Publicity and Committals

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It will be useful firstly to discuss why and how newspapers report courts, including some general principles of open courts. Secondly, a number of propositions about particular coverage of committal proceedings will be made, on the assumption that things stay more or less as they are. Finally, a few observations, some practical, will be stated about publicity and court reportage were the committal system to be changed along any of the lines being canvassed at this conference.

Why Court Proceedings are Reported

The law courts are a great theatre of life, where one sees people at their best and at their worst. The cases before the court involve conflict, whether between citizen and citizen or the citizen and the state, and conflict is a staple of news. Decisions made in the courts can have a great impact on the community. For all of these reasons newspapers publish court reports and devote considerable resources to the task.

In the past, newspapers such as *The Canberra Times* have had three overlapping reasons for detailed court coverage. One was for simple news, with reports judged and placed simply on their news value. Another was for politics—because the law, the way in which it is interpreted and applied is at the very heart of social organisation and our readers need to know what is going on. There was 'newspaper of record' material as well, in which cases, dull or otherwise, have been presented as a way of providing the public, or a section of it, with basic information about what is going on.

But times have changed, and the style of media coverage has changed considerably. Although all newspapers, and some broadcast media, report big or sensational cases, and the reports command as much lineage as ever, few newspapers attempt any longer to give a systematic coverage of all of the courts in their primary circulation areas. Few contain any newspaper of record material—apart from the law lists—and few put into the field reporters with legal qualifications or experience which enable them to comment with any expertise on matters being decided in the courts. More newspapers than before have law reporters or legal correspondents, but a high proportion of these sit high in ivory towers pontificating and do not actually soil their hands by entering courtrooms.

The Canberra Times has resisted these trends and sometimes looks a little old-fashioned. Although it is an increasing strain on our resources we continue to attempt to systematically cover everything of note happening in the ACT. This is done partly because we think it is part of our duty of community service: we believe our readers want and need to know about what is happening in the ACT, not simply about the odd juicy or sensational case which goes through it—but also for commercial reasons—simply because we believe that a systematic coverage produces the goods—the news stories which people expect in our paper.

How Court Proceedings are Reported

Be that as it may, the style of coverage is changing at *The Canberra Times* as well as elsewhere. For starters, reports tend to be brighter, and somewhat less deferential. This is all to the good, provided reporters know what they are doing and obey the limits of the law, commonsense and good taste. Reports are now more likely to include comment and interpretation, and, within limits—particularly if our readers can readily discern the difference—this is perfectly all right.

Reports not only provide a service to ordinary readers—whose knowledge of legal concepts, though not to be underestimated, may not be profound—but to lawyers and legal specialists who need to know something of the obiter of particular cases and the judicial reasoning involved. And given the political importance of some decisions, the press is quicker to comment on the wider implications of a case and even, sometimes, about the politics of the decision making.

The range of courts and tribunals covered is increasing. In Canberra, for instance, unlike 15 years ago, there is now the High Court, the Federal Court and the Family Court as well as the familiar ACT Supreme Court and ACT Magistrates Court. There is also the Administrative Appeals Tribunal and a number of other specialist tribunals getting regular attention. Space, whether in pages devoted exclusively to court reports or in ordinary news or comment pages, is at a considerable premium, and reports have to compete for inclusion. Whether a report is used depends on matters such as brightness, topicality and tightness. Good reports are lifted ahead to news pages, but even on the courts pages, news value, in ordinary terms, is the primary consideration.

One other change, very much contrary to old court reporting practice, is that the best reporters understand that much of what happens around and about the courts—as much as in them—is the stuff of news as well.

Although most newspapers doing regular reportage have good relationships and arrangements with the backroom court staff, which enables easy access to essential court papers and materials, it is important to understand that reporters have no especial privilege before the courts. Our reporters are simply ordinary citizens, and, when they attend a court case, they stand, technically at least, in no better position than any ordinary old busybody or senior citizen who comes in and sits in the back of a courtroom. What is written carries no legal protection any greater than a person gossiping among his or her friends about what he or she had seen and heard. There are some obvious legal rules—for example, about reporting a voire dire examination or coping with a suppression order of some sort or

another—which have more impact upon the press than on the ordinary member of the public, but even there the difference is one of degree only. It is not fundamental.

