

On Camera Proceedings: A Critical Evaluation of the Inter-Relationship Between the Principle of Open Justice and the Televisation of Court Proceedings in Australia

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INTRODUCTION

'Televising court proceedings is among the sickest developments going around ... about a rung below televised executions.'

— Tony Squires, Sydney Morning Herald¹

The opening of the courts to the electronic media has been the subject of much attention within the Australian legal system, law reform bodies and the general public.² Some of the more prominent US cases have served as a catalyst for discussion of the televisation of court proceedings in the Australian context.³

CURRENT SITUATION

Substantial media coverage is currently given to reports of court proceedings where there is a perceived interest, importance or curiosity.⁴ Such reports, however, are generally limited to summaries, 'highlights' or the occasional re-enactment of proceedings, rather than a direct coverage of the proceedings themselves.⁵

There has only been limited experience with the televisation of proceedings in Australia.⁶ The first, and most notable to date, was in February 1981, when the Northern Territory Coroner, Mr Denis Barritt SM, allowed the live televising of his findings in the first *Coronial Inquiry into the Death of Azaria Chamberlain*.⁷ The Coroner did so due to the intense public interest that the inquest had generated and in an attempt to dispose of public innuendo and suspicions surrounding the case.⁸

Later that same year the ABC's *Four Corners* program televised two documentaries. One was a film of proceedings in Sydney's Central Court of Petty Sessions intended to give the public a general view of what it is like to appear in a Court of

* This article was researched and written while the author was a LL.M student at Monash University 1998.

¹ Tony Squires, 'Television hasn't squeezed the last juice out of murder yet' *Sydney Morning Herald* 7 October 1995, 24.

² Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media in Access to Justice: An Action Plan* (1994) Canberra, para 20.2.

³ Tony Squires op cit (fn 1).

⁴ David Weisbrot, 'Take One!: The Case for Televising Court Proceedings in Australia' (1994) 1 *Precedent* 18, 18.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Robert Hoskin, 'Trial by Television: Television Broadcasting within the Judicial System' (1995) 77 *Media International Australia* 120, 122.

⁸ *Id* 123.

Petty Sessions.⁹ The second was filmed in the Hobart Court of Petty Sessions.¹⁰ The opening of the case by the prosecution and the defence was televised because of the considerable public interest in the matter.¹¹ There have also been a number of television documentaries in which proceedings of courts have been televised.¹²

However, no further footage with a profile high enough to generate substantial public debate had emerged from any Australian Court until 1995. On 18 May 1995, Teague J in the Supreme Court of Victoria sentenced Nathan John Avent to life imprisonment with a non-parole period of 21 years.¹³ Generating much controversy at the time, the decision of Teague J to televise the sentencing overshadowed the actual trial. The sentencing was televised under what the media described as 'strict conditions'.¹⁴ The most controversial of these was that television networks were required to broadcast a minimum of two minutes of the sentence.¹⁵

Since the Teague initiative, the Federal Court has permitted very limited filming of court proceedings to generate file footage for use in news reports of proceedings.¹⁶ In July 1997, work on a documentary filmed in the Adelaide Magistrates' Court began, after consultation with Chief Magistrate Jim Cramond.¹⁷ After taking almost twelve months to complete, the final version went to air as part of law week.¹⁸ Unlike Teague J's decision, this does not appear to have sparked any great controversy.

This scarcity of televised proceedings may be a result of the strict view Australian courts have taken to the televising of proceedings. While any person is entitled to

⁹ New South Wales, Law Reform Commission, *Proceedings of Courts and Commissions: Television Filming, Sound Recording and Public Broadcasting, Sketches and Photographs*, Issue Paper 4 (1984) para 4.25.

¹⁰ Daniel Stepniak, 'Why Shouldn't Australian Court Proceedings be Televised?' (1994) 17 *Univ of NSWLJ* 345, 345.

¹¹ *Id* para 4.24.

¹² In November 1981, the ABC's *Four Corners* program televised the documentary 'Stop Thief' in which part of a trial before the Senior Judge of South Australian District Criminal Court was filmed; On 31 March 1992, Mr Justice Millhouse of the South Australian Supreme Court permitted television cameras to record proceedings in a civil case; In September 1993, 'So Help Me God', a documentary of proceedings filmed over a period of six weeks in Campbelltown Local Court in Sydney was televised on the ABC; In October 1993, the ABC's *Four Corners* program featured an investigative report 'Kids at Risk', which included footage of proceedings in the Children's Care Court in Kempsey, New South Wales; In May 1994, proceedings in the Practice Court of the Supreme Court of Victoria were filmed for use as background material for an interview to be shown on ABC's *Lateline* program. Victorian Chief Magistrate Pappas has also permitted filming of Magistrates' Court Proceedings for a Channel 9 Documentary.

¹³ P W Young, 'Televising Court Proceedings' (1995) 69 *ALJ* 565.

¹⁴ Conditions were that only one camera be permitted to film the sentencing, the sentencing could not be broadcast live, the camera had to be focused only on the judge and that the film was to be edited by the judge before being released. Television networks were required to broadcast a minimum of two minutes of the sentence, without editorial comment and the footage was to be used for no purpose other than news. See P W Young, 'Televising Court Proceedings' (1995) 69 *ALJ* 565.

¹⁵ *Ibid*.

¹⁶ Including the Hindmarsh Island matter in South Australia, the ARL matter in Sydney and a commercial trial in Melbourne. See Michael Ball and Marnie Costello, *op cit* (fn 16) 'Television in Court' (1996) 23 *Brief* 9, 10.

¹⁷ Sylvia Kriven, 'Ground Breaking TV Documentary' (1997) 19 *Bulletin* 15.

¹⁸ Friday, 20 May, 8.30pm Ch7. See Sylvia Kriven, 'Ground Breaking TV Documentary' (1997) 19 *Bulletin* 15.

take notes or sketches of proceedings held in open court,¹⁹ Australian Courts have not generally permitted the recording, televising or broadcasting of proceedings.²⁰ No Australian court presently has in it television cameras recording images for public broadcast,²¹ and although the High Court of Australia visually records proceedings, these are not available for public broadcast.²² While there are rarely any formal, general prohibitions on electronic recording it is the policy in most jurisdictions to prohibit the taping or televising of court proceedings unless this is done with the leave of the court.²³ The court has a general discretion to withhold or grant leave which may be on conditions. Leave has been granted on very few occasions.²⁴

OPEN JUSTICE

'Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.'

— Jeremy Bentham²⁵

Any discussion of the televising of court proceedings involves a discussion of the principle of open justice. The principle of open justice is recognised as one of the essential characteristics of common law tradition and one of the most fundamental principles of our legal system.²⁶ The principle says that justice should be administered in open court unless it can be established that justice cannot otherwise be done.²⁷ This was espoused in the leading case of *Scott v Scott*²⁸ which has been accepted as authoritative in Australia and other parts of the Commonwealth.²⁹ 'It is now also widely recognised that important institutions in Australian society should be open to scrutiny by way of television coverage.'³⁰ 'Some have argued that for the principle of open justice to have real meaning in today's society, the media should be entitled, subject to certain constraints, to broadcast court proceedings.'³¹

¹⁹ *R v Leicester City Justices; Ex parte Barrow* [1991] 2 QB 260; *Collier v Hicks* (1831) 2 B and Ad 663, 669; 109 ER 1290, 1292 per Lord Tenterden CJ; *Lambert v Home* [1914] 3 KB 86, 90 per Cozens Hardy MR.; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303 per Lord Diplock.

²⁰ New South Wales Law Reform Commission, op cit (fn 9) para 4.1.

²¹ R D Nicholson and Bernard Teague, 'The Courts, The Media and The Community: Collection of Two Articles' (1995) 5 *Journal of Judicial Administration* 5, 13.

²² Id 13.

²³ New South Wales, Law Reform Commission, op cit (fn 9) para 4.1.

²⁴ Id para 4.24.

²⁵ Bowring, *Works of Jeremy Bentham* (Vol 4, 1843) 305.

²⁶ Garth Nettheim, 'The Principle of Open Justice' (1984) 8 *University of Tasmania Law Review* 25.

²⁷ *Scott v Scott* [1913] AC 417 approved by the Australian High Court in *Dickason v Dickason* (1913) 17 CLR 50 and *Russell v Russell* (1976) 134 CLR 495.

²⁸ [1913] AC 417.

²⁹ Garth Nettheim, 'Open justice v. Justice' (1985) 9 *Adelaide Law Review* 487, 487.

³⁰ New South Wales, Law Reform Commission, op cit (fn 9) para 4.1.

³¹ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) 443–458 para 20.3.

ANALYSIS OF THE CURRENT POSITION

'The difficulty is that if, as is the case, proceedings in court are public as a matter of fundamental principle, there can be no reason in theory why they should not be made more public.'

— Sir Daryl Dawson³²

While open justice is accepted as a basic tenet of our legal system, it is a matter of contention whether the principle of open justice should extend to the televising of court proceedings.³³ It is therefore necessary to examine whether, in light of the principle of open justice, television of proceedings by the media is permissible.

Prima facie, the television of proceedings accords with the principle that proceedings should be conducted in public. Publicity has been recognised as the essential element of open justice and without it the principle is rendered nugatory. Generally speaking, it is taken for granted that court proceedings are open to the public and may be freely reported.³⁴

The principle is not absolute and can be displaced by statute.³⁵ However, Australia does not have any specific legal prohibition of the use of cameras in the courtroom. There do exist general common law and statutory restrictions regulating all forms of media reporting including the existing laws of contempt, defamation and other numerous statutory provisions restricting the scope of any televising of court proceedings.³⁶ None of these provisions, however, contain a general prohibition on televising and neither the Federal Government nor any of the States have legislated to ban cameras from Australian courtrooms.³⁷ Therefore it appears, prima facie, television of court proceedings would be legal.

³² Sir Daryl Dawson, 'Judges and the Media' (1987) 10 NSWLJ 17, 25.

³³ Australia, Access to Justice Advisory Committee, op cit (fn 31) para 20.1.

³⁴ Garth Nettheim, op cit (fn 29).

³⁵ Statutory Exceptions to the principle of Open Justice (Power to sit *in camera*.) See ss 125 and 126 *Magistrates' Court Act* 1989 (Vic), s 81 *County Court Act* 1958 (Vic), ss 18 and 19 *Supreme Court Act* 1958 (Vic), s 19 *Children and Young Persons Act* 1989, s 107 *Adoption Act* 1984 (Vic), s 97 *Family Law Act* 1975 (Cth), s 47 *Coroners Act* 1985 (Vic), s 17 *Federal Court Act* 1976 (Cth), s 15 *Judiciary Act* 1903 (Cth), s 85B *Crimes Act* 1914 (Cth), s 129 *Health Act* 1985 (Vic).

