Judicial Writing in an Electronic Age

The intent of this paper is to highlight some of the issues or problems that may arise from the wide dissemination and availability of reasons for judgment and sentencing remarks through the internet and to generate discussion on the extent to which a judge should have regard to these issues in preparing reasons for judgment or sentencing remarks.

Background

Prior to electronic publication of judgments, most judgments in civil matters were unreported and, practically speaking, were not generally available to members of the public. After the parties' initial interest in the outcome of their case, the copies of reasons for judgment would remain on the court file, the solicitors' files or in a court library collection and would be located only by a determined or informed searcher.

Prior to electronic publication of sentencing remarks, very few sentencing remarks were publicised or reported. In fact, media attention is still primarily given to sentences of high profile offenders, for notorious crimes or where the facts are bizarre.

The advent of electronic databases of judgments (including sentencing remarks for some jurisdictions) has had a profound effect on their accessibility. In the Australian context the Australasian Legal Information Institute ("AustLII") was set up in October 1995. AustLII not only provides free internet access to Australasian decisions, both reported and unreported, since it commenced its database, but it has incorporated into its database past decisions of those courts, tribunals and other bodies whose decisions it currently publishes.

Practical obscurity v public accessibility

The means by which reasons for judgment and sentencing remarks were published prior to electronic databases had the result that most of those judgments and sentences were not easily accessible. The term that has been used to describe this phenomenon is "practical obscurity". Its use is now so prevalent in this area of discourse that I will

provide a relatively early reference to the term, rather than definitively identify its origin.

The United States Supreme Court in *United States Department of Justice, et al., Petitioners v Reporters Committee for Freedom of the Press et al.*[1] had to decide whether a "rap sheet" kept by the Federal Bureau of Investigation on a particular person was protected by an exemption under the Freedom of Information Act, after a request was made for that rap sheet under that legislation by a CBS news correspondent and the Reporters Committee for the Freedom of the Press. The relevant exemption excluded records or information compiled for law enforcement purposes to the extent that the production of such materials could reasonably be expected to constitute an unwarranted invasion of personal privacy. At that time the information in a rap sheet was compiled by the FBI as a criminal identification record which contained descriptive information (such as date of birth and physical characteristics), as well as a history of arrests, charges, convictions and incarcerations. In the opinion of the Court delivered by Stevens J reference is made[2] to the Government submission that the relevant exemption required the Court "to balance the privacy interest in maintaining, as the Government puts it, the 'practical obscurity' of the rap sheets against the public interest in their release." The following observation[3] captured the essence of 'practical obscurity':

> "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."

The Supreme Court held that the exemption was applicable.

The nature of the problem of real accessibility to court decisions, rather than theoretical accessibility was commented upon by Spigelman CJ in an article *Open Justice and the Internet*[4]:

> "We are only now beginning to adapt to the loss of that practical obscurity which past methods of information retrieval conferred on

[1] 489 U.S. 749 (1989)
[2] Note 1 at 762.
[3] Note 1 at 764.
[4] Spigelman JJ, 'Open Justice and the Internet' *Judicial Officers' Bulletin* Vol 16 No 1 (Feb 2004)

> court proceedings. The demands of open justice require that adequate reasons are provided for judicial decisions. The reasons for judgment perform a number of different functions for the parties and for the public processes of the law. Nevertheless, the kind of detailed personal information about parties and witnesses, which judges have become used to including in reasons for judgment, may not all be necessary to serve those functions. The identification of persons by name, in a way which permits the compilation of information about individuals, is not always necessary."

Identity theft

For a person who is not averse to committing fraud by appropriating another person's identity, it is a gift to be able to access another person's full name, address, date of birth, place of birth or other personal details. To minimise the opportunities for identity theft arising from court generated judgments and sentences, the cautious approach favours avoiding unnecessary personal identifiers in judgments and sentences. Personal identifiers include date and place of birth, spouse or partner's name, residential address, children's names and bank account details. Usually it is the age of a person that is relevant and not the exact day of birth. Sometimes during the course of sentencing remarks, the home address of the offender or victim is disclosed incidentally (such as the address of the place where the offence occurred), even though identifying that exact address is not essential information for the sentence.

