

OPEN JUSTICE VERSUS JUSTICE

The principle of open justice is one of the essential characteristics of the common law judicial tradition. Generally speaking, it is taken for granted that court proceedings are open to the public and may be freely reported. The leading English exposition of the principle is to be found in the House of Lords decision in *Scott v Scott*,¹ which has been accepted as authoritative in Australia and other parts of the Commonwealth. In the United States of America support for the principle has been found in the Constitution. And the principle is recognized in a number of international human rights treaties.²

The principle is not absolute. It can, of course, be displaced by statute. But even at common law certain exceptions have been recognized. The main exception is concerned with the interests of justice itself.

“While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions . . . But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done . . . As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must *as of necessity* be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on *necessity*.”³

There appear to be a number of respects in which the principle of open justice may be perceived as coming into conflict with the public interest in the due administration of justice:

1 Control of public attendance. Disorder or even over-crowding in the court or its precincts, or the behaviour or mere presence of particular members of the public may make a proper trial difficult or impossible.

2 Sensitivity of trial participants. Persons may be deterred from instituting civil or criminal proceedings by the knowledge that such proceedings will be conducted in public and freely reported; and persons may find it difficult or impossible to testify in open court subject to free reporting.

• Professor of Law, University of New South Wales. The author gratefully acknowledges the research assistance of Fiona Tito and Maria Cinque. This article is drawn from a larger study which was supported by a grant from the Australian Research Grants Scheme.

1 *Scott v Scott* [1913] AC 417.

2 Garth Nettheim, “The Principle of Open Justice” to be published in (1984) 8 *University of Tasmania Law Review*.

3 *Supra* n 1, 437-438, per Viscount Haldane LC. Emphasis supplied.

3 Publicity and fair trial. Certain forms of publicity may be seen as likely to prejudice the fairness of a trial.

To the extent that such perceptions of danger to the administration of justice are soundly based, it does not follow that the only solution is to conduct proceedings in camera. Less drastic measures may be available to reconcile the open justice principle with the wider interest in the proper administration of justice.

(1) Control of public attendance

Jeremy Bentham listed as one of his exceptions to the open justice principle:

Object 1. To preserve the peace and good order of the proceedings: to protect the judge, the parties, and all other persons present, against annoyance.⁴

It was acknowledged in *Scott v Scott* that the public, or a portion of the public, may be excluded from court proceedings in order to prevent overcrowding or disorder. (Punishment by contempt proceedings for disorder is a separate issue.⁵)

In *Garnett v Ferrand*⁶ Lord Tenterden CJ dismissed an action for trespass against a coroner for excluding the plaintiff from an inquest, primarily because no action would lie against the judge of a court of record for an act done in his judicial capacity. But the Chief Justice also rejected an argument that a coroner's inquest is open to the public on the basis that:

"It is obvious that such an inquiry ought, for the purposes of justice, in some cases to be conducted in secrecy: it is a preliminary inquiry, which may or may not end in the accusation of a particular individual . . ." ⁷

In this context, the matter of exclusion was entirely in the discretion of the coroner. In discussing the particular problems of overcrowding and disorder, Lord Tenterden said:

"It will be, in many cases, impossible that a proceeding should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding officer, whether he be judge, coroner, justice, or sheriff, has not the control of the proceeding, and the power of admission or exclusion according to his own discretion . . . The power of exclusion is necessary for the due administration of justice." ⁸

This may appear to be an overstatement in the light of the *Scott v Scott* principle that *exercise* of a power of exclusion is justified only when necessary for the due administration of justice. It also appears to be an overstatement in light of the decision in *Daubney v Cooper*⁹ (only two

⁴ *Rationale of Judicial Evidence* Vol 1, ch.x (1827, Garland Facsimile edn, 1978), 541.

⁵ Eg *Morris v Crown Office* [1970] 2 QB 114; *Ex parte Tuckerman; re Nash* [1970] 3 NSW 23.

⁶ (1827) 6 B & C 611.

⁷ *Ibid* 626.

⁸ *Ibid* 628.

⁹ (1829) 10 B & C 237.

years after *Garnett v Ferrand*), in which the King's Bench allowed an action of trespass against magistrates exercising summary criminal jurisdiction for forcibly excluding the plaintiff from proceedings. Interestingly, the report notes that, before giving judgment, the Court had conferred with Lord Tenterden. In giving judgment, Bayley J held that the magistrates were exercising judicial authority, and he asserted the right of the public to be present "if there is room in the place for that purpose, provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed. . ." ¹⁰

So, even if the principle of open justice is given primacy, persons may be removed in order to prevent disorder or overcrowding. Many cases confirm this.