³⁶ For a useful summary see Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.7–20.11.

These include those prohibiting the publication, printing, broadcasting or televising of materials that might identify a juror (For example s 69 *Juries Act* 1967 (Vic)), those which forbid the publication of an account of certain types of proceedings in such a way as to identify a party, a witness, a person related to, or associated with, or in any way concerned with the proceedings (For example s 121 (1) *Family Law Act* 1975 (Cth) and s 121 (2) *Adoption of Children Act* 1984 (Vic)), those dealing with sexual offences (For example s 81 (1) *County Court Act* 1958 (Vic) and s 126 (1) (d) *Magistrates' Court Act* 1989 (Vic)) as well as statutory powers of courts to make orders prohibiting the publication of reports on the grounds of 'public decency and morality' (For example s 3 (1) (a) *Judicial Proceedings Reports Act* 1958 (Vic) and s 81 (1) *County Court Act* 1958 (Vic)).

³⁷ Anne Flahvin, 'Justice Through the Eye of the Camera', *Sydney Morning Herald*, 26 September 1994, p 13.

However, it has been noted that courts have inherent jurisdiction or power to control their own proceedings.³⁸ This power, is the only basis upon which courts have sought to justify their ability to prohibit the television of proceedings. At common law the ability of the court to displace the principle of open justice is limited to exceptional circumstances where it is necessary to do so in the interests of justice itself.³⁹ It is clear that a court's inherent jurisdiction to control its own proceedings cannot exceed what is necessary for the administration of justice.⁴⁰ Consequently, any power of a court to restrict television of proceedings is limited to situations where it is necessary to do so in the interests of the administration of justice.

PHYSICAL DISRUPTION

One of the first arguments against the television of court proceedings is that the presence of media and equipment will cause physical disruption that will interfere with the administration of justice.

This was recognised by the US Supreme Court in *Estes v Texas*,⁴¹ the first of the US Supreme Court's decisions regarding the use of cameras in the courtroom. In *Estes*, despite objections of the defendant, the judge, Mr Justice Clark, allowed parts of the trial to be televised. Estes was convicted, but appealed to the Supreme Court on the basis that he had been deprived of his constitutional right to a fair trial because of the excessive intrusion. The Supreme Court described the situation:

At least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.⁴²

It was held by the United States Supreme Court that the televising and broadcasting of the trial had deprived Estes of his right to due process of law and the conviction was reversed.⁴³ The Justices' concern was that the presence of bulky equipment and noisy camera operators would have so affected judicial proceedings that the jurors, lawyers and judges could not function properly, and the defendant would thus be denied a fair trial.

However, this justification has become significantly weaker with the progression of technology. It has been stated by Fulton⁴⁴ that, 'the claim that the

³⁸ K Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 ALJ 449, 449.

³⁹ See *Scott v Scott* [1913] AC 417.

⁴⁰ *Scott v Scott* [1913] AC 417, 477; *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264.

⁴¹ (1965) 381 US 532, 567.

⁴² (1965) 381 US 532, 535–536.

⁴³ It was later concluded in the case of *Chandler v Florida* (1981) 101 S Ct 802 that broadcast coverage of a criminal trial is not *inherently* a denial of due process, but that an individual appellant could demonstrate affirmatively that broadcast coverage of their trial had a sufficiently adverse impact on the trial participants to constitute such a denial.

⁴⁴ J D Fulton, 'Fourteenth Amendment — Cameras in the Courtroom: Supreme Court gives the go-ahead' (1981) 72 *Journal of Criminal Law and Criminology* 1393, 1394.

presence of the media in the courtroom will cause disruption is no longer a basis for the ban, if indeed it ever was.⁴⁵ It is now widely acknowledged that technological advances, combined with pooling arrangements between the media, has meant that the risk of disruption is virtually eliminated.⁴⁶ The US Supreme Court in the later case of *Chandler v Florida*⁴⁷ recognised that there had been substantial changes in television technology since the *Estes* trial in 1962.⁴⁸ The court noted that the distracting aspects of the media's presence discussed in *Estes*, including bulky equipment, cables, special lighting, and numerous technical personnel are no longer part of media technology and thus not objectionable.⁴⁹ They also noted that there is an absence of 'empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect,'⁵⁰ and consequently, the court held that the television coverage of the *Chandler* trial had not affected the defendant's right to a fair trial.⁵¹

It is now widely recognised that new technological developments in audiovisual communication permit proceedings to be recorded unobtrusively and without adverse effects on proceedings.⁵²

As it happens, many if not most court and tribunal proceedings in Australia are now electronically recorded for the purposes of preparing transcripts. The High Court of Australia already employs quite a sophisticated video-recording system which is used for transcript preparation as well as interstate video-conferencing. There has been no suggestion whatever that this disrupts proceedings.⁵³

It does not appear that television causes any physical disruption that would interfere with the administration of justice. Evidence appears to suggest that the ability to televise proceedings can in fact lessen disruption in the courtroom. 'Experience with closed circuit television [in Australian Courts] shows that not only can cameras be used without interrupting court proceedings but that cameras can in fact lessen potential interference by enabling proceedings to be viewed from outside the courtroom.'⁵⁴

Fulton also concludes that,

Television has become commonplace at many types of public proceedings, such as legislative sessions, city council meetings, and even solemn religious ceremonies. If the presence of camera at these proceedings has not been found to be disruptive, it is reasonable to conclude that cameras will not disrupt the courtroom. Disruption of the courtroom is no longer a valid reason for an absolute ban on television cameras.⁵⁵

⁴⁵ Id 1404.

⁴⁶ Ian M Ramsay, 'Televising Court Proceedings' (1993) 70(4) *Current Affairs Bulletin* 16, 21. (1981) 101 S Ct 802.

⁴⁸ Id 810–811.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ (1981) 101 S Ct 802.

⁵² Australia, Access to Justice Advisory Committee, op cit (fn 2) 443.

⁵³ David Weisbrot, op cit (fn 4) 20.

⁵⁴ Daniel Stepniak, op cit (fn 10) 357.

⁵⁵ New South Wales, Law Reform Commission, op cit (fn 9) 1405.

ACCESS TO COURTS

'Court decisions and judicial rules that limit camera access ignore the important role television plays in our society and deny access to millions whose only means to exercise their access right is through the media.'

— Sandra Chance⁵⁶

A fundamental element of the principle of open justice is that it entails the public's right to attend trials.⁵⁷ It has been noted that for many people the principle of open justice is of little relevance, unless access to the courts can be achieved via the electronic media. Enthusiasts of television argue that television is one of the only ways to ensure many are able to exercise their right of public access to what goes on in public courtrooms.⁵⁸ They argue that public galleries may have served this purpose well in the 1890's but are inadequate in the 1990's.⁵⁹ It has been noted that, 'most people these days get the bulk of their information about the world around them — including their own social, political and legal institutions — from the broadcast media.'⁶⁰ 'It is only those members of the public who have the time, resources and inclination to travel to a court and for whom public seating is available who will see at first hand what transpires. For the remaining vast majority their understanding of particular proceedings and of the general functioning of the courts is derived from the media.'⁶¹

It was argued, however, by the US Supreme Court in *Estes v Texas*⁶² that the public's right to be informed about court proceedings is satisfied if reporters are free to attend on and report the proceedings.⁶³ This right to be informed of court proceedings will be satisfied,

as long as the court is open to those who wish to come, sit in the available seat, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast or otherwise transmit the trial proceedings to those members of the public not present.⁶⁴

For two hundred or more years this access was achieved through the print media, through newspapers.⁶⁵ However, it has been argued that in today's world far more people rely on television and radio for news reporting and for shaping their views on the functioning of the institutions of society. It has been said that, 'the electronic media are the eyes and ears of the public,'⁶⁶ and for the principle of open justice to have any real meaning they should have access to courtrooms.⁶⁷

⁵⁶ Sandra F Chance, 'Considering Cameras in the Courtroom' (1995) 39 *Journal of Broadcasting and Electronic Media* 555, 556.

⁵⁷ Ian M Ramsay, *op cit* (fn 46) 18.

⁵⁸ Michael Ball and Marnie Costello, *op cit* (fn 16) 11.

⁵⁹ *Ibid.*

⁶⁰ David Weisbrot, *op cit* (fn 4) 18, 19.

⁶¹ Ivor Richardson, 'The Courts and the Public' [1995] NZLJ 11, 14.

⁶² (1965) 381 US 532, 567.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Ivor Richardson, *op cit* (fn 61).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

EDUCATE THE PUBLIC

'Nothing will do more to demystify the legal process and foster public understanding and confidence in the courts-television is the greatest educator of the 20th Century.'

— Michael Ball⁶⁸

There is also a strong justification for the televising of court proceedings in that the electronic media could play an important role in dispelling the view that the courts are remote and incomprehensible institutions.⁶⁹ 'Cameras [would] open up the most mysterious, least understood branch of government; provide significant social and educational benefits by presenting an important view of how the legal system works; and inspire confidence in the judicial process.'⁷⁰

Few would disagree that major trials can provoke discussion about public issues.⁷¹ 'Television coverage of the Simpson case, for all its embarrassing excesses, has generated public debate about race relations . . . the effect of money and wealth on the quality of justice and the ethics of lawyers, witnesses and jurors alike. Pulling the plug on televisions in courtrooms short-circuits these conversations.'⁷² Televising the proceedings of Australian courts is likely to have educational advantages in encouraging greater public discussion and understanding about the legal system. 'The public is more likely to understand, respect and obey laws that it can see operate fairly. The public is more likely to generate better proposals for new laws if it has access to the best available information on the results obtained with existing ones.'⁷³

It has also been argued that if judicial proceedings were televised, the public would be better educated about the administration of justice and the nature of their legal system.⁷⁴ 'With better access to courts, the public would have a better understanding of the responsibilities of the courts, and the way these responsibilities are exercised.'⁷⁵ 'To allow a wider range of people than are able under present arrangements to sit in the back of a court to witness the full unfolding of the trial process would have a valuable educative function for the community.'⁷⁶ Television it is argued is a better source of information about the courts than the press because it is, 'a more direct medium . . . it can convey the moods and nuances of a trial, and provide the public with first hand information about a trial or testimony rather than second hand information through someone else's words.'⁷⁷

⁶⁸ Michael Ball and Marnie Costello, op cit (fn 16) 11.

