disclosure. Jurors should feel at ease during court proceedings and private deliberations and not feel pressured to reach a particular verdict. They should not apprehend that they will be approached either during the course of a trial or after it and questioned about their decision or their deliberations. Citizens should be encouraged to perform jury service, and be protected from the threat of intimidation or harassment. They should not be filmed, photographed or audio-recorded by the media when performing their important duties.

PERSONS IN THE PUBLIC GALLERY

138. With the exception of closed proceedings, the public may attend any court hearings. Under existing arrangements, the media may report on the presence of those people in the public gallery. Respondent media organisations argued that the electronic publication of court proceedings does not warrant changing this position. They argued that, as a court is a 'public place' and the use of cameras is not necessarily an invasion of privacy, the media should be permitted to film and broadcast the public gallery. It was acknowledged that a signal or alert system, for example a red light outside the courtroom, should be employed to indicate when a matter is being filmed so that members of the public can make an informed decision as to whether they enter that courtroom. Although respondent media organisations noted that interest in filming the public gallery will likely be low, one respondent identified that there would be interest from the media in capturing the family and friends of defendants and victims.

139. Under the New Zealand guidelines, members of the public attending a trial or review must not be filmed.

140. A concern was raised in the Scottish Report[63] that some people may be tempted to use the public gallery as a platform for protest in the knowledge that their efforts may be broadcast. The panel of judges who authored the New Zealand Report on in-court media coverage stated

[63] At 5.4.7.

that this had not been their experience of recording court proceedings. In any event, this issue could be avoided by the judge excluding the content of the protest from being broadcast.

141. Of greater concern is the risk that members of the public gallery with a particular interest in the case, such as members of the family of the victim or of the defendant, may feel some pressure to display their feelings and responses to evidence for the benefit of the camera.

142. Currently judges have to monitor the behaviour of persons in the public gallery so as to ensure a fair trial. Even a subtle nodding or shaking of a head in response to particular evidence may distract and influence a jury.

143. The scenario that the media would wish to capture the reactions of the family and friends of defendants and victims in the public gallery is an unattractive one. It risks converting the coverage of the case from the evidence to things that are not evidence, and which a jury should not take into account, namely the conduct of persons in the public gallery.

Recommendation – persons in the public gallery

144. On balance, we consider that the right of the media to report the fact that certain persons were in the public gallery does not justify the recording of images of persons in the public gallery and the broadcasting of their reactions to parts of the evidence and to what is said by counsel. There is insufficient public interest in recording the presence of persons in the public gallery to outweigh the risk that the recording of their reactions will affect their behaviour and act as a distraction. We favour the New Zealand position whereby members of the public gallery are not filmed.

DEFENDANTS IN CRIMINAL CASES

145. Images of defendants in the dock and their emotion (or lack of emotion) may be prejudicial, especially if edited out of context.

146. It may be argued that as the defendant is already publicly identified by appearing in open court, recording of the defendant should not be prohibited on grounds such as embarrassment or hardship. Also, where the alleged offender's identity is in issue, the law of contempt would prohibit publication of images of the defendant.

147. We accept that the recording in court of the defendant and the broadcasting of those images in cases in which identity is not in issue should not be prohibited simply on the ground that it may add to the embarrassment or hardship of the defendant. Restrictions on such broadcasting may be justified, however, where it may affect the administration of justice or prejudice a fair trial. Images of a dispassionate defendant may be as prejudicial as that of an emotional defendant. It may prejudice public perceptions of a defendant and risk those perceptions being communicated to jurors by friends and family.

148. Images of a defendant, whilst temporarily inattentive or uncharacteristically emotive, may not be representative of the general demeanour of the defendant in court. Their broadcasting would be unfair to the defendant and may affect the administration of justice in a particular case.

149. Media organisations submitted that there is a public interest in capturing a defendant's reaction when a verdict is delivered. That may be so, but the desire to film a defendant may be said to expose pre-existing biases in that if a defendant fails to display the requisite degree

of emotion, or conversely shows too much emotion, he or she may be the subject of undue criticism or attention. Such a public perception of the defendant may be unjustified, but affect the fairness of any retrial ordered on appeal. The interest of the public in seeing images of the defendant at the time a verdict is delivered may not outweigh the risk of such unfairness.

150. In addition, the recording and broadcasting of a defendant when a verdict is delivered may encourage some defendants, who are convicted, to make scandalous and inflammatory statements.

Recommendation – defendants

151. As a matter of principle, the right of the media to report the defendant's demeanour in court, including the defendant's reactions to parts of the evidence, to what is said by counsel and to a verdict, might be said to justify a right to film the defendant in the dock and to broadcast parts of what is recorded. However, images of defendants in the dock and their emotion (or lack of emotion) may be prejudicial, especially if edited out of context. Therefore, we do not support the recording and broadcasting of defendants on trial or upon sentence.

OTHER PARTICIPANTS IN PROCEEDINGS

Litigants

152. The media may have limited interest in the in-court recording of parties to other proceedings, such as ordinary civil proceedings, which typically are of little interest to the general public. Still, the position of those litigants should be considered, both in respect of media broadcasting and live-streaming.

153. One respondent submitted that broadcasting court proceedings may encourage unmeritorious litigants to pursue frivolous actions, encouraged by the prospect of being televised. One means of reducing this risk would be to require the consent of all the parties to the proceeding being recorded for broadcast. In the event that one party refused to give their consent, another party could bring an application before the presiding judge for an order that recording is in the public interest despite a lack of consent between the parties.

154. Another submission was that medical negligence proceedings should only be broadcast with the consent of the plaintiff.

155. In its submission, the Queensland Public Interest Law Clearing House (QPILCH) identified the particular challenges faced by self-represented litigants (SRLs) when they engage with the courts. It conducted a small qualitative study of some of its clients. While the results of that study are not intended to be determinative of the issue as the sample size was small, they are useful nonetheless in identifying how broadcasting might be received by SRLs. QPILCH noted that many SRLs experience anxiety during their court proceeding and may be suffering from or develop a mental illness in the course of that proceeding. A majority of SRLs questioned by QPILCH said they would be intimidated by the prospect of their proceedings being broadcast. The respondents noted that there would be some benefit in being able to view a video resource about court proceedings, however an unedited recording of a court hearing would be of little assistance to a layperson.

156. Some of the considerations discussed in the context of the recording and publication of images of defendants apply to the recording and publication of images of other litigants. Some have less force, or no application, since jury trials in civil cases are rare.

157. Given the variety of civil proceedings, different considerations may apply to particular cases. Some proceedings involve vulnerable individuals, such as the victims of alleged abuse. The additional pressure of being recorded whilst in court and the possibility of those images being communicated to the general public may deter the individuals from bringing claims or unnecessarily increase their distress in court. Other proceedings and their subject matter do not generate similar concerns. Rather than have a general rule which either allows or prohibits the in-court recording of litigants in civil proceedings, a better approach would be to require an application, ordinarily to be made in advance of the trial of any such proceeding, to record litigants (and others) in court. The parties might consent to such an application. In the absence of consent, legitimate concerns, including the interest of the public in being informed of the conduct of such proceedings, would be considered by a judge. If the application was granted, appropriate safeguards would be imposed to protect the legitimate interests of litigants.

Legal practitioners and the judge

158. Different views exist about whether lawyers and judges should be filmed. Some lawyers are concerned that recording them in court may compromise their conduct and increase the risk of their being subject to threats. Concerns also exist that some counsel and some judges may be encouraged to perform for the camera.

159. Identification through broadcasting removes a certain level of protection that lawyers are presently afforded. A submission on behalf of the Queensland Office of Director of Public Prosecutions (ODPP) stated that its staff were opposed to their images or voice being broadcast, in part for identification and security concerns. It also warned that the ODPP may incur additional costs where counsel or staff are unwilling to be recorded and other practitioners must be briefed. One respondent suggested that counsel's consent to being recorded should be obtained. This proposal however does not ameliorate the risk that those counsel who do not object to being filmed may nonetheless feel that it is necessary to adopt certain courtroom strategies which are "palatable to the public". One submission also warned that microphones may pick up confidential communications between lawyers. This risk materialised in the recent appeal in the *Pistorius* case when a conversation between counsel for Pistorius and the prosecutor was recorded during a court adjournment by microphones in place for broadcasters.[64]

160. One benefit of broadcasting court proceedings, including lawyers in the case, would be to lessen the occurrence of media scrums. The issue of media-crowding at the entrance to the Supreme Courts precinct is addressed in Practice Direction 17 of 2014. That Practice Direction directs that media personnel, while reporting on court proceedings from outside the courthouse, are to remain in certain areas well clear of any vehicular entrances and to not obstruct the orderly entry into, movement within, or exit from the Supreme Court precincts by any person or vehicle. It is unlikely that the broadcasting of court proceedings will result in a significant decrease in media scrums as camera crews approach and record lawyers in the precincts of the court.

[64] Mr Barry Roux, counsel for Pistorius, was recorded telling the prosecutor 'I am going to lose'. See: http://www.theguardian.com/world/2015/nov/03/oscar-pistorius-appeal-lawyer-barry-roux-i-am-going-to-lose.

161. A consent-based system for recording lawyers in court would require the court to establish some administrative process and a register in which consents to filming obtained from parties or practitioners would be recorded. Such a process would mean that, if the court retained editorial control over the raw footage at first instance, the court would be responsible for any administrative errors resulting in footage of counsel being released unintentionally. To avoid this, the presiding judge or a court officer in that matter would need to review the edited content before it is released to media organisations, adding to the workload of judges, their associates and court staff.