One example is the remarkable case of *Re the Sheriff of Surrey*.¹¹ Blackburn J of the Queen's Bench was sitting in Surrey as a Commissioner of Assize in a courtroom which, according to a note in the report, was "remarkably incommodious and ill-adapted for the due administration of justice".¹² The Judge,

"finding noise made by persons walking about in a covered place, between the Court and the street, separated from the Court by a railing only, and otherwise open to it on the one side, and the street on the other, ordered that place to be cleared, which was accordingly done."¹³

The high sheriff was present, did not object to the order, but did not assist in clearing the place and preserving quiet.¹⁴ Subsequently, the sheriff caused to be placed outside the Court a notice recording his protest at what he described as the unlawful order by Blackburn J that the Court be closed to the public, and notifying that he had directed that the Court should be opened to all persons "so long as they conduct themselves with decorum",¹⁵ and that his officers were not to bar public access. For this, the sheriff was summoned to appear before Cockburn CJ and Blackburn J. The sheriff expressed "the greatest respect and deference to their Lordships",¹⁶ but stoutly maintained his view that the order to clear part of the Court was an illegal act, having the effect of invalidating the verdicts which had been afterwards returned, and that he saw his duty as being to assert the illegality of the course pursued by the judge.

The Chief Justice informed the sheriff that he had mistaken both the law and the facts. As to the law, Blackburn J undoubtedly had power to make the order: "It is at once conceded that English courts of justice are open to the public in the fullest sense, and I trust they will ever remain so." But the judge clearly had power "to order such modifications of the arrangements of the Court as are indispensable to . . . the efficient administration of justice".¹⁷

10 Ibid 240.

11 (1860) 2 F & F 234.

12 Ibid 236 note (a).

13 Ibid 236.

14 Ibid.

15 Ibid.

16 Ibid 237.

17 Ibid 238.

As to the facts, Blackburn J had not ordered any part of "what is properly to be called the Court" to be cleared but only the lower part of the Court open to the street, because the examination of witnesses in criminal trials was inaudible to the Court and jury. Such a course was "a transparent necessity". The Chief Justice went on, however, to say that "even were it otherwise, it is undoubtedly in the power of the Judge, in his discretion, to order the Court or any part of it to be cleared if due quiet is not preserved".¹⁸

For his robust, if ill-judged, defence of the principle of open justice, the sheriff was found guilty of contempt of the Court and fined five hundred pounds.

Re the Sheriff of Surrey finds a near converse in *Ex parte Tubman; re Lucas*.¹⁹ In the latter case, officers were cited for contempt for requiring people to remain outside the courthouse in a situation where seats in the courtroom were almost completely filled by arresting officers. Asprey JA stated that it might be a contempt of court for any person, *without lawful authority or justification*, to exclude persons from court proceedings. However, s 67 of the Justices Act 1902 (NSW) provided that proceedings before justices should be held in "open and public court, to which all persons may have access so far as the same can conveniently contain them", thus recognizing an inherent power to exclude persons if there was no seating accommodation available for them. There was also inherent power, recognized in *Scott v Scott*, "to exclude persons from the court where circumstances exist for [a magistrate] to exercise that power as a necessary step to be taken for the securing of justice",²⁰ particularly when necessary to prevent disorder. Such power extends to the precincts of the court and is exercisable by a judicial officer through court officers. In the circumstances he held that the court had not been "closed" and that the police should not be held in contempt. (Mason JA and Herron CJ reached similar conclusions).

*R v Denbigh Justices*²¹ is a similar case. The two accused were convicted in 1973 of having television sets without a licence — the offence was a political protest based on their championing of the Welsh language. They had been convicted of the same offence in 1972, at which time some of their supporters had been involved in a disturbance. The 1973 proceedings were listed in the smaller of two magistrates' courts with a number of other cases so that, after accommodation was provided for parties, lawyers and the press, there were seats left for only five members of the public. The two accused had 20 to 30 supporters with them. Each was allowed to nominate two or three friends to occupy those seats, while the other people remained outside.

Both accused, in turn, asked that the proceedings be conducted in the Welsh language. The requests were refused. Some of their five supporters intervened and all were eventually asked to leave or left of their own volition. So did the two accused, and they were convicted and fined in their absence.

¹⁸ Ibid 239. This statement can hardly be reconciled with the necessity standard expressed in *Scott v Scott*, supra n 1.

¹⁹ [1970] 3 NSW 41.

²⁰ Ibid 52.

²¹ [1974] 2 All ER 1052.