⁶⁹ New South Wales, Law Reform Commission, op cit (fn 9) 1407.

⁷⁰ Sandra F Chance, op cit (fn 56) 560.

⁷¹ Barbara Hooks, 'Televised trials: are they inevitable here?' *Age Green Guide*, 14 December 1995, 10.

⁷² Sandra F Chance, op cit (fn 56) 555.

⁷³ D J Henry, 'Electronic Public Access to Courts: A Proposal for its Implementation Today', in P Anisman and A M Linden (eds), *The Media, the Courts and the Charter*, (1986) 441.

⁷⁴ Ian M Ramsay, op cit (fn 46) 18.

⁷⁵ Robert Hoskin, 'Trial by Television: Television Broadcasting within the Judicial System' (1995) *77 Media International Australia* 120, 125.

⁷⁶ John Slee, 'Jury's Still Out on Issue of TV Trials', *Sydney Morning Herald*, 16 October 1995, 15.

⁷⁷ C E Riemer, 'Television Coverage of Tribunals: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Interest' (1985) *30 Villanova Law Review* 1299.

A failure to permit televisisation of Australian court proceedings will also mean that the only source of actual footage of court proceedings for Australians will be that generated by courts of other jurisdictions. Australians are already being given access through television to information about courts and the legal system, but it is not the Australian system. Most of the information that Australian television viewers receive comes from other countries, most often the United States.⁷⁸ The Federal Access to Justice Advisory Committee, in 1994 recognised that unless there are broadcasts of the Australian legal system at work, 'Australians' images of their legal system and proceedings are distorted by the plethora of United States media portrayals that are available to them without the countervailing influence of local material.'⁷⁹

'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.'

— P J Downey⁸⁰

The most serious argument opposing television coverage of court proceedings is that television does not present an accurate picture of what has transpired in court.⁸¹ Some argue that rather than educate, televised proceedings would sensationalise and create misconceptions about the judicial process.⁸²

Former Chief Justice of the New South Wales Supreme Court Sir Laurence Street has stated that, 'It is extremely difficult, to the point of being almost impossible, for a televised excerpt to avoid being misleading and being such as to give rise to distorted conclusions. The medium has both an inherent limitation in the extent of the cover that can be telecast, as well as an inherent tendency for the form and appearance to overshadow the substance.'⁸³ It has been noted that the very nature of the television picture 'frames' and 'isolates' the subject in such a way as to give an unreal emphasis, and that this may be inconsistent with the appearance live in the courtroom.⁸⁴ This means that any televisisation could, therefore, not be a true representation.⁸⁵

'The cameraman is selective in what part of a scene is recorded, and then the producer cuts and splices the tape to shape a story. What the viewer sees is not what he or she would have seen had they been there. And inevitably so it will be with trials.'⁸⁶

It has been argued that televising, 'won't enhance public understanding of the court system, since the media will take "30-second grabs" or sensationalise things.'⁸⁷ If only very brief excerpts of proceedings are televised then it is argued that any educational value is lost.⁸⁸ 'Public access will not be enhanced by imbalanced

⁷⁸ Ian M Ramsay, op cit (fn 46) 16.

⁷⁹ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (Canberra, 1994) para 20.21.

⁸⁰ P J Downey, 'TV in Courtrooms' [1992] NZLJ 1, 2.

⁸¹ Ian M Ramsay, op cit (fn 46) 21.

⁸² Daniel Stepniak, op cit (fn 10) 490.

⁸³ Memorandum of Street CJ contained in 'Televising of Court Proceedings and the Judiciary' (1981) 55 ALJ 839.

⁸⁴ Robert Hoskin, 'Trial by Television: Television Broadcasting within the Judicial System' (1995) 77 *Media International Australia* 120, 124.

⁸⁵ *Ibid.*

⁸⁶ P J Downey, 'TV in Courtrooms' [1992] NZLJ 1, 1.

⁸⁷ Michael Ball and Marnie Costello, op cit (fn 16) 12.

⁸⁸ Ian M Ramsay, op cit (fn 46) 17.

“highlights” of proceedings, and the brevity of clippings is unlikely to serve either an educative function or scrutinising function.’⁸⁹

‘Television is concerned with ratings, the courts with justice, and seldom the twain shall meet.’

— Kenneth Gee⁹⁰

It has been submitted that even if television does have educational value, only sensational cases will be televised providing a distorted view of the judicial process to the public who will not receive an accurate impression of the work of the courts.⁹¹ It has been stated that, ‘where television has broadcast courtroom proceedings, it has selected frivolous proceedings and has covered them in a trivial manner.’⁹² Hence, this type of coverage will trivialise court proceedings and so lower the standing of courts in the eyes of the public.⁹³

Television is not reality. The people who run it are not public servants, but competitive entertainers. They represent us, sure, but not as active citizens, more as idle, channel surfing couch potatoes. With all the safeguards in the world they will treat trials as entertainment.⁹⁴

There also exist concerns as to the electronic media’s ability to present a balanced view of court proceedings given, its ‘ephemeral, selective nature and its reliance on an “entertainment” factor.’⁹⁵ Former US Chief Justice Earl Warren once stated, ‘the televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry.’⁹⁶ It has been argued that because of television’s need to entertain, the trials to be televised would be, ‘the bizarre, extravagant, dramatic, lurid and sensational’ and that the picture of the courts would not be an accurate one, ‘as many cases are long and tedious and deal with relatively mundane matters.’⁹⁷ It could be argued that the televising by Justice Teague is a prime example of this occurring.

Why was that case chosen? The answer is because it was so newsworthy, even sensational . . . because it involved such a cruel and bloody crime by an unlikely perpetrator from a religious family with horrible suffering of both the families of the victim and of the accused. If the object were to give a window into the operation of the courts, this was scarcely a typical day in the life of the Australian courts.⁹⁸

⁸⁹ Morag McDowell, ‘The Principle of Open Justice in a Civil Context’ (1995) 2 NZLJ 214, 222.

⁹⁰ Kenneth Gee, ‘Television in the Courts’ (1994) 6 *Judicial Officers Bulletin* 80.

⁹¹ New South Wales, Law Reform Commission, *op cit* (fn 9) para 4.39.

⁹² B V Danielson, ‘T.V. in Court: Fade to Black’ (1991) 70 *Michigan Bar Journal* 70.

⁹³ Ivor Richardson, ‘The Courts and the Public’ [1995] NZLJ 82, 89.

⁹⁴ Libby Purves, ‘Where is the Justice when TV moves In?’, *Times*, 21 November 1994, 17.

⁹⁵ Morag McDowell, ‘The Principle of Open Justice in a Civil Context’, (1995) 2 NZLJ 214, 222.

⁹⁶ See George Gerbner, ‘Cameras on Trial: The “O. J. Show” Turns the Tide’ (1995) 39 *Journal of Broadcasting and Electronic Media* 562, 564.

⁹⁷ Robert Hoskin, ‘Trial by Television: Television Broadcasting within the Judicial System’ (1995) 77 *Media International Australia* 120, 124.

⁹⁸ M D Kirby, ‘Forum: Televising Court Proceedings’ (1995) 18 *Univ of NSWLJ* 483, 485.

It has been postulated that this is a problem overcome to a certain extent by having a channel devoted exclusively to courtroom activities, and 'not having bits and pieces of trials sandwiched between *Oprah* and *Bill Cosby*.'⁹⁹ However, Sir Daryl Dawson highlights that:

it is to be borne in mind that at least one objective of . . . a television program is to increase ratings, often with an eye to profit. Even if assurances are given that the final product will be pitched at the level of education rather than titillation, experience has shown that the result often does not meet expectations and is likely to trivialise rather than explain the process of the law.¹⁰⁰

As noted, 'when first done [television] will of course be cautious and careful, but in the course of time commercial values (or lack of values) will take precedence.'¹⁰¹ A study of the US Federal Court's experiment with admitting cameras into civil trials:

found little or no evidence that the use of courtroom footage provides additional information to viewers about either the facts of the case being covered or the legal process involved . . . The pictures frequently seemed to dramatise and personalise the story, rather than adding any factual material to it . . . [and] could not confirm that the use of cameras in the courtroom served any educative function.¹⁰²

Many believe that television would not distort or sensationalise proceedings any more than currently occurs in the press and television reports. The Australian Access to Justice Advisory Committee noted that distorted images of court proceedings are already being presented in the media.¹⁰³ 'There is little doubt that the televising of a segment, or a series of segments, of court proceedings may not convey an accurate account of the entire proceedings . . . But there is nothing novel in this difficulty. It applies to newspaper (or for that matter television) reports of the day's events in the court . . . Of course not all reporting is careful or balanced, but this is not a vice peculiar to televised court proceedings.'¹⁰⁴ Weisbrot noted that,¹⁰⁵ 'it is difficult to see how the 30-second video clip or sound bite of the broadcast media poses a much greater threat to the administration of justice than a several-word screaming headline in a tabloid.'¹⁰⁶ However, it has been argued that, 'the image on the screen is more powerful, for good or ill, than the printed word.'¹⁰⁷

It has also been argued that television could in fact be a better form of access than personal access to the courts. As noted by Stepniak, 'viewing edited televised proceedings with commentary has certain advantages . . . The television viewer is better placed to hear and see proceedings clearly, is permitted to witness the most

⁹⁹ Robert Hoskin, 'Trial by Television: Television Broadcasting within the Judicial System' (1995) 77 *Media International Australia* 120, 127.

¹⁰⁰ Sir Daryl Dawson, 'Judges and the Media' (1987) 10 NSWLJ 17, 18.

¹⁰¹ P J Downey, 'TV in Courtrooms' [1992] NZLJ 1, 1.

¹⁰² D Amundson and S R Lichter, *Cameras in the Courtroom: A Content Analysis of the use of Courtroom Footage in Television Newscasts*, (Centre for Media and Public Affairs, Washington, 1993).

¹⁰³ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.24.

¹⁰⁴ *Ibid.*

¹⁰⁵ David Weisbrot, 'Take One!: The Case for Televising Court Proceedings in Australia' (1994) 1 *Precedent* 18, 20.