The other point to mention is that legal restrictions upon reportage are only one element of restrictions on coverage. Good taste is another. Newspaper policy is another. Using *The Canberra Times* as an example, it has a number of written down policies about different types of case and coverage. These policies, for example, cover how drink-driving cases, shoplifting, suicide and sexual offence matters (to nominate but four) are reported. In each of these areas significantly more could be reported if we chose, but, for what is thought to be good reasons, supportable in our view of the public interest, some restrictions have been placed on them. The policy that we do not report the names of persons accused of sexual offences and assaults unless and until they are convicted will be discussed further below.

Open Courts

It is always easiest for reporters to do their jobs when the formal restrictions on what they can report are clear. It is also much easier, in applying policy as much as in practice, when the rules are the same. A newspaper has an obvious vested interest in open courts—after all, its survival turns on its being able to sell information. But even putting that obvious interest aside one can argue that the public interest is best served by the open dispensation of justice. In a big community a newspaper does have some grounds for saying that in sitting in and reporting a case, it stands in for the legitimate interest and curiosity of the world at large. People need to know and want to know what is happening in the courts, but because it is practically impossible for them to attend, because of work and other commitments, they expect that newspapers will do the monitoring for them.

We live, however, in an age in which the trend is to put more restrictions upon coverage. It is probably true, for most jurisdictions (apart from South Australia), that the powers of courts to close proceedings or put reporting restrictions upon them, has not altered much over the years. Be that as it may, it is undoubtedly true that these powers are being more availed of. Quite apart from that, it seems that the courts now require of newspapers stronger attention than in the past to the avoidance of accidental or incidental prejudice. This is in spite of the fact that the trend in actual contempt decisions is becoming increasingly liberal. For newspapers, avoidance of contempt is a serious worry and much of what occurs is self-denying ordinance. When a person is before the courts on two charges, one to be heard soon after the other, there is a serious risk that coverage of the first, however innocuous, will be accused of prejudicing the latter.

There are two separate objections to powers of the court to restrict reportage. The first one is that a very high proportion of the orders made appear to ordinary citizens to offend the principle of equality before the law. That is, the same rules do not seem to apply to all. A solicitor, or a doctor, or a prominent businessman charged with an offence has a very good chance, before some magistrates, at least, of getting his name suppressed until after the case is disposed of. A labourer, or any other ordinary wage slave, has next to no such chance. The ordinary citizen seems to have no difficulty with the idea of a suppression power over the names of rape victims or others, but when the power is seen to be exercised capriciously, when there appears to be different rules for different people, the image of the law takes a mighty battering. This battering appears to be greater at the lower, rather than the higher court, if only because so much of what occurs in the workhorse lower courts depends on consent.

The second problem is that increasingly courts appear to be using materials access to which is restricted, whether in practice or as a matter of ruling. Yet these materials have been created as a part of an attempt to influence the court in its decisions and do in fact do so. What then happens is that it is impossible for the outsider, including the reporter attempting to explain to the world what occurred, to know why. In some cases it is a matter of the court's suppressing documents handed up to it—say psychiatrist's reports. In other cases, there is no formal prohibition at all. It is simply that the court, as a matter of convenience and to save time, uses, and allows counsel to use documents, around which everyone speaks in shorthand but no-one who does not have the document can know. When the court rises it can often be very difficult in practice to obtain a copy of the document—even where there is no formal reason why it ought not to be available. The file, for example, stays with the judge because the case is not concluded and cannot be inspected in the registry. The magistrate has not marked the document as an exhibit and does not place it on the file. Cases such as these are ones where justice may be done, but it is not seen to be done.

In espousing open justice, and a minimum of reporting restriction, I do not want to be taken as denying the need for some suppression or the real risk to the justice process that publication can bring. I will not discuss the damage to reputation from a report of a conviction—but even that is real enough—simply because in most cases that is a consequence of the deed in question rather than the fact of publication. There are two areas of risk about which the criminal justice system has to be very alert—and both are particular risks in the committal process.