Subsequently, the accused sought a writ of certiorari on two bases: denial of natural justice and breach of the statutory open court requirement in s 98(4) of the Magistrates' Courts Act 1952. In the Divisional Court Lord Widgery CJ found no authority for the proposition that breach of the open justice principle constitutes a denial of natural justice, and he concentrated on the statutory argument. He held on the evidence that the court was "open" at the start of the proceedings and it had not been established that, after the five public seats had been vacated, any member of the public who wished to go in had been refused admission.

One basis on which it is accepted that a judge may order an individual from the courtroom, for the due administration of justice, arises where the person in question is to give evidence in the proceedings. The reason for the power is to prevent a witness modifying his testimony in the light of evidence given by prior witnesses. If a witness should disobey such an order he might be punishable for contempt, but his evidence remains admissible.²²

There is one suggestion of another class of persons who might properly be excluded in the interest of the due administration of justice, namely, close relatives of trial participants, especially of jurors. In a controversial ruling in 1956, Richardson J discharged a jury on the second day of hearing of a widow's claim for compensation for the death of her husband in a road accident. He did so on the basis that the wife of one of the jurymen had been present in Court throughout the previous day's proceedings. He said:

"This is an open court to which the public is admitted, nevertheless a juror's wife should not be present. Human nature being what it is, I must assume that a juror, having his wife or any close relative present, would discuss the case during the overnight adjournment, and it is no exaggeration to say that the Court would have five jurors instead of four."²³

One commentator noted that the ruling raised many difficulties:

"It leaves open where the line is to be drawn to mark off 'close' relatives from the juror's other relations. It assumes that relatives necessarily exert more pressure on a man's judgment than other persons with whom he comes in contact. Since it acknowledges the fact that every jurymen in a civil case discusses it with his wife, it is based on the unrealistic view that only the wife who has been in court will exert influence over his judgment. And it provides a ready means of escape for any citizen wishing to be relieved of jury service, an inconvenience which could be effectively avoided only by empanelling the wives of jurymen with their husbands."²⁴

The comment noted the heavy costs involved in an aborted trial and expressed the hope that the principle involved would not become an inflexible rule curtailing a judge's discretion in the matter of discharging a jury. It concluded:

22 Cf *Roberts v Garratt* 6 (1842) JP 154; *Chandler v Horne* 2 M & Rob 423; 174 ER 338.

23 *Colyer v March* (unreported); note (1956) 30 ALJ 1.

24 *Ibid* 1-2.

"In fairness to his Honour it should be mentioned that the wife in question had been observed engaging in apparently amicable conversation with a relative of the plaintiff in the precincts of the Court, a fact not adverted to in his judgment or in the press report of the case."²⁵

No similar precedents for exclusion of relatives of trial participants are known.

Short of excluding the public or individual members from the courtroom, it appears that a judge has a discretion as to the places within the courtroom which they may occupy. The issue came before the Full Court of the Queensland Supreme Court in *Re Andrew Dunn and The Morning Bulletin Ltd.*²⁶ A judge of the Central Supreme Court took exception to articles written by Dunn and published in the newspaper, which criticised the judge's conduct of a case, and he forbade reporters from the papers published by the company "from sitting at the reporter's desk or taking notes on the floor of the courtroom". The order continued by stating that the reporters "may, however, like other members of the public, have access to the public gallery during Court proceedings". The restrictions were to remain in force until Dunn apologized. Dunn and the company appealed.

In an affidavit, Dunn stated that the public gallery was "unprovided with facilities for the taking and transcription of notes, and so situated that no person could reasonably be expected to report the proceedings correctly and accurately". Accordingly the company's reporters were instructed not to attend the court, and had to rely on condensed reports from the official shorthand writer.

The appeal was dismissed. The Full Court took the view that it is entirely within the administrative discretion of a judge to direct where members of the public might sit within the courtroom, and that the press had no greater rights in this regard than the public at large. R J Douglas J added that the "power should be exercised with a wise discretion and with the sole idea of promoting the interests of justice, and not capriciously or from any ulterior motive".²⁷ He "personally would not have made such an order",²⁸ but an exercise of the power is not subject to appeal. Henchman and E A Douglas JJ concurred.

(2) Sensitivity of trial participants

"The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and witnesses, . . . but all this is tolerated and endured, because it is felt that in public trial is to found [sic], on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."²⁹

From these words of Lord Atkinson in *Scott v Scott* it would seem that such "sensitivity" considerations should prevail over the open justice

²⁵ Ibid 2.

²⁶ [1932] St R Qd 1.

²⁷ Ibid 15.

²⁸ Ibid 16.

²⁹ *Scott v Scott* [1913] AC 417, 463.

principle only if accepted within the general exception as “necessary” for the proper administration of justice.