¹⁰⁶ *Ibid.*

¹⁰⁷ Kenneth Gee, 'Television in the Courts' (1994) 6 *Judicial Officers Bulletin* 80.

important segments of drawn out proceedings, and is much more likely to understand the nature and relevance of what they are observing.¹⁰⁸

There also exist arguments that the excesses of American media sensationalism will be avoided in Australia because of tougher contempt and defamation laws.¹⁰⁹ Mr Justice Kirby has argued that these unrepresentative samples and embarrassing highlights, 'can be controlled, in part at least, by the law of defamation, by public regulation of the electronic media and by effective control exerted by, and statements of, the trial judge.'¹¹⁰ Under Australian contempt law any reports of court proceedings, if shown not to be a fair and accurate report, or tending to undermine public confidence in the administration of justice, may be held to constitute contempt.¹¹¹ Broadcasts which distort proceedings could also be in breach of broadcasting standards.¹¹² As noted by the Australian Access to Justice Advisory Committee, 'The concern about possible distortion cannot be dismissed lightly. However, it suggests that caution should be exercised about the *manner* in which broadcasting of court proceedings should be permitted rather than about whether it should take place at all.'¹¹³

The primary function of the judiciary is not the education of the public, but the execution of their judicial powers. It has been said that the television of proceedings does not contribute materially to this objective, but rather constitutes the injection of an irrelevant factor into proceedings. As the Victorian Premier, Jeff Kennett, commented at the time of the Nathan Avent Case, 'justice is not entertainment'.¹¹⁴

Education is something entirely different from the administration of justice. The courts are there to adjudicate, not educate. 'A courtroom is not a stage and witnesses and lawyers, and judges and juries and parties are not players. A trial is not a drama, and it is not held for public delectation or even public information. It is held for the solemn purpose of endeavouring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process.'¹¹⁵ It is the role of educators and the media to disseminate information about the legal process and its results. 'The judicial process is not designed or intended to educate, inform or entertain the public. It is a search for truth ... While a trial may be dramatic, anything that promotes theatrics in the courtroom should be deterred ... The media like to talk about the right to know the educational process, but their interest is mainly, and understandably, in good theatre.'¹¹⁶

¹⁰⁸ Daniel Stepniak, op cit (fn 10) 490.

¹⁰⁹ For example See Daniel Stepniak, op cit (fn 10) 378.

¹¹⁰ M D Kirby, op cit (fn 92) 486.

¹¹¹ Daniel Stepniak, op cit (fn 10) 351.

¹¹² Ibid.

¹¹³ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.25.

¹¹⁴ Gerard Henderson, 'With Due Respect, Judges are there to Judge, Not to Play Media', *Age*, 9 April 1996, 11.

¹¹⁵ E N Griswold, 'The Standards of the Legal Profession: Canon 35 Should not be Surrendered' (1962) 48 *American Bar Association Journal* 615, 616.

ACCOUNTABILITY

'Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.'

— Lord Atkin¹¹⁷

It is postulated that the television of court proceedings will impose a greater degree of accountability on the judiciary and, 'will lead to a new era of openness and public awareness regarding the conduct of judicial proceedings.'¹¹⁸ Television allows greater public scrutiny of what judges and lawyers do, and provides an important mechanism for keeping the justice system accountable to the public. It has been postulated that, 'what worries judges most about TV broadcasting of trials is not that it threatens justice, since they have no evidence at all on this, but that it threatens their monopoly control over their courts and their power to impose their views, unchallengeable except by appeal to a higher court.'¹¹⁹

It has been noted that, 'parliamentary proceedings are routinely broadcast on radio and television; administrative law (including Freedom of Information) has expanded enormously; public authorities (and public companies) are subject to reporting requirements and external scrutiny; and governmental and industry Ombudsman's offices and other "watchdog" agencies are proliferating rapidly.'¹²⁰ This general environment of openness gives rise to a strong presumption that anything encouraging the open justice principle should be encouraged unless cogent reasons exist otherwise. Permitting the televising of court proceedings would be consistent with the trend to de-mystify the law and the legal process and to open them to greater public scrutiny.¹²¹ 'The courts and the legal profession must be accountable. If they won't allow television access to courts, then they are being anachronistic or fear scrutiny.'¹²²

It has been submitted that, 'the courts and the wider profession have a public duty to demonstrate that justice is being done and to avoid being seen as secretive or mysterious. Arguably, permitting appropriate television access will enhance the courts' ability to fulfil that role.'¹²³

As stated by Lord Diplock in *A-G v Leveller Magazine*,¹²⁴ 'If the way judges behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice.'¹²⁵ This view is also expressed in the New South Wales

¹¹⁶ J G Day, 'The Case Against Cameras in the Courtroom' (1991) 20 *Judges Journal* 19, 20.

¹¹⁷ *Ambard v AG for Trinidad & Tobago* [1936] AC 322 per Lord Atkin 335.

¹¹⁸ New South Wales, Law Reform Commission, op cit (fn 9) 1394.

¹¹⁹ Padriac McGuinness, 'Judicial Arguments Against TV in Courts Based on Ignorance of the Jury System', *Sydney Morning Herald*, 27 October 1995, 14.

¹²⁰ David Weisbrot, 'Take One!: The Case for Televising Court Proceedings in Australia' (1994) 1 *Precedent* 18, 18.

¹²¹ Daniel Stepniak, op cit (fn 10) 360.

¹²² Michael Ball and Marnie Costello, op cit (fn 16) 12.

¹²³ Id 14.

¹²⁴ [1979] AC 440.

¹²⁵ Id 450.

case of *R v Brady*,¹²⁶ by the then Chief Justice Sir Laurence Street, who said, 'It is a deeply rooted principle that justice must not be administered behind closed doors — court proceedings must be exposed in their entirety to the cathartic glare of publicity . . . Publicity of proceedings is one of the great bastions against the exercise of arbitrary power as well as a reassurance that justice is administered fairly and impartially.'¹²⁷

Television allows greater public scrutiny of what judges and lawyers do, and so provides an important mechanism for making the justice system more accountable to the public. 'It is fear of scrutiny that is at the bottom of much of the opposition by lawyers to the idea. That makes it perhaps the strongest argument of all for continuing in this new direction.'¹²⁸

Some commentators argue that the television of proceedings is not necessary to ensure accountability of the judiciary. It has been submitted by Devine,¹²⁹ that this is the role of the press:

We live in a representative democracy in which various levels of surrogacy act as shock absorbers and assure an orderly and peaceful society. Instead of lynching criminals, we turn them over to the courts. Instead of peering over the shoulders of the judges all the time (with human or electronic eyes), we assign adequately skilled observers to keep watch. We don't place excessive reliance on excerpts. That way we run an effective justice system, with no part of it getting out of hand.¹³⁰

EFFECTS ON PARTICIPANTS IN THE TRIAL

*'Social scientists measure the intelligence of monkeys more effectively than the courts have attempted to ascertain the effects of television in the courtroom.'*¹³¹

Perhaps the most significant objection to the televising of court proceedings is the alleged adverse effect that it has on participants. The Australian Access to Justice Committee recognised that television could have an adverse effect on participants in the proceedings such as witnesses, lawyers and judges, which may result in an unfair hearing.¹³² In *Estes v Texas*¹³³ Mr Justice Clark of the US Supreme Court stated that cameras in the courtroom are an unsettling influence even though, 'one cannot put his finger on the specific mischief.'¹³⁴ Concern was expressed with the effects of television on jurors' impartiality and attentiveness, effects on witnesses, effects on the parties and on the judge as well.

¹²⁶ NSW Court of Criminal Appeal, 29 July 1977, unreported cited in New South Wales, Law Reform Commission, *Sound Recordings of Proceedings of Courts and Commissions: The Media, Authors and Parties* (Report 39, 1984) para 2.11. See also New South Wales, Law Reform Commission, *op cit* (fn 9).

¹²⁷ NSW Court of Criminal Appeal, 29 July 1977, unreported.

¹²⁸ Editorial Opinion, 'Fear of Television', *Sydney Morning Herald*, 19 May 1995, 16.

¹²⁹ Frank Devine, 'Let Judges Consider Judging, Not Editing', *Australian*, 18 May 1995, 11.

¹³⁰ *Ibid*.

¹³¹ J Hirschorn, 'Cameras in the Courtroom? No' (1980) 7 *Barrister* 56.

¹³² Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) 443.

¹³³ (1964) 381 US 532.

¹³⁴ *Id* 544 per Clark J.

IMPACT ON JURORS

One argument against cameras in the court is based on the impact on jurors. Although the potential impact on jurors has not been subject to any intensive study, it is possible that televisionisation could have detrimental effects on jurors.

It has been suggested by the US Supreme Court in *Estes v Texas*¹³⁵ that the conscious or unconscious effect which publicity has on the juror cannot be evaluated, but experience indicates that it is not only possible, but highly probable that it will have a direct bearing on their vote. They propose that the presence of television cameras at a trial or hearing distracts jurors. This could be either through the physical presence itself, or through less tangible effects such as the simple awareness of the fact of televising.

Television coverage may also reduce the ability and willingness of jurors to make impartial findings,¹³⁶ because, 'neighbours, friends and relatives who view parts of the trial on television will exert pressure on jurors.'¹³⁷ This has been described as, 'mediated feedback whereby family and friends of jurors view the proceedings on television and express their opinions to the juror.'¹³⁸ As a result of this pressure jurors may adopt a 'popular opinion' in order to conform to the perceived outcome of the case.¹³⁹ As noted by Brind Woinarski, Chairman of Victoria's Criminal Bar Association, 'If you have a huge number of people yelling for blood, it can be very hard for a juror to overcome.'¹⁴⁰

It has also been postulated that jurors may see evidence that was presented in their absence in court if this evidence was subsequently televised.¹⁴¹ 'Prejudice may arise if jurors are permitted to return home at the end of the day when the trial is still continuing and watch selected excerpts on television.'¹⁴²

One solution that has been suggested is that the film or videotape of the proceedings should not be broadcast until the trial is completed.¹⁴³ This procedure would obviously reduce the newsworthiness of any television coverage, however, the competing interests of allowing media access to trials and at the same time obtaining a fair and unprejudiced trial for the parties, must be balanced.¹⁴⁴

In the Australian context it has been noted that Australian laws on *sub judice* contempt would preclude the possibility of widespread reporting of, and public debate on, the significance of evidence excluded from the jury on a *voir dire*.¹⁴⁵

¹³⁵ (1965) 381 US 532, 567.

¹³⁶ New South Wales, Law Reform Commission, op cit (fn 9) 4.45.

¹³⁷ Ibid.

¹³⁸ Comment, 'Televising Trials' [1995] NZLJ 101.

¹³⁹ Robert Hoskin, 'Trial by Television: Television Broadcasting within the Judicial System' (1995) 77 *Media International Australia* 120, 123.

¹⁴⁰ Ibid.

¹⁴¹ Ian M Ramsay, op cit (fn 46) 21.

¹⁴² New South Wales, Law Reform Commission, op cit (fn 9) para 4.45.