An order for compensation made as part of the sentence may identify the address of the recipient of the compensation so that the Registrar of the Court knows where to pass on the compensation, after it has been paid by the offender. The detail of the victim's address does not need to be in the version of the sentencing remarks published electronically, as it is not essential for making sense of the sentencing remarks.

Spent convictions

For all jurisdictions in Australia (apart from Victoria and South Australia) there is legislative recognition of the benefit in fostering rehabilitation of offenders who are convicted of less serious offences by having the slate "wiped clean" for an offender

after a prescribed number of years and no further offending, so that for most purposes that conviction is then not disclosable in respect of that offender.[5]

Sentencing remarks that are placed on the web may remain there for all time, but even if removed after a relatively short period (as is the practice in Tasmania, South Australia and Queensland), the information disclosed in the sentencing remarks may have been "harvested" by users of the internet who compile that information for their own purposes or databases. The greater accessibility through the internet of information disclosing convictions may affect the implementation of spent convictions legislation.

In May 2000 the CrimeNet website was launched[6] which allows a member of the public who provides credit card details (or sends funds in advance to cover the search fees) to search a database containing criminal records information for all Australian jurisdictions. According to CrimeNet's website, it obtains its information from original newspaper clippings and certified copies of newspaper clippings and court records and records convictions of any person who has been convicted of one or more offences and sentenced to imprisonment to a term of not less than three months, convictions relating to sex offences, paedophilia, fraud or violence or convictions of persons in positions of public trust, but does not record convictions of minors. The website also indicates that convictions may have been removed due to the "Spent Convictions Act". The existence of this database was one of the reasons for the establishment by the Standing Committee of Attorneys-General (SCAG) of a Working Party that produced an Issues Paper entitled 'Online Dissemination of Criminal History Information' that in turn, resulted in SCAG Ministers agreeing to further research and investigation into spent convictions legislation.[7] The SCAG Discussion Paper has been circulated for comments.

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[5] *Crimes Act* 1914 (Cth) Pt VIIC; *Spent Convictions Act* 2000 (ACT); *Criminal Records Act* 1991 (NSW); *Criminal Records (Spent Convictions) Act* 1992 (NT); *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld); *Annulled Convictions Act* 2003 (Tas); *Spent Convictions Act* 1988 (WA).

[6] http://www.crimenet.com.au (accessed 21/12/04).

[7] SCAG Discussion Paper 'Uniform Spent Convictions – A Proposed Model' (prepared August 2004) at 13.

The Discussion Paper acknowledges[8] that according to CrimeNet's website, it has established systems to remove convictions details in accordance with spent convictions requirements but states:

> "However, at present, as a consequence of the inconsistency between the spent convictions schemes of each jurisdiction, and the non-existence of schemes in Victoria and South Australia, any legislative spent convictions requirements applicable to databases such as CrimeNet are implemented inconsistent with each scheme, and voluntarily. *A specific criminal offence to target such business as CrimeNet would ensure their compliance with a national uniform spent convictions scheme.*"

Recommendation 45 of the Discussion Paper is "That disclosure of spent convictions information by businesses in the trade of providing criminal record information be a criminal offence."

A related issue is whether the purpose of the sentencing option of not recording a conviction, after a person has pleaded or been found guilty of an offence[9] is reduced in effectiveness if the sentencing remarks are published on the Court's webpage.

Personal details about relationships, health, medical treatment etc

Problems are avoided with the disclosure of personal information in proceedings under the *Family Law Act* 1975 (Cth), because of the requirements of s121 of that Act. A selection of Family Court judgments is published electronically and, where necessary, they are "anonymised" to comply with s121.

Although there are some equivalent restrictions on publication of proceedings in State jurisdictions,[10] it is common for extremely personal details to emerge in evidence in cases such as personal injuries' claims, estate litigation and criminal injuries' compensation claims where there are no statutory restrictions applying to the publication of reasons for judgment.