An initial distinction may need to be made between those who institute legal proceedings, whether as plaintiffs, prosecutors or informants, and those who are to participate in such proceedings solely as witnesses. Of course, those who institute proceedings will often also be required to testify, but the roles may need to be distinguished as they may involve distinct aspects of the public interest. An additional distinction may need to be made between civil and criminal proceedings.

(a) *Institution of Proceedings*

In *Scott v Scott* Earl Loreburn said:

“If the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress. . . in my opinion an order for hearing or partial hearing in camera may lawfully be made.”³⁰

But the other Law Lords did not approve any such exception, and Lord Shaw described it as “very dangerous ground”.³¹ Speaking as he was in the context of matrimonial proceedings, he said:

“The concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keep us secure: and it must further be remembered that, in questions of status, society as such — of which marriage is one of the primary institutions — has also a real and grave interest as well as have the parties to the individual cause.”³²

Generally speaking, it appears that the argument that openness might deter persons from instituting proceedings has not been accepted by judges as sufficient reason to depart from the openness principle, at least in civil proceedings.³³

In regard to criminal proceedings a different situation may arise, presumably because such proceedings are concerned, not with the assertion of private rights, but with the punishment of persons who have offended the community at large. If persons decide not to bring civil actions, that can be regarded as “their business”; if they decide not to notify the commission of a crime, a broader public interest is affected.

Such a view seems to have been accepted, at least partially, in *R v Socialist Worker Printers and Publishers Ltd*³⁴ in which the Divisional Court held that the trial court was entitled to order that the name of

30 Ibid 446.

31 Ibid 485.

32 Ibid. See also *Dickason v Dickason* (1913) 17 CLR 50, 51. In the context of matrimonial proceedings, there have been considerable changes since 1913 in the importance attached by society to marital status. There have, on the other hand, also been substantial changes in Australia to the grounds for dissolution of marriage and for nullity proceedings which would seem to lessen the “sensitivity factor” in instituting such proceedings in open court.

33 *Greenway v Attorney-General* (1927) 44 TLR 124. *B v Attorney-General* [1967] P 119. (Both cases were legitimacy suits and, like nullity suits, involved questions of status). *D v D* [1903] P 144, to the contrary, was held in *Scott v Scott* to have been wrongly decided.

34 [1975] QB 637.

blackmail victims should not be published. Lord Widgery CJ pointed out that in a case of blackmail "the complainant has done something disreputable or discreditable, and has something to hide and will not come forward unless thus protected".³⁵ But he stopped short of asserting that such considerations would justify conducting blackmail cases in camera.

By contrast, in 1982 the US Supreme Court held unconstitutional a Massachusetts statute which, as interpreted, required mandatory closure of courtrooms during the testimony of minor victims of sex crimes. The majority of the Court rejected an argument that closure was justified so as to encourage minor sex victims to come forward as "speculative in empirical terms". But it should be noted that the State statute provided no barrier to subsequent publication of the testimony, and even the identity, of a minor victim.³⁶

(b) *Testimony*

There has been some acceptance of the argument that the principle of openness may be limited if a witness is otherwise unable to testify.³⁷ In *Jamieson v Jamieson*³⁸ the witness was unable, because of embarrassment, to give evidence in open court and the court was closed while she gave evidence. But the court subsequently held that the mere closing of the court, without more, did not render her evidence secret after it had been given, and it was as available for publication as evidence given in open court.

Considerations of state security or personal safety have also been accepted as justifying, at common law, the closing of a court during the giving of evidence, or restrictions on publicity identifying a witness.³⁹ It appears that the latter, more limited form of restriction on openness — restriction on publicity — must be related to the public interest in the due administration of justice, but may not have to be justified as "necessary" for that purpose, in contrast to an order to close the proceedings to the public.

(3) *Publicity and Fair Trial*

A major focus for concern that publicity may prejudice a fair trial is represented by that aspect of the law of contempt of court which imposes liability on those who publish material calculated to cause such prejudice. There are restrictions, in the interests of fair trial, on what the press (and others) may publish about the issues in a pending trial or about trial participants.⁴⁰ It is a large topic, but one which is primarily

³⁵ Ibid 652. In another blackmail case *R v Beale* [1941] QWN 29, the judge simply requested the press not to publish the contents of the relevant letter or the names therein.

³⁶ *Globe Newspaper Co v Superior Court for the County of Norfolk* 449 US 894, 66 L Ed 2d 124, 101 S Ct 259 (1982).

³⁷ *Moosbrugger v Moosbrugger* (1913) 29 TLR 658.