¹⁴³ L J Tornquist and K L Grifall, 'Television in the Courtroom: Devil or Saint?' (1981) 17 *Willamette Law Review* 345, 361-362.

¹⁴⁴ New South Wales, Law Reform Commission, op cit (fn 9) para 4.45.

¹⁴⁵ Wendy Harris, 'Don't Rush to Judgment on Court TV in the OJ Simpson Aftermath' (1995) 3 *Australian Media Law Reporter* 1, 2.

Furthermore, 'What if the defendant has had a thoroughly bad day of it? Is it right that the jury should be able to watch all or part of it again, possibly with the slow motion button at the ready?'¹⁴⁶ While concern has been expressed that juries' impartiality could be jeopardised through watching edited replays of evidence on television at home, it must be borne in mind that telecasts would be subject to the normal rules of contempt which in part are designed to overcome this danger.¹⁴⁷ Jurors would also be given the usual warning by the judge to avoid any media reports of proceedings.¹⁴⁸

Fulton¹⁴⁹ argues that in any trial, televised or not, which has generated intense public sentiment, the jury must feel a similar pressure.¹⁵⁰ 'The jurors' friends and neighbours will know of the jurors' role in the trial, and if these friends and neighbours are inclined to make their viewpoints known to the individual juror, or otherwise to exert pressure on him, they will do so without regard to the presence of television.'¹⁵¹

While this argument would be true in most cases, it is possible that that the juror may, if they wish, keep their role as a juror private. The opportunity to keep this fact private may not exist if the trial is publicly televised.

It is possible that the presence of television cameras may be distracting to the jurors.¹⁵² The US Supreme Court in *Estes v Texas*¹⁵³ stated that the jurors' mere awareness that they are being televised can distract them, thus preventing them from devoting full concentration to the trial proceedings.¹⁵⁴ The court reasoned that this followed from 'human nature.'¹⁵⁵ However, as discussed previously with the modern developments in media technology this would be unlikely. Fulton adds that, 'in light of the public's great familiarity with the medium of television, and the unobtrusive fashion in which broadcasting can be accomplished, it seems unlikely that jurors would be so intensely preoccupied by filming.'¹⁵⁶

Many suggest that the television of proceedings would have little effect on jurors. 'After all, it should not matter in the least if what is seen by that handful of the members of the public able to find a place in an open courtroom is also seen by as many people who want to see it on a screen outside the court. No contamination of the mind of a jury necessarily results from that.'¹⁵⁷

While the presence of television cameras in court may be considered likely to place pressure on, and distract, jurors, the evidence from American experiments suggests that television fades in psychological importance as the trial progresses.¹⁵⁸

¹⁴⁶ Comment, 'Tele-Justice' (1989) 139 *New Law Journal* 705.

¹⁴⁷ Daniel Stepniak, *op cit* (fn 10) 367.

¹⁴⁸ *Ibid.*

¹⁴⁹ New South Wales, Law Reform Commission, *op cit* (fn 9) 1405.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Ian M Ramsay, *op cit* (fn 46) 21.

¹⁵³ (1965) 381 US 532.

¹⁵⁴ *Id* 546.

¹⁵⁵ *Ibid.*

¹⁵⁶ New South Wales, Law Reform Commission, *op cit* (fn 9) 1405.

¹⁵⁷ John Slee, 'Jury's Still Out on Issue of TV Trials', *Sydney Morning Herald*, 16 October 1995, 15.

¹⁵⁸ See summary in Daniel Stepniak, *op cit* (fn 10) 367.

There is even some evidence that the presence of cameras promotes greater diligence in jurors and that they are assisted in their task, by their personal experiences of having viewed trials on television.¹⁵⁹

The Sackville Report has left the question of whether jurors should be permitted to be televised, to be determined by the drafters of the court televising guidelines.¹⁶⁰ However, for policy reasons some commentators have suggested that the televising of juries should be prohibited in all cases. It is suggested that to allow television of jurors would be contrary to the policy objectives of existing legislation, which seek to ensure that jurors merge back into the community after a trial and that people are not discouraged from acting as jurors because of the possibility of being recognised or even criticised.¹⁶¹ In Victoria, s 69 *Juries Act* 1967 (Vic) would operate to prohibit the publication, printing or broadcasting of material which may identify a juror.

EFFECT ON WITNESSES

'Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may through some unsuspected connexion burst forth to his confession.'

— Jeremy Bentham¹⁶²

Similar argument has been adopted in relation to the effect of televising witnesses' testimony. It has been argued that television cameras may be a distraction to witnesses, in the sense that witnesses 'will often be aware that they are "under surveillance"', and may adjust their manner or conduct accordingly, even to the extent of changing testimony.¹⁶³ This is a particularly strong argument against television, as if these effects are established, then it is clear that television would interfere with the administration of justice. It has been argued that, 'when a witness is required to testify in highly publicised trial, or to reveal intimate details of embarrassing or traumatic personal experiences before a television audience, the accuracy of that testimony may be jeopardised.'¹⁶⁴ As Justice Clark observed in *Estes* the impact of cameras is, 'simply incalculable . . . memories may falter, as with anyone speaking publicly, and accuracy of statements may be severely undermined. Embarrassment may impede the search for truth.'¹⁶⁵

¹⁵⁹ *Ibid.*

¹⁶⁰ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) 443 para 20.33.

¹⁶¹ Daniel Stepniak, *op cit* (fn 10) 366.

¹⁶² Bowring (ed), *Works of Jeremy Bentham*, (Vol 4, 1843) 305.

¹⁶³ Australian Law Reform Commission, *Contempt*, (1987) para 123.

¹⁶⁴ Gregory K McCall, 'Cameras in the Criminal Courtroom: A Sixth Amendment Analysis' (1985) 85 *Columbia Law Review* 1546, 1553.

¹⁶⁵ (1965) 381 US 532, 547.

*‘Witnesses . . . are catapulted into notoriety and can either shrink from testifying freely or exult in it, or sell their stories to talk shows and tabloids, damaging their usefulness in court but trading “trash for cash”.*¹⁶⁶

It has been suggested by the US Supreme Court in *Estes v Texas*¹⁶⁷ that the quality of testimony in proceedings would often be impaired. Arguments are that witnesses could become more inhibited or less truthful.¹⁶⁸ ‘It is hard enough to be frank even before the relatively impersonal audience in the courtroom. What would be the position if the witness knew the evidence was being watched and heard by parents, children, friends, enemies and countless strangers throughout the community?’¹⁶⁹ As the *Estes* court noted, ‘some [witnesses] may be demoralised and frightened [on the stand], some cocky and given to overstatement.’¹⁷⁰

In *Estes v Texas*¹⁷¹ the US Supreme Court recognised that witnesses might be identified and subject to advice and other influence from strangers and others.¹⁷² ‘Furthermore, particularly in sensational criminal trials, camera coverage may intensify a witness’ concerns about his personal safety and about ostracism from the community at large.’¹⁷³ Such fears, it is proposed, may also discourage a witness from testifying freely and completely.¹⁷⁴ ‘Data from some socio-psychological studies tends to support the proposition that the increase in publicity and resultant loss of anonymity due to the broadcast of the witness’ testimony make it more likely that the testimony will be altered to conform to widely held beliefs in order to “avoid public ostracism.”’¹⁷⁵

There also exists an argument that the broadcasting of witnesses’ testimonies could be used to brief other witnesses. Similarly it is argued that a person may have evidence published via a broadcast that may be of detriment to them in a second or subsequent trial. However it has been postulated that Australia’s strict *sub judice* contempt rules would provide a sufficient deterrent to this occurring.¹⁷⁶

It has also been suggested that witnesses may become reluctant to appear in a televised proceeding for fear of embarrassment or recrimination and thereby impede the trial as well as the discovery of the truth. The presence of cameras may not only deprive a defendant of the voluntary and accurate testimony of a witness, but may deter some witnesses from coming forward at all.¹⁷⁷ This could be controlled by

¹⁶⁶ George Gerbner, ‘Cameras on Trial: The “O. J. Show” Turns the Tide’ (1995) 39 *Journal of Broadcasting and Electronic Media* 562, 567.

¹⁶⁷ (1965) 381 US 532, 567.

¹⁶⁸ Michael Ball and Marnie Costello, op cit (fn 16) 12.

¹⁶⁹ Richard E McGarvie, ‘The Standing and Future of the Judiciary’ (1996) 8 *Judicial Officers Bulletin* 57, 63.

¹⁷⁰ (1965) 381 US 532, 547.

¹⁷¹ Id 567.

¹⁷² Id 547–548.

¹⁷³ Gregory K McCall, ‘Cameras in the Criminal Courtroom: A Sixth Amendment Analysis’ (1985) 85 *Columbia Law Review* 1546, 1553.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Mark Armstrong, David Lindsay and Ray Watterson, *Media Law in Australia* (3rd ed, Oxford University Press, Melbourne, 1995) 133.

¹⁷⁷ Gregory K McCall, ‘Cameras in the Criminal Courtroom: A Sixth Amendment Analysis’ (1985) 85 *Columbia Law Review* 1546, 1554.

prohibiting coverage of witnesses who do not consent to being televised.¹⁷⁸ The miscellaneous statutory provisions that already exist to protect certain witnesses, such as children, sexual offence victims and witnesses under protection of anonymity would achieve this.¹⁷⁹

It is also possible that in the presence of television cameras, some witnesses may become extremely nervous or agitated. It has been postulated that these, 'camera-induced alterations in demeanour may, in turn, affect the factfinder's evaluation of the witness' testimony. Jurors might interpret excessive nervousness or posturing by the witness as an indication that he is lying. While a witness may have no right to testify in absolute comfort, fairness to the defendant requires that intimidating factors, other than those inherent in the adversarial process, be minimised.'¹⁸⁰

However, it is to be noted that, 'studies concerning the effect of television coverage on the testimony of witnesses are not conclusive . . . There is no evidence for concluding that witnesses are more nervous when filmed, and no difference is to be found in the responsiveness or decisiveness of witnesses.'¹⁸¹

Other research findings suggest that witnesses who are told that they were being recorded, or who see the camera, are more accurate in their responses and remember more specific detail and less incorrect detail than those who are not recorded.¹⁸² These findings suggest that televised trial may actually improve the quality of witnesses' testimonies rather than impair it.¹⁸³ It has been suggested that fearful of being discovered as liars, witnesses are more likely to tell the truth if they have knowledge that their evidence is publicly heard and that potentially some person could come forward to challenge their evidence.¹⁸⁴ 'Far from being a danger and a potential hindrance to a fair trial, in this context television cameras can, in fact, lead to a fairer trial. Because the witnesses could be expected to generate more complete and more correct information in response to the questions from the various attorneys, both sides could benefit from the increased information on which the court's decision could be reached.'¹⁸⁵

A perhaps less obvious justification for the televising of court proceedings is that witnesses, 'may as a result of publicity, be alerted to a trial or hearing and come forward to give evidence . . . Others are encouraged to come forward, share their own experiences and perhaps bring their own claims.'¹⁸⁶

¹⁷⁸ New South Wales, Law Reform Commission, op cit (fn 9) para 4.43.