The first area of risk is of prejudice—a particularly serious risk in indictable matters since material ruled relevant at committal may be ruled out at trial, the more likely perhaps if the indictment is in a form and on charges different to committal. Though it is not denied that this risk is a substantial one, it can be overstated for two reasons. Firstly, the time between committal and trial is usually substantial and most members of the public, and potential jurors, will have forgotten it, if ever they saw it, by the time of trial. Secondly, the other actors in the system often pay insufficient heed to the conscientiousness with which members of most juries obey judges' remarks about forgetting anything they may have seen or heard about a case and to concentrate on the evidence before the court.

These comments about overstatement apply more strongly to the routine, ordinary or minor case, rather than the celebrated one. However conscientious the juror, it is difficult to avoid retaining some background information about, say, a Murphy case or a Chamberlain case. Accept this, however, and where does one go? Suppose we keep committals but hold them in secret: would justice be better served? I doubt it; indeed such a system could work to the disadvantage of the defendant in cases where publicity brings forward volunteer witnesses.

The second area of risk is a much more tricky one. Much as I would, in another context such as a defamation case, deny it, the fact is that a substantial proportion of the public equate being charged and being brought before the courts with being guilty of an offence. Even those ultimately acquitted, and who get publicity surrounding their acquittal commensurate with the publicity surrounding their being charged must invariably suffer the comments of those who will assume that they have escaped only because of a technicality, or because the police evidence fell short of proof. In this regard my comments about there sometimes seeming to be one law for the rich and another for the poor are perhaps a little unfair. A lawyer who is charged will almost certainly lose nearly all of his or her business

immediately after; so may a doctor, a prominent businessman or accountant or whatever, when an ordinary wage slave may, for want of prominence, escape relatively unscathed except in his or her neighbourhood and amongst friends. The nature of the opprobrium may differ according to the type of offence, but there does appear to be cause for saying that the ordinary member of the public does not much believe in the presumption of innocence. Publicity, in short, can ruin a person, even though they have committed no offence. In many circumstances that very ruination may prevent a person being able to conduct a proper defence.

Personally, I have thought that there were grounds for arguing that no person should have his or her name published unless or until conviction occurred or unless that person consented. Were there to be such a rule, it would have to be applied uniformly, otherwise the moment it appeared that it was used selectively the courts would fall into discredit. Indeed, if one wanted to ask why the South Australian suppression laws are so routinely ignored out of the jurisdiction, one should look at its selectivity.

Above, it was mentioned that the *The Canberra Times* has a policy of not naming persons charged with sexual offences before conviction. It accompanies a policy of not naming victims or alleged victims of sexual assaults, whether or not the court has made orders. Relevant areas of the policy are as follows.

First, we do not identify, in any circumstances, victims of sexual assault. Although the position is reserved in a case where an alleged victim has completely concocted a story, perhaps with a view to blackmail or similar, reporters should assume this rule to be inviolate. If it is a consequence of this rule (as in an incest case) that we cannot identify the alleged assailant, even after conviction, that is what follows. Naming victims is completely out. Other identifying details, such as sometimes: occupation (public servant, teacher, waitress is fine, headmistress is not), street address, or some physical characteristic should be avoided if the tendency would be to identify the victim to someone who knew the victim but did not have previous knowledge of the case.

Secondly, we do not identify an accused person facing charges of sexual assault unless or until he or she is convicted. This rule is not inviolate—we would probably publish the Prime Minister's name if he is charged with indecent exposure—but such would require a decision by the editor. This is a general matter of *Canberra Times* policy, not a matter of law: the thinking is that there is some especial disgrace—including a public assumption of guilt—flowing from an accusation with sexual overtones which does not occur in, say, a theft case.

No other newspaper of which I am aware has a similar policy. But even those who might agree with us might wonder whether or not the discretion ought to be in the hands of an editor rather than the court. All that can be said about this is that one should not assume any want of accountability on the part of editors to members of the general public—one quite willing to make formal and informal complaints. The policy has been attacked from both sides—there are a substantial number of people who think names should be published, if not always for worthy reasons, and others believe the policy ought to be extended.