³⁸ (1913) 30 WN (NSW) 159.

³⁹ *Norman v Mathews* (1916) 85 LJR (KB) 857; *R v Governor of Lewes Prison*; [1917] 2 KB 254; *Attorney-General v Taylor* [1975] 2 NZLR 138 (appeal, ibid 675); *Attorney-General v Leveller Magazine Ltd* [1979] QB 31.

⁴⁰ For general treatment of these issues see Campbell and Whitmore *Freedom in Australia* (2 edn, 1973), 297-306; Miller, *Contempt of Court* (1976) chapters 5-9; Borrie and Lowe, *The Law of Contempt* (1973) chapters 3-5; Street, *Freedom, the Individual and the Law* (4 edn, 1977), 167-179; Flick, *Civil Liberties in Australia*

concerned with publication of matter other than that adduced before the court conducting such a trial. By and large, the media (and others) are free to publish a fair and accurate report of trial proceedings themselves,⁴¹ subject only to such restrictions on access and reporting that may be imposed under common law justifications or under legislative authority.

(a) *Committal Proceedings*

A problem has sometimes been perceived in the fact that publicity given to one court proceeding may be thought to prejudice the fair trial of a subsequent court proceeding. This arises particularly in regard to committal proceedings (also referred to as preliminary hearings or examinations). Such proceedings are held before magistrates to establish whether there is a prima facie case made out against a person charged with an indictable offence to warrant his committal for trial before judge and jury. Such committal proceedings are not, strictly speaking, judicial proceedings, and the rules of evidence are not strictly applicable, with the consequence that evidence may be received in such proceedings which would not be admissible at trial. Furthermore, defendants commonly reserve their defence so that a report of the proceedings may present only the prosecution case. Reports of such proceedings, it is widely believed, may prejudice the ability of a jury to try the case fairly. (Similar considerations might also apply to other forms of proceedings such as coroners' inquests, Royal Commissions and company investigations which may be followed by, or related to, judicial proceedings.)

The High Court's analysis in *Barton v R*⁴² indicates that committal proceedings are for the benefit of an accused person. However, it has been argued that *publicity* given to such proceedings may well work to the disadvantage of an accused person in a subsequent trial (in the event that he is committed for trial).⁴³ There has been very little empirical research to investigate whether such concern is soundly based.⁴⁴ But judges and legislators over the past twenty-five years have felt sufficiently

40 *Cont.*

(1981), 132-144. In 1983 the Australian Law Reform Commission was asked to review the law of contempt.

41 *Ex parte Terrill; re Consolidated Press Ltd.* (1937) 37 SR (NSW) 255. For the UK, s 4 of the Contempt of Court Act 1981 makes similar provision.

42 (1980) 147 CLR 75.

43 The arguments that reports of committal proceedings may prejudice a jury in a subsequent trial are summarised in the report of the Tucker Committee, Cmnd 479, para 34.

44 *Ibid* para 36; Sir Zelman Cowen, *Individual Liberty and the Law* (1977), 130-133. *Report of the Committee on Contempt of Court* (the Phillimore Committee) Cmnd 5794 (1974) paras 50-51.

There have been a number of notorious trials in England where free reporting of committal proceedings may well have affected the subsequent trial: Cowen *supra* at 136-139; Kennedy, *The Trial of Stephen Ward* (1964), especially 233-234; Cowen *Sir John Latham and Other Papers* (1965) 93-96.

Committal proceedings against the former leader of the Liberal Party, Jeremy Thorpe, and others, were freely reported on the basis of Thorpe's own application under the Criminal Justice Act 1967 (UK) s 3, and were followed by a trial in which he was acquitted.

For a 1970 account of limited US research on the issue, see Siebert, Wilcox and Hough, *Free Press and Fair Trial* (1970).

worried by the possibility to propose limits on the openness of committal proceedings.

(i) *England.*

An initial question is whether committal proceedings are regarded as coming within the general concept of open court. If not, then (in the absence of statutory provision on the matter) the public have no right of access, and there is no privilege to publish even fair and accurate reports of the proceedings. Committal proceedings were, historically, more akin to investigation than adjudication, and, prior to the 19th century, the process (like that of coroners' courts) was regarded as outside the scope of the open justice principle.⁴⁵

In England, s 19 of the Indictable Offences Act 1848 (Jervis' Act) for the first time entitled an accused person to be present at the examination in committal proceedings of witnesses against him. But s 19 provided that the room or building in which a justice or justices took examinations of indictable offences should not be deemed an open court for that purpose, and it enabled justices, in their discretion, to exclude members of the public if it appeared that the ends of justice would be best answered by so doing. Later legislation of 1879 and 1884 gave rise to some doubts on this matter, and they were not resolved until the Magistrates' Court Act 1952, repealed the existing provision and provided simply, in s 4(2), that examining justices were not obliged to sit in open court.