¹⁷⁹ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) 20.37.

¹⁸⁰ Gregory K McCall, 'Cameras in the Criminal Courtroom: A Sixth Amendment Analysis' (1985) 85 *Columbia Law Review* 1546, 1554.

¹⁸¹ New South Wales, Law Reform Commission, op cit (fn 9) para 4.45.

¹⁸² Daniel Stepniak, op cit (fn 10) 367.

¹⁸³ *Ibid.*

¹⁸⁴ Morag McDowell, 'The Principle of Open Justice in a Civil Context' (1995) 2 NZLR 214, 222.

¹⁸⁵ J L Hoyt, 'Courtroom Coverage: The Effects of Being Televised' (1977) 21 *Journal of Broadcasting* 494, 495.

¹⁸⁶ Morag McDowell, 'The Principle of Open Justice in a Civil Context' (1995) 2 NZLR 214, 222.

IMPACT ON THE PARTIES

Television could also affect the parties to the proceedings. The US Supreme Court in *Estes v Texas*¹⁸⁷ has emphasised that the impact of courtroom television on a defendant cannot be ignored and recognised its presence as a form of mental, if not physical, harassment resembling a police line-up or the third degree.¹⁸⁸

Some fear that litigants and defendant could be subjected to two trials — one in court and the other in the ‘courtroom of public opinion.’¹⁸⁹ It is argued that the accused may suffer victimisation if the proceedings are televised and may be less likely to give testimony.¹⁹⁰ If the accused is seen on television before the verdict is reached, he or she may suffer victimisation¹⁹¹ and the presence of cameras may also cause potential litigants and witnesses to avoid the court process altogether.¹⁹² Victims may be reluctant to appear in court if proceedings will be televised, particularly if the details are sensitive.¹⁹³ Once again, the miscellaneous statutory provisions that protect certain witnesses may, in part, overcome this.¹⁹⁴

The presence of television cameras may pose an additional burden on the parties to the trial. ‘The camera close-ups expose their every facial expression and gesture to a public that will form judgements on that basis. For an unsavoury or unpopular defendant, especially one who looks and acts strange, stigmatisation by imagery may well tip the scales of justice the other way.’¹⁹⁵

However, as was stated in the leading House of Lords case of *Scott v Scott*¹⁹⁶ by Lord Atkinson, ‘The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trials, on the whole, the best security for the pure, impartial, and efficient administration of justice, is the best means for winning public confidence and respect.’¹⁹⁷

Again, there is a lack of evidence of the effects of television on the parties to a case. However, Florida Supreme Court’s experiment in relation to the television of proceedings indicated that the presence of electronic media, ‘made all respondents feel only slightly nervous or more attentive.’¹⁹⁸

Australian contempt law provides some protection to the parties if television were to occur. While proceedings are *sub judice* television broadcasts would need to

¹⁸⁷ (1965) 381 US 532, 567.

¹⁸⁸ *Ibid.*

¹⁸⁹ Michael Ball and Marnie Costello, *op cit* (fn 16) 13.

¹⁹⁰ Ian M Ramsay, *op cit* (fn 46) 21.

¹⁹¹ Robert Hoskin, ‘Trial by Television: Television Broadcasting within the Judicial System’ (1995) 77 *Media International Australia* 120, 124.

¹⁹² Morag McDowell, ‘The Principle of Open Justice in a Civil Context’ (1995) 2 NZLR 214, 222.

¹⁹³ Ian M Ramsay, *op cit* (fn 46) 21.

¹⁹⁴ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media contained in Access to Justice: An Action Plan* (AGPS Canberra, 1994), 443, 20.37.

¹⁹⁵ George Gerbner, ‘Cameras on Trial: The “O. J. Show” Turns the Tide’ (1995) 39 *Journal of Broadcasting and Electronic Media* 562, 567.

¹⁹⁶ [1913] AC 417.

¹⁹⁷ [1913] AC 417, 463.

¹⁹⁸ 370 So.2d 768.

avoid disclosing the identity of the accused, if identity is at issue and not convey an impression that is adverse to a litigant.¹⁹⁹ Any commentary accompanying the broadcast proceedings would also need to avoid words which could be construed as seeking to influence the court's decision or which impair the impartiality of the court, thus evidencing an intention to interfere with the administration of justice or having a tendency to do so.²⁰⁰ To broadcast proceedings closed to the public or containing information withheld from those in court, such as the identity of a blackmail victim or *voir dire* proceedings, would also constitute contempt.²⁰¹

EFFECTS ON LEGAL REPRESENTATIVES

*'All barristers are repressed actors and most judges are former barristers. The temptation to play up to a television audience will distract them from concentrating all their efforts and attention on the effective conduct of the trial.'*²⁰²

It has also been argued that lawyers may be given to grandstanding if proceedings are televised and, 'the presence of cameras will encourage barristers and others to act up for television.'²⁰³ Former Chief Justice of the New South Wales Supreme Court, Sir Laurence Street has recognised that with television there is, 'an inherent tendency for the form and appearance to overshadow the substance . . . [which] imports a further tendency to induce those participating in the proceeding to give undue attention to form and appearance of their part in the litigious process. Being at the expense of substance this could distort the process of justice itself.'²⁰⁴ Gerbner²⁰⁵ noted that, 'prosecutors and defence attorneys cannot ignore the fact that television coverage presents career-making or breaking opportunities and potentially lucrative markets for their words, writings, and appearances that far exceed those of other forms of publicity. Their fate and fortune may depend on how they look, sound, and perform on camera, as well as, or perhaps even more than, on how faithfully they perform their legal responsibilities.'²⁰⁶

However, rather than providing an impetus for a reduction in standards it has been proposed that the standard of advocacy would surely improve if proceedings were televised.²⁰⁷ While the presence of cameras in court may also increase the pressure on lawyers, evidence suggests that the presence of cameras can act as, 'a spur to excellence for lawyers.'²⁰⁸ In American experiments, lawyers and judges were found

¹⁹⁹ Daniel Stepniak, op cit (fn 10) 365.

²⁰⁰ Ibid.

²⁰¹ Id 366.

²⁰² Richard E McGarvie, 'The Standing and Future of the Judiciary' (1996) 8 *Judicial Officers Bulletin* 57, 63.

²⁰³ Michael Ball and Marnie Costello, op cit (fn 16) 13.

²⁰⁴ Memorandum of Street CJ contained in 'Televising of Court Proceedings and the Judiciary' (1981) 55 ALJ 839.

²⁰⁵ George Gerbner, 'Cameras on Trial: The "O. J. Show" Turns the Tide' (1995) 39 *Journal of Broadcasting and Electronic Media* 562, 567.

²⁰⁶ Ibid.

²⁰⁷ Comment, 'Tele-Justice' (1989) 139 *New Law Journal* 705.

²⁰⁸ Daniel Stepniak, op cit (fn 10) 368.

to have acted far more diligently with far less “inconsequential squabbling” under the watchful eye of television.²⁰⁹

Naturally, the media frenzy surrounding the OJ Simpson trial, and others in the US are widely cited by proponents of the arguments that, ‘courtroom dignity and television do not go hand in hand.’²¹⁰ It is argued again that Australia’s more stringent contempt of court rules would prevent some of the most visible US excesses from occurring here.²¹¹

JUDGES

*‘There was a time when, for the most part, judges of superior courts were seldom seen and rarely heard. Not any more. In the media-saturated 1990s, their honours are just as likely as anyone to acquire the status of newsmaker.’*²¹²

Some fear that the judge’s attention could be directed to his or her performance rather than to doing his or her task of doing justice in the particular case at hand. It has been argued that the increased publicity associated with televised proceedings may affect judges impartiality and independence and may tempt them to create more ‘news-worthy’ judgments.²¹³

However, Fulton noted that, ‘this is a somewhat cynical view of the trial judge and the gravity with which [they] view [their] judicial tasks. After all, a “good performance” by a judge consists of “doing justice”.’²¹⁴ In addition it has been noted, that any judicial ‘showboating’ to the detriment of the administration of justice would be readily observable, and the defendant could demonstrate such behaviour as evidence of unfairness in their particular case.²¹⁵

If anything, judges’ behaviour may improve. ‘Judges might be on somewhat better behaviour if they knew their sneers and innuendos were being preserved on camera.’²¹⁶

Another factor of crucial importance that has been highlighted by the US Supreme Court in *Estes v Texas*²¹⁷ is the additional responsibility the presence of television places upon the presiding judicial officer. In addition to their regular court responsibilities, judges would have to supervise the electronic media in their courtroom, and maintain judicial decorum.²¹⁸ ‘There is no question that electronic media coverage will place an additional burden on trial judges to ensure that any adverse effect of

²⁰⁹ L H Abugov, ‘Televising Court Trials in Canada: We Stand on Guard for a Legal Apocalypse’ (1979) 5 *Dalhousie Law Journal* 694, 716.

²¹⁰ Michael Ball and Marnie Costello, op cit (fn 16) 14.

²¹¹ Ibid.

²¹² Gerard Henderson, ‘With Due Respect, Judges are there to Judge, Not to Play Media’, *Age*, 9 April 1996, 11.

²¹³ Ian M Ramsay, op cit (fn 46) 21.

²¹⁴ New South Wales, Law Reform Commission, op cit (fn 9) 1407.

²¹⁵ Ibid.

²¹⁶ Daniel Stepniak, op cit (fn 10) 368.

²¹⁷ (1965) 381 US 532, 567.