162. We consider that any system for the recording and broadcasting of proceedings should allow for lawyers to apply to the trial judge for an order that they not be filmed or photographed in court. Such an application might be granted if, for example, there were evidence that recording would inhibit the lawyer in the presentation of a case or expose the lawyer to a significant risk of threats or intimidation. We prefer this to a consent-based system. It is consistent with an approach which confers judicial control over who, if anyone, is recorded in court for the purpose of broadcasting. Such a system enables participants in proceedings who oppose such recording to advance arguments, and for the judge to weigh competing arguments.

163. Judges sitting in trials, appeals and other hearings are not simply individuals playing a part. They constitute "the court". Individual judges are often described by others as "the court" and sometimes refer to themselves in that way. In most cases, judges wear robes and other regalia which are uniform, and which signal the judge's institutional role. Individual judges may exhibit individual styles, but each judge plays an institutional, not a personal, role in dispensing justice.

164. Televising in-court proceedings may be thought to create the theatre of the individual judge playing some individualistic part, rather than being the personal embodiment of "the court". The judge may appear to be an individual character in something akin to a reality TV show. The relative anonymity of judges would be reduced. This risk should not be overstated, since current reporting can include photographs of judges or file footage taken on ceremonial occasions. However, broadcasting of in-court recordings of a judge may accentuate the role of the judge as an individual, as if part of a courtroom drama. Few judges would welcome being depicted as such a character, rather than as one of many judges who constitute a court.

165. Unlike most lay witnesses and even some expert witnesses who are unused to appearing in courts, and whose performance may be affected by the additional pressure of having proceedings electronically recorded and broadcast, judges are public officers whose public functions are subject to scrutiny. They are used to their conduct being reported, and sometimes misreported, in the media.

166. Like lawyers and other participants in the judicial process, judges may feel vulnerable to the pressure associated with having their every word and gesture recorded, knowing that recordings of them and their speech may be broadcast to the world at large. This is likely to be the case in high-profile trials. Few judges are likely to welcome the additional pressure associated with their words and gestures being recorded and broadcast to the world at large, either by news reports or live-streaming on the internet.

167. While the imposition of additional pressure on judges creates risks to the fair trial of particular proceedings and the administration of justice in general, we do not consider that it is sufficient to justify a blanket restriction on their being recorded in court. Instead, it should be for the judge to decide in a particular case whether he or she, and other participants in the proceeding, should be recorded in court.

Court staff and correctional officers

168. Absent restrictions, judges' associates, court officers who act as bailiffs, other court staff and correctional officers may be filmed or photographed under any system which allowed "cameras in the courtroom" either for televising or live-streaming**.**

169. As for court staff, we consider that the extent to which they are filmed should be subject to the directions of the judge in a particular case, after assessing any risk that recording and broadcasting their images may affect the performance of their duties or expose them to unnecessary risk of harm.

170. As for correctional officers, if a judge allowed the defendant in the dock or a defendant giving evidence to be recorded, then it is likely that correctional officers who typically sit near a defendant would also be recorded, unless special steps were taken to avoid this. The Department of Corrective Services did not make a submission in response to the Issues Paper, and one should not assume that recording images of correctional officers would expose them to a significant risk of harm. Still, the New Zealand Report recommended a guideline which would restrict the identification of correctional officers. This recommendation was made on the basis that there is no public interest in identifying officers visually, and that they are not participants in the trial, but simply present in court as part of their employment. However, given that correctional officers were not at high risk and may not object to being recorded, the New Zealand report recommended that the onus should be on them to provide to the court an objection in writing to being recorded if that will lead them to being identified. This seems a sensible approach in not adding an unnecessary burden on those who are permitted to record a trial or sentencing hearing, including cases in which a judge might permit the defendant to be recorded in the dock or in giving evidence.

Recommendation – other participants

171. Ultimately, it should be for the presiding judge or judges to decide in a particular case whether any, and if so which, participants in the proceeding, should be recorded in court for the purpose of having audio-visual recordings communicated to the general public.

172. Rather than have a general rule, which either allows or prohibits the in-court recording of litigants in civil proceedings, the better approach is to require an application, ordinarily to be made in advance of the trial of any such proceeding, to allow the recording of litigants and others in court for the purpose of the recordings being communicated to the general public. If the application was opposed, it would allow consideration to be given to the interests of the public in receiving those recordings and being better informed, and other interests, including the interests of vulnerable litigants.

173. Any system for the recording and broadcasting of proceedings should allow for individuals to apply to the court for an order that they not be filmed or photographed in court or otherwise electronically recorded in court for the purpose of the recording being communicated to the general public. Such an application might be granted if, for example, the court were persuaded that recording would inhibit the person from performing his or her role in the proceeding or expose the person to a significant risk of threats or intimidation. Correctional officers should be allowed to object in writing to the court to being recorded if that will lead them to being identified.

174. Rather than adopt a consent-based system, by which the consent of lawyers and other participants would need to be obtained before they could be recorded, applications should be made to record and broadcast proceedings. Such an approach maintains judicial control over who, if anyone, is recorded in court for the purpose of broadcasting. It enables participants in proceedings who oppose such recording to advance arguments, and for the judge to weigh competing arguments.

WOULD BROADCASTING SIGNIFICANTLY INCREASE PUBLIC UNDERSTANDING OF PARTICULAR PROCEEDINGS AND THE JUSTICE SYSTEM?

175. Because of the diversity of proceedings, some of which do not typically involve witnesses, such as appeals and sentences, no simple answer can be given to the question of whether the broadcasting of proceedings in general, subject to appropriate safeguards, is likely to significantly increase public understanding of particular cases or the justice system.

176. For reasons to be discussed below, broadcasting of all proceedings via a court-based live-streaming system cannot be justified in the light of anticipated demand and the resources required to establish such a system and to monitor appropriate restrictions on what is communicated to the general public.

177. As for the broadcasting of proceedings by traditional broadcast media by way of live transmission or news broadcasting, the greatest demand by the media is likely to be in respect of certain criminal trials and sentences.

CRIMINAL TRIALS

Criminal trials – public understanding

178. If a system was introduced which prohibited the recording and broadcasting of all lay witnesses and of expert witnesses who do not consent to being filmed, then the recording and potential broadcasting of criminal trials would be effectively limited to opening statements by counsel, addresses by counsel to the jury and the trial judge's summing up. Jury empanelment would be excluded as it would identify jurors. Legal debate in the absence of the jury would not be broadcast during the course of the trial and, depending upon its content, not during any appeal period or pending any re-trial. There is a risk that opening statements, which anticipate the evidence to be given, would be relied upon by viewers as an authoritative statement of the evidence which was in fact given.

179. If, as proposed above, there is a general restriction upon the recording and broadcasting of the evidence of certain participants (for example, witnesses or witnesses who "opt out"), then the demand for the traditional broadcast media to record criminal trials for the purpose of live transmission or news reporting would be reduced. A demand may still exist to record and broadcast other parts of criminal trials, such as counsel's addresses and the trial judge's summing up. If so, then it is questionable whether the broadcasting of images of lawyers and judges making statements would add greatly to the quantity of information presently imparted by reports of what they say in cases which the media chooses to report.

180. While it is possible that an otherwise unknown case may draw media coverage and public attention if in-court proceedings were recorded, this has not been the experience of other jurisdictions.[65] It is likely, however, that media coverage of those proceedings that are already within the public consciousness and have all the necessary ingredients to engage media interest will be increased. There will be no enhancement of the principle of open justice by reporting proceedings which would otherwise go unreported. At best, the recording of in-

[65] See for example, D Stepniak, *Audio-Visual Coverage of Courts: A Comparative Analysis* (Cambridge: Cambridge University Press, 2008) 159-160.

court proceedings would add some limited film footage in high-profile cases which are already reported.

181. A system which permitted, as a general rule, the recording and broadcasting of criminal trials is unlikely to lead to more trials being reported, or even to a significant increase in the amount of information which is reported in cases which are currently reported. Even with the introduction of guidelines, the need for consideration to be given in particular cases to the exclusion of certain evidence from being recorded and broadcast would be a source of distraction to counsel and judges, thereby impeding the efficient conduct of a trial.

182. On balance, the ability of the media to record some parts of some criminal trials, but not the evidence of all or most witnesses, is unlikely to significantly increase public understanding of particular proceedings or the justice system in general.

Criminal trials – expected demand

183. As noted, it seems unlikely that permitting the in-court recording and broadcasting of criminal proceedings, with restrictions on broadcasting the evidence of witnesses and various other participants in the trial, will lead to cases which are presently unreported being reported. Instead, it is likely to lead to selected images in high-profile trials being included in media reports. It may include a "sound bite" from opening or closing statements of counsel, but add little of substance to the reporting of proceedings. Trials, particularly high-profile trials which are already extensively reported in the media, will be the subject of recording and broadcasting. There is unlikely to be any substantial increase in public understanding of the particular proceeding or in the criminal justice system in general.