Whatever the formal legal position, the almost invariable practice in England in modern times was that examining justices would proceed in camera only when hearing:

- (a) evidence which ought to be kept secret in the interests of national security;
- (b) evidence from a witness who genuinely feared intimidation if his testimony were made known; and
- (c) evidence which had for some reason to be taken elsewhere than in court; eg in hospital.

* Since 1967 the English legal position has been reversed. The Magistrates' Courts Act 1980,⁴⁶ now requires that proceedings be held in open court except where the contrary is provided by legislation or where the ends of justice would not be served.

As to publication of committal proceedings, the earlier view appears to have been that even a fair and accurate report would not attract the privilege which attaches to reports of judicial proceedings proper.⁴⁷ But after the 1848 Act, there were decisions tending to the contrary view, culminating in *Kimber v The Press Association Ltd*⁴⁸, and the currently accepted position is that a fair and accurate report of committal

⁴⁵ It does appear that many committal proceedings were, in fact, conducted openly and were freely (and sometimes luridly) reported in the press. For an account of the situation in England prior to 1848, see Marjorie Jones, *Justice and Journalism* (1974), Chapter 1.

⁴⁶ S 4(2), superseding s 6(1) of the Criminal Justice Act 1967.

⁴⁷ *R v Fisher* (1811) 2 Camp 563; 11 RR 799; 170 ER 1253. See Jones, *supra* n 45 at 13-22.

⁴⁸ [1893] 1 QB 65. Also *R v Evening News* [1925] 2 KB 158. See, generally, Jones, *supra* n 45 at 43-52.

proceedings is privileged if published without malice, subject to any relevant statutory restrictions.⁴⁹

Devlin J (as he then was), in his summing up in a much-publicized 1957 murder trial of a Dr Adams, remarked that it would have been wiser if the case had been heard in private in the preliminary proceedings. He added that he was making the statement with the authority of the Lord Chief Justice. Indeed the preliminary proceedings had attracted much publicity thought likely to be damaging to the accused though, in the event, he was acquitted.⁵⁰ Shortly afterwards, on 1 June 1957, a committee was appointed under the chairmanship of Lord Tucker to consider and report whether committal proceedings should continue to take place in open court, and, if so, whether it was necessary or desirable that any restriction should be placed on the publication of reports of such proceedings. The Committee reported in July 1958.⁵¹

The Tucker Committee early in its report came down in favour of the view that, generally, committal proceedings should continue to take place in open court.⁵² It then proceeded to consider the issue of publicity. The Committee surveyed various submissions for and against the proposition that free reporting of committal proceedings may tend to prejudice the jury in a subsequent trial. The Committee membership was apparently itself divided on the issue, but agreed that concern was sufficiently widespread that the existing system should not be continued unless it could be shown to have some overriding merit.⁵³ The Committee examined several arguments in support of free reporting but found them insufficiently strong to justify no change in the existing system.⁵⁴

The Tucker Committee's unanimous recommendation was that, until the accused had been discharged or, if he was committed, until the trial had ended, any report of committal proceedings should be restricted to such "neutral" facts as names of the accused and witnesses, the charges, and the decision of the court.

However, action on the Tucker Committee's report was long delayed. It eventually saw the light of day as s 3 of the Criminal Justice Act 1967. The same Act, s 1, also provided for "paper committals", ie, committals based on written statements by witnesses, as a way of dispensing with the need for full oral proceedings in most cases.⁵⁵ As a result, the impact of s 3 is limited to the minority of cases where oral proceedings still occur.

49 *Cassidy v Mercury Newspaper Pty Ltd* [1968] Tas SR 198 (NC29).

50 *The Times*, 9 April 1957; see note: "The Aftermath of the Adams Case" (1957) 20 Mod LR 387. Devlin J's comments apparently led to an increase in the number of committal proceedings heard in camera.

51 *The Report of the Departmental Committee on Proceedings before Examining Justices*, Cmnd 479 (1958). Much of the historical summary on these pages is drawn from the Report, paras 12-15.

52 *Supra* n 49, paras 28-30; also paras 56-57, 69. See Criminal Justice Act 1967, s 6(1).

53 *Ibid*, paras 36-39.

54 *Ibid*, paras 40-50.

55 It has been estimated that 95 per cent of all committals in England are now paper committals: New South Wales Law Reform Commission, *Criminal Procedure – First Issues Paper* (1982), para 10.29.