²¹⁸ Robert Hoskin, ‘Trial by Television: Television Broadcasting within the Judicial System’ (1995) 77 *Media International Australia* 120, 124.

electronic coverage is minimised.²¹⁹ However, while it is true that the need to supervise and regulate the filming of proceedings can place additional pressure on judges, the American experience has shown that such extra pressure can be minimised by adequate guidelines.²²⁰

NO EFFECT ON PARTICIPANTS IN TRIAL

Despite all of the above arguments, the claim that televising adversely affects participants is contentious.²²¹ While broadcasting may be more immediate and more widely disseminated than written coverage, it does not qualitatively add any extra psychological pressure to the already intimidating atmosphere of the courtroom.²²² Studies in the United States have shown that the televising of proceedings of courts has not had a measurable effect upon participants.²²³ 'Research evidence currently available strongly suggests that the presence of television cameras in trial proceedings appears to have little if any significant psychological effect on trial participants,'²²⁴ and 'does not necessarily influence the majority of trial participants to behave in ways that are noticeably different from behaviour in non-televised trials.'²²⁵ This has also been highlighted by the Supreme Court of Florida which has stated, 'Courtrooms were intimidating long before the advent of the electronic media. Trials with considerable public interest have always resulted in courtrooms full of spectators, news reporters, and sketch artists, all of whom add to the intimidation of the courtroom atmosphere . . . The single addition of the camera in the courtroom in these circumstances should not increase tension significantly, given the fact that electronic media will report the proceedings whether or not its camera is actually in [the] courtroom.'²²⁶

In addition, the Australian Access to Justice Advisory Committee suggested that any effect that televising does have is also likely to be minimised by the use of unobtrusive camera equipment.²²⁷ Sir Daryl Dawson has stated that facilities for the closed circuit television of proceedings in the High Court are already in place and, 'proceedings are continuously televised but not for publication . . . No-one in the Court is, I think, at all conscious of the fact that proceedings are being televised and there is certainly no distraction.'²²⁸ It is therefore possible to obtain broadcast

²¹⁹ J Connolly and D B Pierce-Gonzalez, 'Cameras in the Courtroom of Massachusetts' (1981) 66 *Massachusetts Law Review* 187, 197.

²²⁰ Daniel Stepniak, op cit (fn 10) 368.

²²¹ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.30.

²²² Daniel Stepniak, op cit (fn 10) 361.

²²³ For a summary see: Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.21.

²²⁴ Garth Nettheim, 'Cameras in the Courtroom' (1981) 55 ALJ 855, 858.

²²⁵ S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (1987) 17 *Univ of NSWLJ* 87.

²²⁶ *State of Florida v Green* (1981) 395 So 2d 532, 536 per Overton J.

²²⁷ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.31.

²²⁸ Sir Daryl Dawson, 'Judges and the Media' (1987) 10 *NSWLJ* 17, 25.

quality videotape, not only without interfering with the proceedings, but without participants being aware of the camera's presence.²²⁹

Mr Justice Kirby stated that, 'it is equally likely that the intensive experience of conducting a trial or an appeal will continue to be so mind absorbing for those immediately involved that they will soon forget the presence of the cameras. Like stenographers who take the official transcript, such electronic recording will become simply an incident of the life of the courtroom.'²³⁰

It also appears that television of court proceedings could have a positive effect on participants in that they are likely to be more attentive and lawyers more fully prepared if they know that a camera is recording their actions.²³¹ 'The public presence in court is thought to improve the presence of all participants in the proceedings. Lawyers are motivated to prepare and present their cases to the best of their abilities; witnesses are less inclined to falsify their evidence; juries have a better understanding of the importance that the community they represent places on their verdict; judges appreciate that when the public can see them explain and apply the appropriate legal principles, it will have greater confidence in the judgements they render.'²³²

PRIVACY

*'What about the privacy of defendants, jurors and witnesses . . . don't they have a right not to become television spectacles?'*²³³

One of the most broadly held and compelling arguments for caution is based on the privacy of participants involved in the proceedings.²³⁴ As has been noted by the Australian Access to Justice Advisory Committee, the television of court proceedings removes any right to privacy of participants in the proceedings. Pictures of parties, jurors or witnesses may make them identifiable to strangers so that they might be subject to harassment or embarrassment.²³⁵ However, historically, privacy considerations have generally been held to be outweighed by the public interest in open justice.²³⁶

While the introduction of television into court proceedings would no doubt magnify concerns about the privacy of participants, it would not necessarily introduce new or substantially different problems. Even without the television of proceedings, 'participants may be watched by those present in the courtroom, identified and discussed in press reports and photographed or filmed in the vicinity of

²²⁹ Daniel Stepniak, op cit (fn 10) 351.

²³⁰ M D Kirby, op cit (fn 92) 486.

²³¹ R F Loewen, 'Cameras in the Courtroom: A Reconsideration' (1978) 17 *Washburn Law Journal* 512.

²³² D J Henry, 'Electronic Public Access to Courts: A Proposal for its Implementation Today', in P Anisman and A M Linden (eds), *The Media, the Courts and the Charter*, (1986) 441.

²³³ Michael Ball and Marnie Costello, op cit (fn 16) 12.

²³⁴ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.28.

²³⁵ Garth Nettheim, 'Cameras in the Courtroom' (1981) 55 ALJ 855, 858.

²³⁶ *Ibid.*

the courthouse'.²³⁷ The Australian Access to Justice Advisory Committee states that, 'it is certainly the case that televising court proceedings will infringe the privacy of parties before the court, at least to the extent that they do not approve of broadcasting ... But it must be remembered that the principle of open justice already means, in practice, that parties and witnesses in court proceedings do not enjoy a right of privacy ... While televising court proceedings can be more intrusive than press coverage, there must be a balance between the privacy of the parties and the legitimate interest of the public in the proceedings of its justice system.'²³⁸

It has been conceded that, 'any conventional form of trial coverage has the potential to embarrass ... nevertheless, television is the only medium which makes public the witness' own voice and image, thus removing *any* shield of privacy or anonymity.'²³⁹

In an attempt to recognise the privacy of individuals the Australian Access to Justice Advisory Committee suggests that, 'the presiding judge should have a discretion to refuse to permit broadcasting where he or she considers that the broadcasting of proceedings would unduly affect the privacy of one or more parties.'²⁴⁰ However, they did not consider that privacy considerations justified a blanket prohibition on broadcasting in all circumstances.²⁴¹

They did, however, recommend that there should be no broadcasting of proceedings in the Family Court.²⁴² This recommendation was made in light of the policy objectives behind the *Family Law Act 1975* (Cth), 'to take family law out of the public arena,'²⁴³ and 'to ensure that considerations of personal privacy generally outweigh matters of public interest in proceedings before the Family Court.'²⁴⁴

In addition proper restrictions on openness and publicity in relation to certain classes of proceedings and participants already exist, as well as general discretions to close the court in particular cases where this is necessary in the interests of justice.²⁴⁵

²³⁷ David Weisbrot, 'Take One!: The Case for Televising Court Proceedings in Australia' (1994) 1 *Precedent* 18, 20.

²³⁸ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.28.

²³⁹ Gregory K McCall, 'Cameras in the Criminal Courtroom: A Sixth Amendment Analysis' (1985) 85 *Columbia Law Review* 1546, 1553.

²⁴⁰ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.28.

²⁴¹ *Ibid.*

²⁴² *Id* para 20.21.

²⁴³ *In the Marriage of Bateman and Patterson* (1981) 51 FLR 263, 271.

²⁴⁴ *In the Marriage of B and B* (1986) FLC 91,741, 75, 419-420.

²⁴⁵ For a summary of existing provisions See David Weisbrot, 'Take One!: The Case for Televising Court Proceedings in Australia' (1994) 1 *Precedent* 18, 20.

OTHER JURISDICTIONS

*'Whatever conservative local jurists and lawyers might say, television coverage of court proceedings has been a fact of life in other parts of the world for decades — and civilisation has survived.'*²⁴⁶

Many other jurisdictions are proposing or have implemented experimental programs of television. These programs could serve as an example for a future experimental program in Australia. In England and Wales, photography and television coverage of criminal court proceedings is currently prohibited.²⁴⁷ However, in 1989, after an extended study into the television of court proceedings, the Working Party of the General Council of the Bar recommended that televising of courts be permitted on an experimental basis under guidelines to be developed for this purpose.²⁴⁸ In Scotland, televising of criminal and civil appellate matters is now permitted with the approval of the presiding judge.²⁴⁹

In the US every state except Indiana, Mississippi and South Dakota makes some provision for cameras in their courtrooms.²⁵⁰ Each state that permits televising has its own guidelines as to the courts and the nature of proceedings that may be broadcast.²⁵¹ The consent of the presiding judge is required in almost all of the states, and coverage is prohibited in nearly all states of cases involving juveniles, victims of sexual offences, domestic relations and trade secrets cases.²⁵² Filming of jurors is also prohibited.²⁵³

Despite the recommendations of an advisory committee and a favourable review of a 3-year experiment, cameras continue to remain banned in Federal courtrooms and the US Supreme Court.²⁵⁴

Judges who participated in the Federal experiment overwhelmingly supported its continuation and expansion . . . The Judges reported better experiences than they had anticipated and became more supportive after their experiences with cameras . . . [They] generally believed that coverage had little or no effect on the participants or proceedings.²⁵⁵

²⁴⁶ Editorial Opinion, 'Lights, Camera, Justice', *The Age*, 7 July 1994, p 13.

²⁴⁷ *Criminal Justice Act 1925* (UK) s 41.

²⁴⁸ Report of the Working Party of the Public Affairs Committee of the General Council of the Bar, *Televising the Courts*, (1989) 46.

²⁴⁹ Nicholas Frenkel, 'Televising Court Proceedings' (1995) 2 *Australian Media Law Reporter* 154, 155.

²⁵⁰ Sandra F Chance, 'Considering Cameras in the Courtroom' (1995) 39 *Journal of Broadcasting and Electronic Media* 555, 557.

²⁵¹ Ian M Ramsay, 'Televising Court Proceedings' (1993) 70 *Current Affairs Bulletin* 16, 18.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ Sandra F Chance, 'Considering Cameras in the Courtroom' (1995) 39 *Journal of Broadcasting and Electronic Media* 555, 558.

²⁵⁵ *Ibid.*

Despite these findings and an overwhelmingly positive internal appraisal the voting judges elected not to permit televisisation of proceedings.²⁵⁶

There is no regular television coverage of Canadian courts, however, there are instances where judges have allowed proceedings to be televised.²⁵⁷ In 1987, the Canadian Law Reform Commission recommended that television coverage of appeals in criminal cases be permitted.²⁵⁸ At the same time, a Committee of the Canadian Bar Association also recommended that television coverage of court proceedings be permitted and that initially a two-year experimental program be undertaken.²⁵⁹

A pilot program is currently underway in New Zealand, and has already proven to be successful.²⁶⁰ Televisation is only permitted in accordance with defined guidelines.²⁶¹ Live televising of court proceedings is not contemplated as part of the New Zealand pilot project, which is designed only to supply material for 'normal news programs or articles.'²⁶²

DIRECTIONS

'Every sensible person can see that, technology of information having moved along, courts and judges can scarcely expect to keep the cameras out of Australian courts forever.'