184. The Issues Paper canvassed the introduction of a "two minutes rule" as a means of countering sensationalism and ensuring that footage is placed in sufficient context without resorting to "sound-grabs".[66] Those respondents who commented upon this suggestion were opposed to it. For many of the same reasons that the rule was abandoned by the New Zealand courts, respondents argued that a two minute rule placed unrealistic demands upon the media and would do little to prevent unfair reporting. Rather, a rule dictating a minimum length of coverage would likely discourage the media from using any footage, defeating the reason for broadcasting court proceedings.

185. As Professor Pearson noted in his submission, concern about the media's highly selective use of material is not new. It remains relevant, however, to proposals to broadcast court proceedings. In a recent lecture Sir Brian Leveson, President of the Queen's Bench Division, identified the particular risks televising court proceedings creates:

> "I have little doubt that the presence of cameras would alter the dynamics of a trial and put undue pressure on witnesses many of whom will be reluctant participants in the court process. Examples of televising such trials, in my view, fully support that concern and risk converting through editing what is intended simply to be law in action into an action movie, inevitably providing a compressed picture of a complex process."[67]

186. In the absence of a guideline akin to the "two minute rule", the inclusion in a broadcast of selected parts of an in-court recording of a high profile case is unlikely to lead to any significant

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[66] This approach has been previously employed by the courts in New Zealand but it was abandoned in 1999.

[67] Sir Brian Leveson, *Justice for the 21st Century: Caroline Weatherill Lecture*, 9 October 2015, at [48].

increase in public understanding of the proceeding. It may even cement a distorted view of the proceeding and the criminal justice system in general.

187. Under any new system which facilitated applications to record and broadcast criminal trials, judges and court staff would have to devote resources to dealing with applications and monitoring compliance with guidelines and rulings. This has the potential to occupy public resources and to distract judges from their duties in conducting a trial.

Recommendation – criminal trials

188. In summary, in the light of expected demand, and even assuming guidelines and appropriate prohibitions could reduce the risks of affecting participants in the trial process and other risks to the administration of justice, the broadcasting of criminal trials is unlikely to lead to any significant increase in public understanding of particular proceedings or the justice system in general. Any slight increase in public knowledge of particular proceedings, the accuracy of reporting and public understanding of the criminal justice system is likely to be outweighed by prejudice to trial participants, particularly witnesses, and thereby prejudice to a party's right to a fair trial.

189. It remains open to media organisations to apply to a trial judge in advance of a trial to record it for live transmission, broadcasting on a news or similar program or for documentary purposes. However, we do not support the adoption of a new system whereby, as a general rule, criminal trials are recorded and broadcast. As a result, we do not support an amendment to the current Practice Direction for criminal trials.

SENTENCING

Sentencing – public understanding

190. Sentencing of offenders is a matter of significant public interest. Some of the concerns raised in respect of recording and broadcasting of criminal trials do not apply to the publication of sentencing reasons. Currently, sentencing reasons in their complete form are effectively unavailable to the general public. The sentencing remarks of judges are recorded by the contracted provider of recording and transcription services. A substantial time later a draft of them is made available by the appointed contractor to the judge and the draft is corrected. Most sentencing remarks, once revised, are only accessed by interested parties. They are not available to the media for near-contemporaneous reporting purposes. The Queensland Supreme Court Library currently has the capacity to post sentencing remarks on its website. However, delays in the provision to judges of the transcript of sentencing remarks means that, ordinarily, sentencing remarks cannot be posted on the same day as they are delivered. They are posted very rarely. In short, the current system does not usually allow early access by the public to sentencing remarks in cases in which the sentencing outcome may be widely reported in the media.

191. The Supreme Court of Victoria has adopted a system whereby audio recordings of sentencing remarks are uploaded and available to the media and others. In general, sentences are audio-broadcast, whether there is particular media interest in the matter or not. Judges need to be mindful of any suppression orders or other restrictions on publication which apply. All audio broadcasting is subject to the overriding discretion of the presiding judge.

192. Save for exceptional cases, audio broadcasts occur via the Court's web-streaming facilities. Where this is done, a high resolution audio-only broadcast can be recorded, on a delayed

basis, for uploading to a URL. The length of the delay is a matter for the presiding judge. In most cases, only a very short delay is needed to enable the broadcast to cease if something unforeseen should occur. The broadcast is disseminated to media via a URL link accessed by a password. The public can listen to but not download the broadcast from the website. If a judgment or sentence contains information of potential concern, it can be recorded only, and not streamed through the web, so as to enable submissions or review before publication. Delay inevitably reduces the likelihood of the material being used.

193. Audio broadcasts of judgments or sentences are transmitted in their entirety. The Strategic Communications Manager co-ordinates the arrangements for audio broadcasting.

194. Such a system assists the media to check the accuracy of stories before they are communicated to the general public. It also enables members of the general public to receive full details of sentencing remarks, to better understand the reasons for a particular sentence and to understand the context in which remarks which were incompletely reported in the media were made.

195. If any similar system for the web-streaming of audio-recording of sentencing remarks was introduced into Queensland, it would be essential that the system be under the direct control of the courts, to operate via the court's own facilities and to be managed by a Courts Information Officer. This would assist in ensuring that information which should not be communicated to the general public, such as the identity of victims of sexual offences, is not broadcast.

196. As noted, the New South Wales legislation creates a presumption in favour of granting applications by the media to record and broadcast "judgment remarks", which includes remarks made by the court when sentencing the accused person and that are delivered or made in open court.[68] The recording is made by a camera which is supplied and operated by a television network for use by it and other networks. The camera simply films the judge reading from written sentencing remarks. Audio-recordings are also made by the media, for example by radio stations for broadcasting.

197. The Scottish Report recommended that filming of sentencing statements should be permitted, but only of the judge as the sentencing statement is delivered. The rationale for such a restriction was to focus "on the points which the judge actually thinks are important to take into consideration in sentencing, not those advanced by the Crown or the defence", and to help ensure that sentencing material "continues to be put before the court in a dispassionate and professional manner". The Scottish Report stated that there should be no filming of the accused, counsel or the public benches, and that there should be a time delay on transmission to cater for the possibility of any disturbance in court.

198. Some respondents advocated for the adoption of a similar system in Queensland, namely the audio-visual recording limited to the judges' delivery of the sentencing remarks. One respondent suggested that broadcasting could aid some of the objects of the sentencing, namely deterrence and denunciation.

199. Those respondents who were opposed to the recording of sentencing remarks warned that broadcasting them may encourage judges to reserve reasons that would otherwise have been given *ex tempore*, adversely affecting the efficient disposal of criminal cases and delaying sentences, to the detriment of victims and offenders.

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[68] *Supreme Court Act* 1970 (NSW), s 127.

200. The Bar Association of Queensland submitted that the Queensland practice of *ex tempore* sentencing remarks is very efficient and it would be undesirable for all concerned to lose it by encouraging judges to reserve sentencing decisions so that they may be "polished" for audio-visual recording. The Queensland Law Society also expressed concern at the potential for judges to delay delivery of their sentences or other decisions to ensure proper arrangements for broadcasting are made. It also directed the Committee's attention to concerns expressed in response to a 2012 proposal by the Ministry for Justice in the United Kingdom. These included increasing the distress of families, whether certain categories of offences would be excluded and, if so, on what criteria, and the practical concern of whether recording equipment would be unobtrusive.

201. As against such concerns is the argument that broadcasting sentencing remarks would aid public understanding of, and confidence in, the sentencing process which is often misunderstood and the subject of uninformed criticism.[69] The Tasmanian Jury Study has shown that increased awareness of the facts of cases improves understanding and approval of the sentences that are imposed.[70]

202. The differences in sentencing practices between Queensland and New South Wales should be noted. In New South Wales the practice is for judges to hear the relevant submissions of the parties and then adjourn to sentence the defendant on another day. This gives judges time to draft and revise their remarks. This is not the practice presently in Queensland where, as a general rule, sentences are delivered very shortly after submissions conclude. Judges do not work off "scripts". They pause to find relevant documents and their delivery may lack the fluency of a sentence that is read from a prepared script. Televising *ex tempore* sentencing remarks may place an unnecessary burden upon judges and, in order to compensate, may prompt judges to adopt the practice presently used in New South Wales. This would delay the prompt imposition of sentences. Such a delay may not be in the interests of justice, the interests of the person being sentenced or the interests of victims.

203. A delay in the delivery of sentencing remarks in order to arrange for them to be broadcast was a factor in the decision of Atkinson J in the *Cowan* case to not allow television cameras to record her sentencing remarks. To delay the sentence was not in the public interest.[71]

204. Sentencing remarks necessarily contain the facts about crimes, which often include some very distressing detail. A judge who knows that his or her sentencing remarks are to be broadcast on live television or radio might be inclined to alter their content to avoid distress to viewers.

205. Sentencing remarks in cases involving sexual offences or vulnerable witnesses may necessarily refer to victims and witnesses whose identity is subject to restrictions on publication to the general public. Compliance with those prohibitions on disclosure may necessitate a rule which does not permit certain parts of the sentencing remarks in such cases to be broadcast.

206. Given the variety of cases in which sentences are imposed and the need for caution in not inadvertently disclosing to the general public certain identifying details or certain facts about crimes which would be very distressing, it would be inadvisable to create a system whereby the media and others had a right to record and broadcast sentencing remarks. Instead, it would be necessary to develop processes by which timely applications were made to record sentencing remarks in particular cases and for guidelines to be developed controlling the

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[69] Alicia Kinlay "Televised Court Proceedings: The Relationship between the Media, Punitive Public Perceptions and Populace Policy" (2010) 25 *Flinders Journal of History and Politics* 71.