"In a study of cases committed for trial by Sheffield magistrates' court during 1972, only one case out of a total of 356 had full committal proceedings. And of 2,406 cases sent for trial in the Crown Court at Birmingham during 1975

Under s 3 it is unlawful to publish a report of committal proceedings before examining magistrates which contains matter other than the following basic details:

- (a) identity of the court and the names of the examining justices;
- (b) names, addresses and occupations of parties and witnesses, and ages of defendants and witnesses;
- (c) offences charged;
- (d) names of counsel and solicitors;
- (e) any decision to commit for trial, and any decision on the disposal of the case against defendants not committed;
- (f) charges on which defendants are committed and the court to which committed;
- (g) date and place to which the committal proceedings may be adjourned;
- (h) any arrangements as to bail on committal or adjournment;
- (i) whether legal aid was granted to defendants.

A maximum fine of 500 pounds is imposed for breach of such prohibition. Prosecutions require the consent of the Attorney-General.

The prohibition does not apply on completion of the actual trial, nor if the magistrates decide not to commit for trial or proceed to try the case summarily with the consent of the accused. In addition, the reporting restrictions shall be lifted by the court where a defendant applies for such an order, and this was to apply even where there were other defendants who might not be willing to have the restrictions lifted.⁵⁶ Such an order was irrevocable.

Section 3 was substantially re-enacted in section 8 of the Magistrates' Courts Act 1980. This was amended in 1981 by the addition of ss (2A) which allowed one co-accused to object to the making of an order lifting reporting restrictions, in which case "the court shall make the order if, and only if, it is satisfied after hearing the representations of the accused, that it is in the interests of justice to do so". In the first case to test the operation of the new subsection, *R v Leeds Justices; ex parte Sykes*,⁵⁷ the Divisional Court granted certiorari, on the application of one co-accused, to quash the decision of the magistrates to lift reporting restrictions at the request of another of the defendants. Griffiths LJ (with whom McCullough J agreed) said that the burden was on the

55 *Cont.*

and 1976, only four had full committals; in 18 others some of the evidence had been given orally". The Royal Commission on Criminal Procedure (the Philips Committee), *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (HMSO, Cmnd 8092-1, 1981), para 193.

56 By 1973 a commentator was able to report that there had been four prosecutions under the provision. He commented on what was "seemingly the first defended case", and noted that the result of the conviction was that publication of any information beyond the list of "neutral data" in s3(4) would constitute the offence, quite irrespective of whether or not the details were potentially prejudicial in nature: Miller, "Reporting Committal Proceedings - 1", *The New Law Journal* (6 December 1973), 1119. See also Seymour, *infra* n 63 at 82-83; Jones, *supra* n 45, ch 7; Harris, *The Courts, The Press and the Public* (1976), ch 3; *R v Horsham Justices; ex parte Farquharson* [1982] 2 All ER 269, 275-277 per Forbes J, 288-289 per Shaw LJ.

57 [1983] 1 All ER 460.

person who wishes committal proceedings to be reported, when another co-accused objects, to satisfy the magistrates that it is in the interests of justice to do so. The interests of justice incorporate as a paramount consideration that the accused should have a fair trial, and the prima facie rule is that committal proceedings should not be reported.⁵⁸

The Contempt of Court Act 1981, can also have some impact on the publicity of committal proceedings in the United Kingdom. Section 4 of the Act provides:

“(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose. . .”

The facts in *R v Horsham Justices; ex parte Farquharson*⁵⁹ were as follows: four men were charged with exporting firearms and ammunition in breach of customs legislation. The case against them proceeded through “old style” committal proceedings (ie proceedings other than “paper committals” authorised by s 1 of the Criminal Justice Act). Under s 3(2) of that Act one of the accused applied, successfully, to have reporting restrictions lifted. The new s 8(2A) of the Magistrates’ Courts Act 1980 allowing other accused to oppose such an application was not yet in force.

Fourteen days after the committal proceedings began, the Contempt of Court Act commenced operation. The accused applied for an order under s 4(2) to prohibit publication of any report of the proceedings until the commencement of any subsequent trial. The magistrates made the order. The prohibition was total, and covered even such neutral information as would be permitted by s 3 of the 1967 Act. A reporter (Farquharson), the National Union of Journalists, and a local newspaper company sought judicial review to challenge the s 4(2) order. The principal grounds for review were that the justices had no jurisdiction to make a s 4(2) order when they had already made an order under s 3(2) of the 1967 Act, and that the order was wider than necessary.