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[8] Note 7 at 60.
[9] *Sentencing Act* 1995 (NT) s8; *Penalties and Sentences Act* 1992 (Qld) s12; *Criminal Law (Sentencing) Act* 1988 (SA) s16; *Sentencing Act* 1997 (Tas) s9; *Sentencing Act* 1991 (Vic) s8.
[10] *De Facto Relationships Act* 1996 (SA) s14A; *Property Law Act* 1974 (Qld) s343.

The issue arises as to the extent to which that personal information needs to be disclosed in the reasons in order to support the decision.

Restrictions on searching

By electronically publishing judgments and sentencing remarks courts are facilitating open justice, but the courts arguably have no reason to assist those users of the internet who are "electronic peeping toms"[11] or up to "cyber-mischief".[12]

The Queensland Supreme Court has recently implemented the Robots Exclusion Protocol on that part of the Court's website that is under the heading "Judgments". It is a standard method of blocking those search engines such as Google or Yahoo which abide by this internet standard. (Robots are programs used by search engines to scan the internet and index documents. The Robots Exclusion Protocol is an official internet standard which advises visiting Robots not to index certain webpages.)

I understand that of the five Australian Courts which publish judgments on their own websites in some form, only New South Wales and Queensland block access to search engines – Northern Territory, ACT and South Australian Courts do not.[13] AustLII also blocks access to search engines such as Google in respect of the contents of the decisions accessed through its website.[14] These search engines are still effective in searching the lists of case names on the relevant website.

There are obvious limitations to such restrictions on searching, eg when the full text of a decision is available through another website where the Robots Exclusion Policy does not apply.[15]

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[11] Winn, P A, 'Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information' (2004) 79 Wash L Rev 307 at 318.
[12] Note 10 at 328.
[13] This information and the advice about implementation of the Robots Exclusion Protocol were provided by the Supreme Court of Queensland Librarian, Mr Aladin Rahemtula.
[14] 'About AustLII: Privacy Policy' 31 July 2003 AustLII http://www.austlii.edu.au/austlii/privacy.html (accessed 21/12/04) at para B2.
[15] Searching the victim's name disclosed in *R v Vann* [2004] NSWSC 988 using Google did not reveal the relevant NSW Supreme Court sentence on AustLII, but did reveal the sentence on http://www.findlaw.com.au (accessed 21/12/04).

Tips

When editing sentencing remarks that are intended for electronic publication:

(a) Consider whether a victim's name or any witness' name needs to be disclosed in full or at all.

(b) Avoid identifying the residential address of any person involved in the sentencing.

(c) Avoid disclosing family relationships when that information is unnecessary for the sentence.

In preparing reasons for judgment, the following list may be of assistance:

(a) Consider whether it is necessary to disclose a person's complete date of birth. Is the month and year of birth sufficient or is the year of birth sufficient for the purposes of the judgment?

(b) Consider the extent to which the personal information about a witness or party is essential to support the decision.

Conclusion

There are challenges presented by the real public accessibility to the contents of judgments and sentencing remarks through electronic publication. Those challenges have been eloquently expressed by Peter A Winn[16]:

> "We have lived in a very forgiving world. The "practical obscurity" of paper judicial records largely sheltered us from the danger of information misuse, while we prided ourselves on our "public" judicial system. The world of electronic information is a far less forgiving place. It is now forcing us to recognize--by our actions, if not yet by our words--that the simple abstract rules developed for a world of paper-based information may no longer suffice to resolve the complex problems of judicial information management. Courts have traditionally been vigilant in protecting individuals from the misuse of sensitive personal information. They must now rise to the difficult task of designing rules to protect litigants and third parties from cyber-mischief and victimization. The failure of the legal system to maintain the ancient balance between access and privacy will lead to the greatest danger of all--inhibiting citizens from participating in the public judicial system. The world of cyber-justice should not be permitted to degenerate into a world where victims of crimes are reluctant to come forward; where people are more unwilling to be witnesses or jurors; and where the rich can

[16] Note 10 at 328-329.

> seek out private judicial forums to resolve their disputes, while the poor and middle classes are faced with an impossible choice--either foregoing justice to maintain their privacy and security; or permitting their sensitive personal information to be commercialized or stolen, and allowing the intimate details of their personal lives to be made available all over the Internet."

Justice Debra Mullins

Supreme Court of Queensland

21 December 2004