[70] Tasmanian juror study: Kate Warner et al, "Public Judgment on Sentencing: Final Results from the Tasmania Jury Sentencing Study" (2011) 47 *Trends & Issues in Crime and Criminal Justice*.

[71] *R v Cowan* [2014] QSC 41 at 3-4.

content of what might be broadcast. Any application to record and broadcast sentencing remarks should be made in a timely way.

207. The processing of applications to record and broadcast sentencing proceedings has the potential to absorb public resources, including valuable judicial time, and necessitate the appearance of prosecutors and defence counsel upon the hearing of any such application. This would come at a cost to the public and to parties who are not legally aided. It would affect the limited resources of the Office of the Director of Prosecutions and Legal Aid Queensland.

Sentences – expected demand

208. Presently most sentences in superior courts are not the subject of media reports, and those that are reported are typically the subject of brief reports in newspapers or on radio or television.

209. Any new system which permitted the in-court recording of sentencing hearings would need to address the recording and reporting of proceedings which are the subject of certain reporting restrictions, such as restrictions upon identifying the victims of sexual offences. For reasons earlier canvassed, any permission to record sentencing hearings is unlikely to extend to the evidence of witnesses, victim impact statements or the submissions of counsel. As in New South Wales, it is likely to be confined to the judge's sentencing remarks.

210. The Office of the Director of Public Prosecutions submitted that on those comparatively rare occasions that it may be thought that an electronic broadcast of the sentence proceedings should be permitted in the public interest, it should be limited to the delivery of sentencing remarks by the sentencing judge.

211. It is difficult to predict the expected demand to record sentencing remarks. The current extent of reporting of sentences suggests that only a relatively small proportion of the sentences which are imposed by superior courts in Queensland each day would be the subject of applications to record. The expected demand would not justify the installation of fixed cameras in all or most courtrooms for such a purpose.

212. Some indication of the likely demand may be obtained from experience in New South Wales. In the year after the *Courts Legislation Amendment (Broadcasting Judgments) Act 2014* came into force and created a presumption in favour of filming final court proceedings, the Supreme Court of New South Wales received 27 applications from the media to film court judgments and granted 19 of those applications.

213. In New South Wales the reporting of sentencing remarks, together with the possible inclusion of audio-visual recordings of those sentencing remarks, is facilitated by the provision by a Court Information Officer of a short summary of those remarks as an aid to fair and accurate reporting.

214. In the light of the New South Wales experience, there is likely to be some demand by the media to report a number of sentencing remarks each year. The resources required to deal with those applications, and the cost to parties of making submissions, should not be ignored. However, the potential benefits of enhancing public understanding of the sentencing process and the reasons why sentences are imposed in particular cases is a distinct benefit. In its submission, Legal Aid Queensland considered that there was some merit in the broadcasting of sentencing remarks in promoting public understanding and confidence in the sentencing process.

Recommendation – sentencing

215. The arguments in favour of permitting sentencing remarks in some cases to be recorded and broadcast justifies a pilot program to monitor:

(a) the demand by the media to record and broadcast certain sentences;

(b) the consequences of making arrangements for recording on the efficient and timely disposition of sentences; and

(c) the extent to which recording and broadcasting sentencing remarks enhances public understanding of the reasons for sentences in particular cases and the sentencing process in general.

216. The judges consider that there is merit in undertaking a pilot program to assess the practicality and costs of recording and broadcasting sentencing remarks. Any program will require the development of a suitable Practice Direction, logistical arrangements and the appointment and assistance of a Courts Information Officer to develop guidelines to assist the judges and the media. This would include the timely processing of applications to record in particular cases.

217. The decision to allow or to not allow the recording and broadcasting of sentencing remarks would remain the decision of the presiding judge in a particular case.

CIVIL PROCEEDINGS – FIRST INSTANCE

218. The general opinion of respondents was that there would be little interest in recording and broadcasting most civil proceedings. The absence of anticipated demand might be argued to provide, in itself, a pragmatic reason as to why the public resources which would be required to record and regulate the broadcasting of civil proceedings cannot be justified: it would not lead to any significant increase in public understanding of particular proceedings or the civil justice system in general.

219. As a matter of principle, the recording and broadcasting of civil proceedings can be justified on the basis of the principle of open justice and the improved accuracy of publicly reporting those proceedings in the traditional media. Some of the issues previously raised about the effect of recording and broadcasting on trial participants, including witnesses, apply equally to civil proceedings. The Scottish Report concluded that several of the concerns relating to witnesses applied equally to civil as to criminal proceedings, and recommended that filming for live transmission or for subsequent news broadcast of civil proceedings which involve witnesses should not be allowed. It broadly accepted that filming for documentary purposes only should be allowed but that certain categories of cases, such as family cases, should be excluded. Similar considerations apply in this country. Any system which permitted civil proceedings to be recorded and broadcast would need to exclude certain categories of cases, such as those involving sexual offences, children and proceedings which are currently the subject of restrictions on publication, such as de facto property proceedings.

220. One respondent noted that broadcasting civil proceedings may put undue pressure on parties to settle.

221. In the light of the submissions, there is likely to be little interest in recording most civil proceedings. One exception may be bail applications, which sometimes attract media interest. Bail applications often canvass evidence which is inadmissible in later criminal proceedings, such as the prior criminal record of the applicant. Responsible media organisations often show restraint in broadcasting such prejudicial material, lest it delay or prejudice a pending trial. Provisions also exist in the *Bail Act* to prohibit publication of parts of bail applications. The presence of "cameras in the courtroom" during bail applications and the possibility that what is broadcast may be preserved and republished on social media suggests that applicants for bail are likely to seek non-publication orders more often if bail applications are recorded and broadcast.

Recommendation – civil proceedings – first instance

222. Because there is likely to be a very small demand to record and broadcast most civil proceedings, any application to do so should occur on a case-by-case basis to the judge who is in control of the particular proceeding. Any system of recording would need to be subject to guidelines addressing matters such as the recording of the evidence of witnesses and the exclusion of certain categories of cases.

APPEAL PROCEEDINGS

223. The nature and content of many proceedings in the Queensland Court of Appeal and most appeals to the District Court from Magistrates do not raise the concerns discussed above in relation to trials and other proceedings at first instance.

224. The general absence of witnesses and the complete absence of juries reduces a number of the major concerns with the electronic publication of court proceedings. Yet a number of issues remain. One is the risk that the publication of criminal appeals may taint a future jury pool should a retrial be ordered. Evidence that is ruled inadmissible on any retrial may be broadcast. This particular risk, however, could be contained by either preventing the live publication of these types of matters or delaying them until after judgment has been delivered. If a retrial is ordered, it may be necessary to delay any broadcast of the appeal proceeding until the retrial has been held. Another risk concerns the considerable number of appeals involving sex offences, children or other matters where publication to the general public is restricted or prohibited by statute. The broadcasting of such matters at all, or at least without heavy editing, would be problematic.

225. Many appellate courts in other jurisdictions record and stream their proceedings. Significantly, the Supreme Court of the United States does not permit the video recording of its proceedings. Instead, it publishes audio recordings of all oral arguments on its website and these recordings are generally uploaded at the end of each sitting week. The case against having television cameras recording hearings of the US Supreme Court has been noted in [109] above. The judges were concerned that televising proceedings might interfere with how judges interact with each other in testing arguments, allow questions and statements to be taken out of context for a "sound bite" on network television news and alter the way judges engage with counsel.

226. The Supreme Court of the United Kingdom began broadcasting its proceedings and in May 2011 live broadcasting of courtroom proceedings was made available via a Sky News platform. Since 2013 these videos have been available for on-demand viewing, originally via YouTube and more recently via the court's website.

227. Audio-visual recording is undertaken by the High Court of Australia. Recordings of oral argument in appeals and the delivery of judgments are uploaded to the High Court's website, typically within one business day of the court sitting. The footage is recorded by fixed cameras from behind the Bar table, which are controlled by the court, and which are unable to be used by media organisations other than with the prior approval of the court.

228. Intermediate appellate courts in other countries record their proceedings. The Court of Appeals for the State of New York was one of the first to do so and its proceedings are live-streamed on a dedicated public broadcasting channel. Two cameras are set up in court. One is directed to the Bar table, the other to the bench. The cameras are remotely-controlled from a small office in the court's basement.

229. The cost of installing web cameras in one or both of the courtrooms that are usually used by the Court of Appeal in Brisbane may not be significant, and some cameras already exist in those courtrooms for the purpose of conducting appeals by video link.

230. A system of live-streaming appeals would impose additional administrative burdens upon judges and court staff. Appeals involving sexual offences, children and vulnerable witnesses are unlikely to be suitable for live-streaming. Many criminal appeals involve discussion of the horrific details of crimes: an issue discussed above.

231. The costs of establishing and monitoring any system for the live-streaming of appeals would need to be balanced against the expected demand for such a service, a matter considered further below. If the costs of providing such a service could not be justified, then an issue would arise on a case-by-case basis, upon any application by a media organisation to record an appeal for the purpose of live transmission or for subsequent news broadcast. Those applications are likely to be infrequent.

232. An additional issue that relates to both criminal and civil appeals is the risk of miscomprehension. Submissions in these matters are largely written. Oral submissions generally speak to the written submissions and assume they have been read. The broadcasting of oral submissions and questions from judges would lack this essential context. They may be effectively meaningless to a member of the general public. If oral submissions in appeals are to be broadcast then it will also be necessary to publish the written submissions of the parties to allow the audience to better comprehend the matter.