— The Honourable Justice M D Kirby²⁶³

It appears that the Federal Court may be the jurisdiction in which future television initiatives are particularly likely.²⁶⁴ In 1994 the Federal Access to Justice Advisory Committee, chaired by Mr Ronald Sackville QC, concluded that there was 'a strong

²⁵⁶ Reasons included a concern for the potential for cameras to intimidate witnesses and jurors even though the federal judiciary's own research dispelled these concerns; that the media did not make enough educational use of the access they were given and that most of the footage appeared in brief news reports, not extended broadcasts. See also Nicholas Frenkel, 'Televising Court Proceedings' (1995) 2 *Australian Media Law Reporter* 154, 155.

²⁵⁷ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.14.

²⁵⁸ Canada, Law Reform Commission, *Public and Media Access to the Criminal Process*, 1987, Recommendation 23.

²⁵⁹ *Report of the Canadian Bar Association's Special Committee on Cameras in the Courts*, 1987.

²⁶⁰ David Malcolm, 'Television Coverage of Western Australian court proceedings? Interview with David Malcolm, Chief Justice of the Supreme Court of Western Australia' (1996) 23 *Brief* 6.

²⁶¹ The New Zealand regulations require coverage to be accurate, impartial and balanced to all parties; Requests for coverage to be made in writing; such requests to be conveyed to all parties; Identities to be protected on request; they ban: coverage under two minutes duration per news item, accompanying editorial comment, cases involving family and youth courts, cases involving sexual offences, proceedings from which the public is barred, visual coverage of the jury at any time and more than one stationary camera. See Barbara Hooks, 'Televised trials: are they inevitable here?', *Age Green Guide*, 14 December 1995, p 10.

²⁶² Robert Hoskin, 'Trial by Television: Television Broadcasting within the Judicial System' (1995) 77 *Media International Australia* 120, 127.

²⁶³ M D Kirby, 'Forum: Televising Court Proceedings' (1995) 18 UNSWLJ 483, 485.

²⁶⁴ Michael Ball and Marnie Costello, 'Television in Court' (1996) 23 *Brief* 9, 10.

case for opening the courts to the electronic media' and that television broadcasting of court proceedings should be permitted 'on a strictly controlled basis'.²⁶⁵ It recommended that the Federal Court of Australia should consider the establishment of an experimental program to allow the broadcasting of proceedings, subject to guidelines to be stipulated by the court.²⁶⁶

These guidelines would aim to protect witnesses; confer on judges a discretion to ban broadcasting where they feel it would interfere with the proper administration of justice; give parties the right to formally object to broadcasting and limit the type and quantity of equipment allowed in the courtroom.²⁶⁷ Guidelines to be considered would include:²⁶⁸

- The media should apply for approval of media coverage to the presiding judge. This application should be made within a prescribed period prior to the proceeding unless good cause is shown for a later application.
- Presiding judge to have discretion of whether to allow broadcasting.
- Permission could be granted on conditions including the ability for the presiding judge to limit, temporarily suspend, or disallow broadcasting if, in the judge's opinion, such coverage has interfered or will interfere with the rights of the parties to a fair trial and the proper administration of justice.
- Media coverage should be prohibited where, under Commonwealth or State laws the court proceeding is required to be held *in camera*.
- Broadcasting of particular witnesses evidence should take place only if the witness consents.
- A party to a proceeding may object to media coverage. All objections should be heard and determined by the judge prior to the commencement of the proceedings.
- Control of the filming process should be at the absolute discretion of the court.
- Where appropriate, the judge should be able to prohibit live broadcasting of proceedings to ensure that sensitive, inadmissible material is not inadvertently broadcast.

In 1995, Federal Attorney General Mr. Lavarch, as part of his 1995 Justice Statement gave the government's seal of approval to opening up the courts to electronic media, firstly in civil cases, and if successful, later to criminal trials.²⁶⁹ Reservations, however, were expressed about the likelihood of opening criminal matters to television, and a preference was expressed that the Family Court not be open to television.²⁷⁰

²⁶⁵ Australia, Access to Justice Advisory Committee, *Courts and the Electronic Media* contained in *Access to Justice: An Action Plan* (AGPS Canberra, 1994) para 20.32.

²⁶⁶ Id para 20.1, 20.2, 20.4.

²⁶⁷ Id para 20.36.

²⁶⁸ Id para 20.37.

²⁶⁹ Michael Ball and Marnie Costello, 'Television in Court' (1996) 23 *Brief* 9, 10.

²⁷⁰ *Ibid.*

However, here in Victoria, when Victoria's Chief Magistrate, Mr Nicholas Papas made a suggestion that he might permit cameras in his courtroom, the controversy that arose forced him to withdraw his proposal shortly afterwards.²⁷¹ Apparently Mr Papas' turnaround was a result of pressure from fellow magistrates and the State government for him to abandon his plan.²⁷²

CONCLUSION

'Ten years after all the hubbub, no one will remember what the fuss was all about.'

— The Honourable Justice M D Kirby

In light of the principle of open justice it appears that all that can be done to encourage openness of public hearings should be done. As a society, it is clear that we now demand a much greater measure of openness and accountability of our major public institutions. Unless there are clear and compelling reasons to the contrary, such institutions should be expected to operate as openly and as transparently as possible.²⁷³ As has been noted:

televising court proceedings does seem to be the natural extension of the principle of open justice. If the administration of justice is unharmed by televising proceedings then one might expect a modern principle of open justice to embrace television.²⁷⁴

It does appear that there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to guidelines. With Australia's commitment to open government and strong principle of open justice it appears we should be strongly examining the option of televising the courts. In addition to these policy arguments the New South Wales Law Reform Commission argues that, 'in the absence of statutory authority and provided that there is no interference with the administration of justice, courts do not have any power to ban sound recorders or television cameras.'²⁷⁵

²⁷¹ Robert Hoskin, 'Trial by Television: Television Broadcasting within the Judicial System' (1995) 77 *Media International Australia* 120, 120.

²⁷² *Id.* 123.

²⁷³ David Weisbrot, 'Take One!: The Case for Televising Court Proceedings in Australia' (1994) 1 *Precedent* 18, 18.

²⁷⁴ Nicholas Frenkel, 'Televising Court Proceedings' (1995) 2 *Australian Media Law Reporter* 154, 155.

²⁷⁵ George Zdenkowski, 'Cameras in Court: Justice Must Stay in the Picture', *Sydney Morning Herald*, 23 June 1995, p 19.

Many believe that cameras in the court will not enhance the administration of justice, and that it might in fact be inhibited by television of court proceedings. However, despite the fears, evidence suggests that television has little or no effect on the administration of justice. In the US, 'no State that has completed an experimental period of electronic coverage has capped the lens on cameras in the courtroom.'²⁷⁶ In the Victorian context it has been noted that:

the broadcasts of excerpts from Justice Teague's 10-minute sentencing remarks have not shaken the foundations of the justice system . . . and have not made the Supreme Court "part of the entertainment ratings" of the television industry . . . Instead of stock footage of the judge upon which his words were superimposed as readable text, Justice Teague was seen saying his own words.²⁷⁷

In light of recommendations by the Australian Access to Justice Advisory Committee it appears that an experimental program may be warranted. The establishment of an experimental program would allow a careful and considered analysis of both the benefits and risks of television coverage of court proceedings and would be preferable to allowing ad-hoc television coverage of court proceedings as occurs at present.

Australian courts have an inherent ability to regulate their own processes and to safeguard them from abuse. It has been noted that, 'an acceptance of courtroom television coverage would not require a concession to the seemingly open slather, largely uncontrolled North American approach.'²⁷⁸ The televising of court proceedings would be remain subject to existing laws and principles which regulate access to courts and the publication of court proceedings.²⁷⁹ In Australia, contempt rules prohibiting the publication of any material that could have a tendency to jeopardise the due administration of justice by prejudicing the tribunal of fact would protect the processes of the courts from these dangers.²⁸⁰ However, if limited television coverage of the proceedings of courts were to be permitted on a formal basis, there would obviously be a need for guidelines to regulate such coverage. General guidelines should also be adopted in order to avoid certain potential dangers that are peculiar to this form of court reporting. Such guidelines would be designed to avoid physical disruption; ensure that the dignity and decorum of proceedings is not adversely affected; and to minimise, if not eliminate, any adverse psychological pressure on all participants.²⁸¹ Much assistance could be obtained in the respect from guidelines adopted in various States of the United States as well as those proposed by the Australian Access to Justice Advisory Committee.

²⁷⁶ Sandra F Chance, 'Considering Cameras in the Courtroom' (1995) 39 *Journal of Broadcasting and Electronic Media* 555, 558 citing C Dyer and N Hauserman, 'Electronic coverage of the Courts: Exceptions to Exposure' (1987) 75 *Georgetown Law Journal* 1633.

²⁷⁷ Editorial Opinion, 'Fear of Television', *Sydney Morning Herald*, 19 May 1995, p 16.

²⁷⁸ Wendy Harris, 'Don't Rush to Judgment on Court TV in the OJ Simpson Aftermath' (1995) 3 *Australian Media Law Reporter* 1, 2.

²⁷⁹ Such as the laws of defamation and contempt. See Daniel Stepniak, 'Why Shouldn't Australian Court Proceedings be Televised?' (1994) 17 *UNSWLJ* 345, 350.

²⁸⁰ Wendy Harris, 'Don't Rush to Judgment on Court TV in the OJ Simpson Aftermath' (1995) 3 *Australian Media Law Reporter* 1, 2.

²⁸¹ Daniel Stepniak, 'Why Shouldn't Australian Court Proceedings be Televised?' (1994) 17 *UNSWLJ* 345, 350-351.

However, this matter of controversy remains an unresolved issue, and at the very least, requires further research. Some suggest that it is not the place for the courts to decide this issue and there may be a call for legislative intervention. But if we are to have effective debate in Australia, it is necessary that detailed research be undertaken so that these issues can be addressed in the Australian context. But as Mr Justice Kirby has highlighted it is not easy to see, 'how the technology can forever be limited to the ball-point pen of the observant news reporter when modern means of recording can do the job so much more accurately.'²⁸²

*'Just as judges of previous generations had to adjust themselves to the reporter's notebook, so judges of the future will have to be able to withstand the cold eye of television.'*²⁸³

²⁸² M D Kirby, 'Forum: Televising Court Proceedings' (1995) 18 *University of New South Wales Law Journal* 483, 485.

²⁸³ Comment, 'Televising of Court Proceedings and the Judiciary' (1981) 55 ALJ 839