I would have no objection to extending the policy, or to its being extended by law. But it would create enormous problems. In by far the greatest proportion of cases, the actual identity of an accused person is not particularly relevant to the news value of the court case, though names, of course, are a very convenient form of shorthand. In any case where a number of names are suppressed, whether by the court or by editorial policy, our reporters tie themselves in great knots finding formulae for distinguishing between them.

The trouble lies with cases in which identity or some identifying characteristic is highly relevant to the story. I might not think that including the name of John Brown, plumber, is critical to the reporting of a theft case, but if a minister of the Crown, a departmental

secretary, the commander of the police drug squad or a senior official of a bank is the person charged, is it right, in the public interest, that the name be suppressed? Few newspapers would agree. Should one not have reported that Lionel Murphy had been charged?

The case for non-suppression is extremely strong in a situation where a prominent person is charged in respect of something going to the heart of his or her formal duties, but can be strong even in cases where the connection is not so marked. No one could deny some disadvantage, or risk from the presumption of guilt reaction, but that is not the only public interest at stake. The interests of justice would appear to let some technically innocent people rot in gaol for up to a year awaiting trial, with consequences even more definite and grievous than being named as an accused person, however, this does not turn a hair. Sometimes, the public has a legitimate interest in knowing that a particular person is before the courts, and, frankly, on past performance, the capacity of many judges cannot be trusted to be better arbiters than newspapers. Put bluntly, many are often too sensitive to the needs of people of their own class and too careless of the rights of those who are not. If any move is made to suppress the names of persons at the committal stage, the first quid quo pro ought to be the removal of other restrictions. The recent liberalisation of Family Court and, in some jurisdictions, Childrens Court, reporting restrictions ought perhaps to be a base model—everything can be reported except identifying details. But even there, any law ought to contain provision for the use of names in appropriate cases, and some ready method of testing decisions which are made.

A Practical Problem

One problem about the existing committal system is that it is often very difficult to decide what are committal proceedings. In the ACT, for instance, a substantial number of matters are ones capable of being dealt with summarily or by indictment, the decision being sometimes one of election by the prosecution, sometimes by the accused and sometimes by the magistrate. Often, the election is only made at the prima facie stage, which may be several days into the case. If there are reporting or publicity restrictions based on the idea that the matter is a committal proceeding, then at some stage, if the nature of the case changes, it is again an open matter. The problem is not an insurmountable one, but this can cause considerable difficulty. It will produce a bad effect if the consequence of the earlier prohibition is that some sections of the media simply fail to cover such cases. The public interest, after all, includes publicity to the courts.

Conclusion

If committal proceedings are to be abolished altogether, with the matter simply handed to Crown prosecutors, one can predict a number of results which have little to do with issues of publicity as such. Trials would be expected to take longer, and I do not expect that pre-trial proceedings, however conducted, and with or without publicity, will avoid this problem. The acquittal rate would be expected to increase substantially, not because the committal system is a particularly well-adapted filter, but because inadequate or not, it does perform some filtration, both in weeding out insupportable cases and in reducing overdrawn cases to

reasonable ones. If the ACT is used as an example, a few general comments can be made. Indictable matters are in the hands of the Director of Public Prosecutions from the beginning and good minds go into the initial consideration of charges at the committal stage as at the indictment stage. The reason why indictment charges are often more conservative than the initial ones is because evidence does not come up to expectations, not usually because of incompetence on the part of prosecutors. In short, it will be rather more frequent, in middle of the jury trial, for cases to collapse or be significantly reduced. Of course there will be savings in abolishing committals, but these will have to be balanced against considerably higher costs at the far more expensive and longer lasting jury trial. Some witnesses may have an easier time because counsel do not get two bites of the cherry—one of which, however conducted cannot prejudice the accused in the minds of the jury. But then, again, there is the risk to accused if what witnesses really say or know cannot be tested except before the jury. All of these observations, all of which have no doubt been made already by other Tories at this conference, have, however, little to do with issues of publicity. Indeed, the press might not mind at all. The far more stately pace of a jury trial makes it easier to report—indeed, when I was a court reporter I cannot remember ever being stretched to covering two at once. So, perhaps there will be more reportage. If that is so, I think it would be a good thing, but I cannot help wondering whether everyone would agree.