233. Similar considerations apply to references to the evidence contained in sometimes voluminous appeal record books. Should these be posted on the court's website to enable viewers to follow what the judges and counsel are reading? Although all appeal record books in the Court of Appeal are available to the court and the parties in an electronic format, appeal record books may contain evidence which cannot be communicated to the general public, for example, evidence which would reveal the identity of complainants in sexual offence cases, the identity of child witnesses, or evidence relating to informers to which s 13A of the *Penalties and Sentences Act* 1992 (Qld) applies. Posting appeal record books on the court's website in these kind of cases would require skilled editing. This would involve some cost to the public.

234. The risk of miscomprehension or an incomplete understanding of what is said during an appeal proceeding is not a sufficient reason to prevent the recording and broadcasting of appeal proceedings in suitable cases. The fact that members of the public who sit in the public gallery of the Court of Appeal may not fully understand or may even misunderstand oral submissions because they do not have access to written submissions and appeal record books does not prevent them from attending matters in the Court of Appeal. The issue of improving the

understanding of the subject matter of appeals is something better addressed in the context of alternative means to improve the communication of information about proceedings. For example, the High Court of Australia publishes short summaries of the issues that are involved in a pending appeal and this information is available to persons who visit its public gallery. The preparation of suitable summaries in respect of pending cases and summaries of judgments that are delivered, both at first instance and on appeal, is addressed in the final section of this report.

235. Presently, the demand for live-streaming of appeal proceedings is unlikely to warrant the burdens that would be placed upon judges and court staff to manage such a system (particularly to ensure that inappropriate material is not inadvertently live-streamed). The expected cost of managing such a system may not warrant its introduction.

236. Requests by the media to record and broadcast appeals are likely to be limited to a relatively small number of cases compared to the number of cases heard each year. Still, the potential benefits to the public in better understanding particular cases and the justice system in general justify the installation of at least a single camera in the courtroom in which the Court of Appeal usually sits in Brisbane and in the Banco Court. Such an arrangement would permit the camera to be used by the media in the event an application is granted to record and broadcast proceedings in the Court of Appeal. It would avoid the recurrent cost and distraction involved in having a "pool camera" being brought in and out of those courtrooms. The court should investigate the most effective and cost-efficient method of achieving this. If, however, an applicant to record and broadcast an appeal proceeding sought to make use of a "pool camera", the application should be decided on its merits by the court hearing the matter.

Recommendation – appeal proceedings

237. As with the recording and broadcasting of sentencing remarks, the public interest in a better understanding of particular proceedings, and of the justice system in general, warrants a pilot program for the recording of appellate proceedings in appropriate cases.

238. Any system of recording for broadcasting purposes would need to be subject to guidelines addressing matters such as the recording and broadcasting of the evidence of witnesses, the exclusion of certain categories of cases and the location and field of view of cameras.

239. An application should be made in advance of the appeal to record the proceedings for the purpose of near-simultaneous transmission, broadcasting on a news or similar program or documentary purposes. The form of application should be developed by the Court Information Office and would indicate whether a single, fixed camera is proposed to be used, or, if some other form of recording is proposed, the participants in the proceeding who would be recorded for broadcasting purposes.

240. Ultimately, it should be for the court to decide in a particular case whether any, and if so which, participants in the proceeding, should be recorded for the purpose of having audio-visual recordings communicated to the general public.

LIVE-STREAMING OF ALL PROCEEDINGS – EXPECTED DEMAND AND REQUIRED RESOURCES

241. Professor Pearson and others have advocated the introduction of a system whereby proceedings which are held in open court are recorded on webcams that are installed in all courtrooms and live-streamed. A variation on this is for the court to have its own dedicated internet channel for live-streaming.

242. It may be argued that, with new and relatively inexpensive technology to record and live-stream proceedings, all proceedings should be live-streamed. This simply would enable members of the public to view what would be seen by them if they exercised their right to attend a proceeding in open court. It may be relatively inexpensive to install webcams in most courtrooms showing the judge and to live-stream the images from this single camera angle to a designated court website which citizens can access. However, such a system would not regulate what was to be broadcast. Guidelines and procedures, and judges and court staff in individual cases, would need to address the evidence of witnesses, including vulnerable witnesses, which may be affected by the knowledge that what they say is being broadcast to the world. Any new system would need to control the transmission of certain evidence to the general public, including the identity of victims and children whose identification is subject to statutory prohibitions. It also would need to control the broadcasting of the horrendous details of certain crimes. Monitoring the recording and transmission of evidence under a system which live-streamed all proceedings in all courtrooms would entail a very substantial cost to the community.

243. Many cases in the superior courts are of no real interest to the general public. Few members of the general public attend them, the media do not report them and it seems unlikely that more than a few members of the general public would wish to view them if they were live-streamed. The resources required to establish a system to record and live-stream all proceedings and to apply appropriate restrictions on what is communicated to the general public cannot be justified in the light of anticipated demand.

OTHER ISSUES

RESOURCE IMPLICATIONS

244. The resources needed to electronically record and publish court proceedings depends on the system that is used, the number of cameras (fixed or otherwise) used, the number of courtrooms in which they are installed and the costs of operating and monitoring any system.

245. The Committee received the following advice from the Queensland Courts' Information and Court Technology Branch. In summary:

(a) It would be possible financially to install cameras to give a split screen/"quadview" online in one courtroom in Brisbane and, perhaps, one or two outside Brisbane.

(b) It would require a substantial, unbudgeted amount to install cameras capable of producing vision suitable for use on television. A number of other components are required to produce the higher quality streams necessary for broadcast use. The particular components and their configuration are not presently known, therefore the cost is also unknown. It is safe to say, however, that it is very unlikely that the court could absorb the cost of delivering this infrastructure within its existing budget allocations.

(c) The court could acquire a dedicated web site to stream court proceedings. The cost of real-time streaming of one channel (such as the view streamed for Commissions of Inquiry) is approximately $800 per month. If multiple courts were to stream proceedings in real-time, the cost would multiply accordingly.

(d) An option is to record proceedings instead of streaming in real-time, edit the recordings into footage that the court considers appropriate and publish that material on a dedicated Queensland Courts channel on YouTube. The actual delivering of videos via YouTube costs nothing. However, there would be a substantial cost to edit the proceedings (including editing material from multiple camera views into one), which would require a large investment in equipment and expertise.

(e) There are physical difficulties with filming a criminal trial because of the layout of the courtrooms – such as ensuring jurors are not filmed. There are problems with reflections in the glass behind the dock. Shots have backgrounds and it can be very difficult not to catch somebody in-shot who the court would not want to be filmed.

(f) If a trial was being streamed then someone (presumably the judge's associate) would have to cut the feed whenever the jury left the court or at any other time the judge required it.

246. Quadview and similar cameras have been used in the past in proceedings in Queensland courts and in other proceedings, such as Royal Commissions. They have been used for the purpose of CCTV recordings to transmit images to other courtrooms and to media rooms. This has occurred in trials such as *Cowan*. Issues arise about the persons who should be recorded by fixed cameras. For example, fixed cameras might be directed at the judge, counsel at the bar table and witnesses. Would a camera be directed at an accused during a trial? The fixed cameras used in the courts are low-resolution.

247. On some occasions, such as on ceremonial occasions in the Banco Court, high-resolution cameras have been used, but they require an operator, with associated costs.

248. The information provided to the Committee indicates that it would be possible to have low-cost cameras which produced low-quality images. Unlike appeal proceedings in the High Court of Australia where there is one fixed camera, issues arise concerning live-streaming of images in criminal courts due to their configuration and the possibility of recording and transmitting images of vulnerable witnesses, jurors, members of the public and defendants (if recording and transmitting images of defendants was considered inappropriate).

249. The presence of a "producer" to ensure that unauthorised images are not recorded and transmitted comes at a cost. It could not be expected that a bailiff or a judge's associate would be able to additionally act as a producer to monitor the feed and to cut it when, for example, the jury came into view.

250. The cost of acquiring and establishing cameras which would record high-quality images, and the editing of those recordings to allow them to be placed on a dedicated channel or YouTube site is beyond the court's budget.

INSTALLATION OF CAMERAS

251. If a system to record and live-stream all proceedings is not introduced, then it becomes necessary to assess the likely demand amongst the media to record and broadcast various types of proceedings. This practical consideration arises because of the costs associated with establishing cameras and other facilities in most courtrooms. Presently, that cost cannot be justified in the light of anticipated demand. As noted, many cases in the superior courts are of no real interest to the general public. Few are currently the subject of reporting by the media, and it is doubtful whether recording them for the possible use of the media would result in many proceedings which are currently not reported being reported.

252. Any pilot program for the recording of sentencing remarks may entail the installation of cameras in some courtrooms. Alternatively, if the New South Wales practice is followed, a pool camera would be brought into the courtroom on behalf of the media organisations which are authorised to record and broadcast the sentencing remarks. The media would cover the costs of doing so.

253. Any pilot program for the recording of appellate proceedings probably would entail the installation of a single camera in the courtroom in which the Court of Appeal usually sits in Brisbane and a similar camera in the Banco Court.

254. A suitably-qualified Courts Information Officer would be required to liaise with media organisations to make arrangements for any pool camera to be used, and to manage the recording and transmission of information that is recorded on fixed cameras.

MODE OF RECORDING

255. A variety of recording forms exist including audio recordings, still photographs, recording from permanently-installed cameras and recording from cameras which are permitted to be used in the courtroom in the event that an application to record proceedings is granted. Each form of recording presents particular issues, including the quality of recording and the potential for cameras to distract participants and disrupt proceedings.

256. Submissions from media organisations proceeded on the assumption that publication would be by way of filming court proceedings for subsequent broadcasting. Footage could be obtained through the use of either fixed cameras or a pool camera. A pool camera is currently used for ceremonial events in the Banco Court, for example, swearing-in ceremonies. One network is responsible for filming the proceeding and the footage is then distributed under an agreement entered into by participating media organisations. If a single pool camera was used, it would need to be positioned between the Bar table and the Bench if both counsel and the judge were to be captured. This positioning would likely result in increased inadvertent recording of jury members and/or the defendant as the camera operator would need to adjust the camera angles as needed. To avoid this, multiple pool cameras would need to be employed. A pool camera would incur the additional cost of a camera operator to control or supervise the recording, unlike fixed cameras. If audio-visual recording of court proceedings were permitted, pool cameras would only be used if media organisations funded their use.

257. The means of audio-visual recording preferred by respondent media organisations is through the use of fixed cameras. This mode would permit the courts to maintain greater control over the footage, but it comes at a cost to the public. Footage could be reviewed by an officer of the court and edited to remove any excluded content before being distributed either to accredited media organisations or to the public by means of uploading the recording to the courts' website. Some respondents suggested that the existing Supreme Court Library Queensland YouTube channel might also host the recorded footage, although one respondent noted that the delay in uploading footage to YouTube would prevent news outlets from meeting deadlines. The cameras used by the courts would need to be of an acceptable quality so that the footage may be used by mainstream media.

258. Respondent media organisations supported the mode of recording adopted in several recent commissions of inquiry. Recording was by fixed cameras and footage was live-streamed onto a dedicated website controlled by the commission. While this mode of recording may work well, commissions of inquiries do not give rise to many of the considerations present in, for example, jury trials. Care would be required that any recording did not inadvertently record witnesses, jurors or other participants who should not be recorded.

MISAPPROPRIATION

259. A risk of the publication of electronic recordings of proceedings is that they will be misappropriated and used for purposes other than those intended. The potential exists for witnesses, parties and others to be vilified, or at least placed under undue pressure, by selective editing, mixing and misrepresentation of what they said or the context in which it was said. While contempt laws are likely to be an effective means of preventing accredited media from using recordings in an unauthorised manner, they are unlikely to be effective at preventing or discouraging certain individuals from misappropriating this material and republishing it via social media and file sharing sites.

260. The Issues Paper sought submissions on how the courts could deal with concerns about the integrity of court reporting and the misappropriation of the content of court proceedings. Digital information is easily manipulated and its removal from the Internet is difficult. The electronic publication of court proceedings through televising, still photography or audio recordings would mean that a significant amount of digital information would be vulnerable to misuse. One respondent noted that court material is already vulnerable to misappropriation, for example through misquotation. Respondent media organisations submitted that live-streaming or timely access to unedited court footage would be the best means of promoting quality reporting and countering misinformation. While accredited

media are currently permitted to make private audio recordings of court hearings under Practice Direction 8 of 2014, one journalist submitted that poor courtroom acoustics make it difficult for journalists attending court to accurately record what occurred.

261. Misappropriation should not simply be accepted as an inevitable aspect of publishing court proceedings. As one respondent identified:

> "In the milder instances, this might bring the court process into disrepute through parody. At the other end of the scale the misappropriation could have very serious consequences to the safety of witnesses. There is danger it could be used as a mechanism to menace, threaten or harass witnesses".

CONTROL OVER RECORDINGS

262. As noted, submissions supported the proposition that the court should be in control of any information that is released publicly. Such control is necessary to avoid the risk of the inadvertent release of information about victims of sexual offences and other information which should be the subject of non-publication, for example, information which might place individuals and families at risk. One submission emphasised that the court should retain a discretion to suspend broadcasting where necessary. Another submitted that the presiding judge's authority to restrict broadcasting should not be subject to appeal. Another submission contended that whether recording be by means of fixed cameras out of the court's control or from cameras which are brought into the courtroom by the media, recording and broadcasting should be assessed on a case-by-case basis by the presiding judge.

GUIDELINES

263. Whilst any recording should be under the control of the presiding judge, who may prohibit the communication of what is recorded or make orders about the conditions upon which any recorded material is broadcast, any system should be supported by guidelines.

264. The way in which any new system is formalised will depend in part upon which system is adopted and the level of protection necessary to ensure that recording and publication is conducted responsibly. Of those respondents who considered this issue, the majority were in favour of administrative guidelines being developed, possibly in the form of practice directions. Legislation governing the broadcasting process would be too inflexible to accommodate changes in technology and media practice.

265. Administrative guidelines should not create rights. Guidelines would encourage a consistent approach. One respondent cautioned that an unintended consequence of an entirely discretionary approach could be that the exercise of discretion in determining which matters may or may not be broadcast could serve to sensationalise those proceedings that are in fact broadcast.

266. Several ways of supervising the enforcement of administrative guidelines were raised in the submissions, including the appointment of a Courts Information Officer or a "Press Judge" and the creation of a committee of judges responsible for oversight of all in-court media coverage matters. It was also suggested that failure to comply with prescribed standards or protocols could result in the individual's or group's removal from the list of accredited media under the Supreme Court Media Accreditation Policy. Enforcement of industry codes of practice and the laws concerning contempt and defamation, as they relate to the publication of court proceedings, would be dealt with in the ordinary course.

FUTURE REVIEWS

267. Changes in technology and changes in the way members of the public receive information about court proceedings mean that current assessments may be overtaken by developments in coming years. Current assessments about the public demand to view particular proceedings, the resource implications of installing cameras in courtrooms and the public cost of managing a system to monitor what is recorded and broadcast may require revision. The outcome of pilot programs to record and broadcast sentencing remarks and appellate proceedings will inform future developments.

268. If, on some future occasion, an application is allowed by a Queensland trial judge to record and broadcast a criminal trial, it may confirm or falsify concerns that have been raised in Queensland and in other jurisdictions about the effects of broadcasting criminal trials on trial participants, the right to a fair trial and the public's understanding of proceedings. Developments in other jurisdictions, and further research into the effects of broadcasting court proceedings, may call for a review of the recommendations contained in this report.

269. These and other changes which cannot be accurately predicted justify a regular review by the judges of what changes should be made to improve public understanding of particular proceedings and the justice system in general.

ADDITIONAL WAYS TO INFORM AND EDUCATE THE PUBLIC

270. One of the aims of the electronic publication of court proceedings is to better inform and educate the general public about the courts and the justice system in general. The Issues Paper canvassed whether there are ways of achieving this aim which avoid some of the risks associated with recording and broadcasting court proceedings. These included whether the public resources required to introduce any system for the recording and broadcasting of proceedings, and monitoring compliance with orders and guidelines, would be better used to develop:

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

271. One way to improve public understanding about the courts and the justice system is the appointment of a Court Information Officer, whose duties would include ensuring that the media and the public are provided with timely and accurate information about matters that are of high interest and to increase the community's understanding of the work of the courts. Such an officer might develop targeted communications to assist court users, the media and the general public about important issues, such as how judges sentence. The Bar Association of Queensland noted that the Supreme Court of Canada has a facility through which its communications officer periodically briefs the media on upcoming cases in the court. The media is provided with information about judgments, including in some cases through lock-up facilities where journalists, without access to electronic communication devices, are able to be briefed on judgments before they are handed down, but are prevented from communicating anything about the judgments until they have been delivered.

272. The Supreme Court of New South Wales has taken significant steps to serve the general public, the media and the legal profession, including initiatives to better explain court judgments. Court judgment summaries condense a full judgment into a one or two-page document that is easy to read and understand. They are appreciated and valued by the media.

273. The case for having a court information officer has been advanced by experience in other jurisdictions and in academic research.[72] All mainland Australian State jurisdictions except Queensland have court information officers. Federal Courts also have court information officers. They have different job titles in different jurisdictions. These officers are responsible for issuing media statements and releases on behalf of the court, developing communications materials, developing and managing protocols for engagement by the courts with the media, and liaising with the media.

[72] See, eg, Jane Johnston, "The court-media interface: bridging the divide" (2008) 30(1) *Australian Journalism Review* 27; Jane Johnston, "Communicating courts: a decade of practice in the third arm of government" (2005) 32(3) *Australian Journal of Communication* 77.

Guidelines and assistance to the media

274. One way in which Queensland Courts can assist the media to report proceedings fairly and accurately is to develop media policies and guidelines. The Supreme Court of Victoria[73] and the County Court of Victoria[74] have developed such documents. Currently the Supreme Court of Queensland and the District Court of Queensland do not have similar policies and guidelines. A suitably-qualified Court Information Officer could develop similar documents under the guidance of the judges, and under the direction of the Chief Justice and the Chief Judge.

275. The Supreme Court of Victoria on its website has a page "Covering the Courts: A Basic Guide for Journalists".[75] The Supreme Court of New South Wales provides resource materials to the media in order to ensure the fair and accurate reporting of proceedings before the court.[76] In August 2015, the Chief Justice of the Supreme Court of New South Wales released a new set of reporting guidelines. The new media guidelines are available through the Supreme Court website.

276. Media reporting of matters which should not be reported can have devastating consequences for victims of crime, the right of an accused to a fair trial and the administration of justice. Trials may have to be aborted, and if they continue there may be a viable ground of appeal concerning prejudicial publicity. It may be necessary for Queensland courts to develop similar guides for journalists as those produced in Victoria and New South Wales. A Court Information Officer could help develop those guides.

Media inquiries and correcting significant inaccuracies

277. A Court Information Officer would be a suitable person to receive any media inquiries which otherwise would be made to a judge's chambers.

278. On occasions a court or a judge becomes aware of a significant inaccuracy in a media report of a proceeding, which may prejudice a proceeding. It may be problematic for a judge or a judge's associate to contact the media to make such a correction, and there is no dedicated officer in Supreme or District Court's staff to take steps to notify the relevant media organisation of the inaccuracy. Such a role could be undertaken by its Court Information Officer.

Case summaries in important cases

279. Court Information Officers in other jurisdictions prepare case summaries of important decisions which are likely to attract public and media interest. Typically, a one-page or two-page summary will be prepared, or at least edited, by a Court Information Officer under the supervision of the relevant judge or court.

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[73] The Supreme Court of Victoria's "Media Policies and Practices" can be found at: http://www.supremecourt.vic.gov.au/home/going+to+court/for+the+media/media+policies+and+practices

[74] The Victorian County Court's guidelines for the media may be downloaded at https://www.countycourt.vic.gov.au/information-media

[75] http://www.supremecourt.vic.gov.au/home/going+to+court/for+the+media/covering+the+courts+a+basic+guide+for+journalists

[76] http://www.supremecourt.justice.nsw.gov.au/Pages/media_resources.html,c=y.aspx

The Court's website

280. Other courts in Australia have well-developed websites and many courts use social media to communicate with court users and others. A Court Information Officer could be responsible for publishing documents and other information to the Court's websites and intranet. This would include the timely uploading of the transcript or audio files of the sentencing remarks in high profile and other cases, thereby assisting the public and the media to obtain an accurate account of what was said.

Managing access by the media to documents and other material

281. The Victorian Guidelines deal with to access to files and documents. The County Court Media Guidelines include a media request form. Queensland's Criminal Practice Rules govern applications by the media to exhibits and other documents.

282. Media requests for access to documentary and other exhibits, including recordings, can be a time-consuming and potentially distracting matter for a judge and a judge's associate. A Court Information Officer might assist the judge and the judge's staff in processing applications in accordance with the Criminal Practice Rules and implementing orders that are made.

Developing protocols for future applications to a judge to record and broadcast a hearing

283. In the future an application is likely to be made to a sentencing judge or a trial judge to record and broadcast a hearing. Such an application was made to Justice Atkinson in *R v Cowan* [2014] QSC 41. The application was declined and one of the reasons was that there were no standardised procedures in this State or in the Supreme Court about recording and broadcasting such a proceeding and that there was no Court Information Officer who could deal with it. Her Honour referred to the great difficulty in developing a procedure on an ad hoc basis.

284. A Court Information Officer would be responsible for developing and implementing guidelines for the electronic recording and publication of in-court proceedings. This would include developing protocols about how the application would be made and a default position about how the recording would take place if the application was granted, e.g. the location of cameras, what could be filmed etc. Each application would need to be determined by a judge on a case-by-case basis, but prior development of a protocol would avoid a judge hearing such an application having to start with a "blank page" in devising what would be recorded and how it would be recorded in the event an application was granted.

Recommendation

285. The judges of the Supreme Court and the judges of the District Court support the appointment of a Court Information Officer to assist the courts in better informing and educating the general public about the courts and the justice system in general. A Court Information Officer would assist the media to obtain important information about proceedings and to assist the media to report proceedings fairly and accurately.

SUMMARY OF RECOMMENDATIONS

Guiding principles

286. Any system for the electronic publication of court proceedings must reconcile the right to a fair trial and the principle of open justice, while also taking other interests into account.

287. The right to a fair trial may be affected if undue pressure is placed upon parties, witnesses and other participants in a proceeding. For example, if a witness is inhibited from giving evidence or in giving evidence, the quality of justice is affected, and an injustice may be the result. Prejudicial publicity may imperil a fair trial and result in adjournment of trials or mistrials. Delays caused by those disruptions can have a devastating effect on individuals and their families, including victims of crime.

288. The principle of open justice ensures that courts are open to public scrutiny. It also enables the public to understand what happens in courts, the procedures by which justice is administered according to law and how justice is done in a particular case. By educating and informing the public about the administration of justice, public confidence in the court system is maintained. Fair and accurate reporting of proceedings helps avoid misunderstandings about what happens in courts, including misunderstandings fostered by individuals who misrepresent how the courts operate.

289. Proposals for "cameras in the courtroom" should be viewed in the broader context of developing practices to ensure that the public is accurately informed about the work that courts do, the justice system in general and particular proceedings which are open to the public. The electronic publication of court proceedings is one means of increasing community engagement with the justice system and educating the general public about the work of the courts.

290. Legitimate concerns exist about the effect of publication of in-court recordings of proceedings upon participants in a matter before the court, including witnesses, jurors and parties. These effects may prejudice a fair trial and have other adverse consequences for the administration of justice.

291. Proceedings are diverse. Some proceedings, such as appeals and sentences, do not typically involve witnesses. Different kinds of cases present different issues. They require separate consideration, in weighing risks against benefits. Therefore, there is no simple answer to the question of whether the broadcasting of proceedings in general, subject to safeguards, would sufficiently increase public understanding of particular cases or the justice system to justify identified risks.

Judicial control and weighing competing interests

292. This report's recommendations relate to changes to Practice Directions which generally prohibit the use of electronic devices in courtrooms and generally prohibit the broadcasting of image and sound recordings of court proceedings. Under current arrangements, and under any future arrangements based on those recommendations, the decision to allow or to not allow the recording of proceedings remains the decision of the presiding judge in a particular case.

293. Respondents to the Issues Paper support the principle that courts should control the audio-visual recording of court proceedings because of its potential to prejudice the right to a fair

trial and to prejudice other important public interests, such as the protection of vulnerable witnesses.

Likely effect of recording and broadcasting proceedings upon participants in proceedings

Witnesses

294. A crucial issue is whether witnesses should be recorded in court for the purpose of contemporaneous or near contemporaneous broadcasting of their evidence. The concerns expressed by many respondents about the effect of such a system upon the preparedness of many witnesses to give evidence and the quality of their evidence are legitimate. Like the Scottish Report, the judges of the Supreme Court and the judges of the District Court do not favour the introduction of a system for the recording of the evidence of witnesses for either live transmission or news broadcast.

295. Recording of witnesses for documentary purposes raises some but not all of the concerns that exist with the recording of the evidence of witnesses for either live transmission or news broadcast.

296. It should remain open for decision in a particular case whether the evidence of witnesses is recorded for the purposes of live transmission, news and similar broadcasts or documentary purposes. Special consideration should be given to the position of victims and vulnerable witnesses.

Jurors

297. Current laws and practices, for good reason, seek to protect the identity of jurors from public disclosure. Jurors should feel at ease during court proceedings and private deliberations and not feel pressured to reach a particular verdict. They should not apprehend that they will be approached either during the course of a trial or after it and questioned about their decision or their deliberations. Citizens should be encouraged to perform jury service, and be protected from the threat of intimidation or harassment. They should not be filmed, photographed or audio-recorded by the media when performing their important duties.

Persons in the public gallery

298. On balance, the right of the media to report the fact that certain persons were in the public gallery does not justify the recording of images of persons in the public gallery and the broadcasting of their reactions to parts of the evidence and to what is said by counsel. There is insufficient public interest in recording the presence of persons in the public gallery to outweigh the risk that the recording of their reactions will affect their behaviour and act as a distraction. The judges favour the New Zealand position whereby members of the public gallery are not filmed.

Other participants

299. Ultimately, it should be for the judge to decide in a particular case whether any, and if so which, participants in the proceeding should be recorded in court for the purpose of having audio-visual recordings communicated to the general public.

300. Rather than have a general rule, which either allows or prohibits the in-court recording of litigants in civil proceedings, the better approach is to require an application, ordinarily to be made in advance of the trial of any such proceeding, to record litigants and others in court. If

the application was opposed, consideration could be given to the interests of the public in receiving those recordings and being better informed, and other interests, including the interests of vulnerable litigants.

301. Any system for the recording and broadcasting of proceedings should allow for individuals to apply to the trial judge for an order that they not be filmed or photographed in court or otherwise electronically recorded in court for the purpose of the recording being communicated to the general public. Such an application might be granted if, for example, the court was persuaded that recording would inhibit the person from performing his or her role in the proceeding or expose the person to a significant risk of threats or intimidation. Correctional officers should be entitled to provide to the court an objection in writing to being recorded if that will lead to them being identified.

302. Rather than adopt a consent-based system, by which the consent of lawyers and other participants would need to be obtained before they could be recorded, applications to record proceedings should be made to the court. Such an approach maintains judicial control over who, if anyone, is recorded in court for the purpose of broadcasting. It enables participants in proceedings who oppose such recording to advance arguments, and for the judge to weigh competing arguments.

Particular proceedings

Criminal trials

303. If there remains a general prohibition on recording and broadcasting the evidence of witnesses, then the recording and potential broadcasting of criminal trials would be effectively limited to opening statements by counsel, addresses by counsel to the jury and the trial judge's summing up. Depending on the case, it may also include the evidence of expert witnesses who consent to having their evidence recorded for broadcasting purposes.

304. The ability of the media to record some parts of some criminal trials, but not the evidence of all or most witnesses, is unlikely to significantly increase public understanding of particular proceedings or the justice system in general. Trials which presently go unreported are unlikely to be recorded and broadcast. The recording of in-court proceedings would add some limited film footage in high-profile cases which are already reported.

305. Even assuming guidelines and appropriate prohibitions could reduce the risks of affecting participants in the trial process and other risks to the administration of justice, the broadcasting of criminal trials is unlikely to lead to any significant increase in public understanding of particular proceedings or the justice system in general. Any slight increase in public knowledge of particular proceedings, the accuracy of reporting and public understanding of the criminal justice system is likely to be outweighed by the risk of prejudice to trial participants, particularly witnesses, and thereby prejudice a party's right to a fair trial.

306. It remains open to media organisations to apply to a trial judge in advance of a trial to record it for live transmission, broadcasting on a news or similar program or for documentary purposes. However, the judges do not support the adoption of a new system whereby, as a general rule, criminal trials are recorded and broadcast. As a result, they do not support an amendment to the current Practice Direction for criminal trials.

Sentencing

307. The arguments in favour of permitting sentencing remarks in some cases to be recorded and broadcast justifies a pilot program to monitor:

(a) the demand by the media to record and broadcast certain sentences;

(b) the consequences of making arrangements for recording on the efficient and timely disposition of sentences; and

(c) the extent to which recording and broadcasting sentencing remarks enhances public understanding of the reasons for sentences in particular cases and the sentencing process in general.

308. The judges consider that there is merit in undertaking a pilot program to assess the practicality and costs of recording and broadcasting sentencing remarks. Any program will require the development of a suitable Practice Direction, logistical arrangements and the appointment and assistance of a Court Information Officer to develop guidelines to assist the judges and the media. Guidelines would address matters such as the exclusion of certain categories of cases and the location and field of view of cameras. The pilot program will require the timely processing of applications to record in particular cases.

309. The decision to allow or to not allow the recording of sentencing remarks would remain the decision of the presiding judge in a particular case.

Civil proceedings – first instance

310. Because there is likely to be a very small demand to record and broadcast most civil proceedings, any application to do so should occur on a case-by-case basis to the judge who is in control of the particular proceeding. Any system of recording would need to be subject to guidelines addressing matters such as the recording of the evidence of witnesses and the exclusion of certain categories of cases.

Appeal proceedings

311. As with the recording and broadcasting of sentencing remarks, the public interest in a better understanding of particular proceedings, and of the justice system in general, warrants a pilot program for the recording of appellate proceedings in appropriate cases.

312. Any system of recording would need to be subject to guidelines addressing matters such as the recording of the evidence of witnesses, the exclusion of certain categories of cases and the location and field of view of cameras.

313. An application would be made in advance of the appeal to record the proceedings for the purpose of near-simultaneous transmission, broadcasting on a news or similar program or documentary purposes. The application would indicate whether a single, fixed camera was to be used, or, if some other form of recording was proposed, the participants in the proceeding who would be recorded for broadcasting purposes.

314. Ultimately, it should be for the court to decide in a particular case whether any, and if so which, participants in the proceeding, should be recorded in court for the purpose of having audio-visual recordings communicated to the general public.

Live-streaming of all proceedings

315. Many cases in the superior courts are of no real interest to the general public. Few members of the general public attend them, the media do not report them and it seems unlikely that more than a few members of the general public would wish to view them if they were live-streamed. Monitoring the recording and transmission of evidence under a system which live-streamed all proceedings in all courtrooms would entail a very substantial cost to the community. The resources required to establish a system to record and live-stream all proceedings and to apply appropriate restrictions on what is communicated to the general public cannot be justified at this stage in the light of the absence of anticipated demand.

Resources

316. Any pilot program for the recording of sentencing remarks may entail the installation of cameras in some courtrooms. Alternatively, if the New South Wales practice is followed, a "pool camera" would be brought into the courtroom on behalf of the media organisations which are authorised to record and broadcast the sentencing remarks.

317. Any pilot program for the recording of appellate proceedings probably would entail the installation of a single camera in the courtroom in which the Court of Appeal usually sits in Brisbane and in the Banco Court.

318. A suitably-qualified Court Information Officer would be required to assist in developing the pilot programs, to liaise with media organisations to make arrangements for any pool camera to be used, and to manage the recording and transmission of information that is recorded on fixed cameras.

Guidelines

319. Whilst any recording should be under the control of the presiding judge, who may prohibit the communication of what is recorded or make orders about the conditions upon which any recorded material is broadcast, any system should be supported by guidelines. Administrative guidelines should not create rights. Guidelines will encourage a consistent approach. The Court Information Officer would assist in developing these principles.

Future reviews

320. Technological and other changes which cannot be accurately predicted justify a regular review by the judges of what changes should be made to improve public understanding of particular proceedings and the justice system in general. The outcome of pilot programs to record and broadcast sentencing remarks and appellate proceedings will inform future developments. The pilot programs and the issue generally should be regularly reviewed.

Additional ways to inform and educate the public

321. The judges of the Supreme Court and the judges of the District Court support the appointment of a Court Information Officer to assist the courts in better informing and educating the general public about the courts and the justice system in general. The Court Information Officer would assist the media to obtain important information about proceedings and to report proceedings fairly and accurately.

322. A Court Information Officer might:

- develop guidelines of the kind used in Victoria which educate judges and the media and improve working relations between them;
- produce guides for journalists to assist in the fair and accurate reporting of proceedings;
- receive media inquiries which otherwise would be made to a judge's chambers;
- notify the relevant media organisation of a significant inaccuracy in a report of a proceeding, which may prejudice a proceeding or undermine confidence in the justice system;
- prepare one or two page case summaries of important decisions which are likely to attract public and media interest;
- upload to the Court's websites the transcript or audio files of the sentencing remarks in high profile and other cases, thereby assisting the public and the media to obtain an accurate account of what was said;
- assist in processing applications under the Criminal Practice Rules to access documentary and other exhibits and implementing any orders that are made; and
- develop and implement guidelines for the electronic recording and publication of in-court proceedings.

APPENDIX I: GLOSSARY

Accredited media means media personnel who are accredited pursuant to the Supreme Court's *Media Accreditation Policy*.[77]

Court proceeding means a hearing in a courtroom that takes place before a judge or a Deputy Registrar.

Courtroom means any room in which a hearing is taking place before a judge or Deputy Registrar.[78]

Documentaries are educational videos produced by internal or external providers for delayed broadcast. Documentaries are one way in which court proceedings may be electronically broadcast while permitting thoughtful editing of the footage to ensure that the best interests of the administration of justice are served.

Electronic device means any device capable of sending, receiving, or recording data or any combination of those functions and includes smartphones, cellular phones, computers, laptops, tablets, notebooks, personal digital assistants, or other similar devices.[79]

Licensed broadcasting means the live or delayed broadcasting of court proceedings by accredited media. This broadcasting may include the transmission of audio, audio-visual or text-based communications.

Live, text-based communications (LTBC) means the live transmission of predominantly text-based communications, for example, through social media platforms such as Twitter and Facebook. LTBC are permitted under Supreme Court of Queensland Practice Direction 8 of 2014. Live transcription services would also fall within this category of electronic communication, with different considerations arising depending upon whether the service was employed by the courts, parties or accredited media.

Live-streaming refers to the instantaneous transmission of court proceedings. The recording may be captured by the official court reporting service or privately by accredited media. Some Queensland courts are already equipped to provide live-streaming and have done so to other court houses or to "overflow" courts in high-profile proceedings.

Pool camera refers to a camera which is supplied and operated by a television network for use by it and other networks. A pool camera is used on occasions to record ceremonial sittings in Queensland courts. A pool camera is used to record sentencing remarks in some cases in New South Wales.

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77 Practice Direction 8 of 2014, [3(a)].
78 Practice Direction 8 of 2014, [3(b)].
79 Practice Direction 8 of 2014, [3(c)].

APPENDIX II: LIST OF SUBMISSIONS RECEIVED

PUBLIC SUBMISSIONS LIST

Attorney-General's Department, Australian Government

Australian Broadcasting Corporation

Bar Association of Queensland

Mr Warren Bolton

Commonwealth Department of Public Prosecutions

Crown Law, Queensland Government

Department of Communities, Child Safety and Disability Services, Queensland Government

Department of Health, Queensland Government

Department of Justice and Attorney-General, Queensland Government

Department of Premier and Cabinet, Queensland Government

Indigenous Lawyers Queensland

Joint Media Organisations

Legal Aid Queensland

Nine Network Australia

Office of the Director of Public Prosecutions, Queensland

Professor Mark Pearson, Griffith University

Queensland Courts, Reform & Support Services

Queensland Law Society

Queensland Police Service

Queensland Public Interest Law Clearing House

Record Holdings Pty Ltd (Auscript)

Dr Pamela Schulz OAM, University of South Australia

Mr Bill Tait

Mr John Taylor, Journalist, Australian Broadcasting Commission

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