The jurisdiction argument was based on the principle *generalia specialibus non derogant* – Parliament had dealt specifically with the topic of publicity for committal proceedings in the 1967 Act, so that the more general 1981 provision should be interpreted as not intended to apply to committal proceedings. This argument was rejected in the Divisional Court by Forbes J with whom Glidewell J substantially agreed. But Forbes J did consider that the justices’ order was too wide:

⁵⁸ Ibid 462. The new sub-section seems to have been a response to the publicity given to committal proceedings against Jeremy Thorpe and others: Ibid 461; *R v Horsham Justices; ex parte Farquharson* supra n 56 at 283 per Lord Denning MR.

⁵⁹ Supra n 56.

“it seems to me that any court considering whether to make an order under s 4(2) is bound to satisfy itself that the order is no wider than necessary to secure the desired end; namely, the prevention of prejudice to the administration of justice.

It may be that on the material we have before us, which is the same material as was before the justices, all that was necessary, and all that reasonable justices properly directing themselves could have considered was necessary, was an order preventing publication of the evidence relating to what I have called the sensitive material referred to in the affidavit.

It is not our task to substitute our view of what would have been a proper order for that of the justices but it is clear that these justices never addressed themselves at all to the question whether a more restricted order than the one they had made would nevertheless suffice to prevent prejudice. They have my sympathy, but undoubtedly they erred in failing to turn their minds to this point and the case should go back to them so that they may decide on the appropriate restriction.”⁶⁰

The case went to the Court of Appeal which dismissed the appeal. The Court agreed that s 4(2) of the 1981 Act was applicable to committal proceedings, but that the order made by the justices was too wide. In the course of his judgment, Lord Denning said:

“The intention of the legislature

On this reading of the statute it will be seen that s 4(2) is to be very strictly confined. It applies only to a very limited type of case. So read, the statute is not a measure for restricting the freedom of the press. It is a measure for liberating it. It is intended to remove the uncertainties which previously troubled editors. It is intended that the court should be able to make an order telling the editors whether the publication would be a contempt or not. Such as the report of a ‘trial within a trial’, or publishing a name which the court for good reason orders should be kept secret, or if magistrates in committal proceedings order that the person blackmailed should not be named. Unless the court makes such an order then the newspaper is given complete protection by s 4(1) from being subjected to proceedings for contempt of court.

The freedom of the press

This interpretation is, in my mind, necessary so as to ensure two of our most fundamental principles. One is open justice. The other is freedom of the press. It is of the first importance that justice should be done openly in public: that anyone who wishes should be entitled to come into court and hear and see what takes place; and that any newspaper should be entitled to publish a fair and accurate report of the proceedings, without fear of a libel action or proceedings for contempt of court. Even though the report may be most damaging to the reputation of individuals, even though it may be embarrassing to the most powerful in the

land, even though it may be political dynamite, nevertheless it can be published freely, so long as it is part of a fair and accurate report. The only case in which it will be punishable as a contempt of court is when the court makes an order postponing publication in the legitimate exercise of its powers in that behalf. . .

Our present case

Returning to our present case, I cannot see any risk of prejudice to the administration of justice. Let me assume that in the course of the evidence, there will be talk about political assassination of one kind or another. It is probably irrelevant to the charges. It may be embarrassing to some group or other. But it is most unlikely to influence the administration of justice. I do not think it would influence any judge or juror who might read it and who might, weeks or some months later, sit on the trial. So I think the magistrates were wrong to make the blanket order as they did at the outset of the hearing. The Divisional Court was quite right to set their order aside.

But I do not exclude the possibility that there may, in the course of the proceedings, arise circumstances which would justify the making of an order in regard to some name or other, or to some point or other in which it would be *necessary* to make an order in the interests of the administration of justice. But whenever an application is made by one party for an order under s 4(2) the magistrates must remember that there is a third party to be considered who is neither seen nor heard. The third party is the public at large. Ever since *Scott v Scott* the court has attached great importance to the public interest in having justice done in open court with the press able to publish a fair and accurate report of all that takes place. The magistrates should remember this and give proper weight to it in coming to their decision.”⁶¹

(ii) *Australia*

Australian law and practice were based originally on English law and practice of the mid-19th century. While many English developments have been followed in Australia, there has been increasing diversity both from England and also among the various Australian jurisdictions. Such diversity is particularly apparent in recent years on the question of openness and publicity of committal proceedings.

One interesting fact is that in no Australian jurisdiction is it laid down that committal proceedings are an obligatory step before trial on indictment, so that the basis for such proceedings rests not on law but on practice.⁶² Nevertheless the legislative provisions for the actual conduct of committal proceedings are quite elaborate.⁶³

But the practice itself has come under increasing criticism and there have been important changes to the conduct of committal proceedings in

⁶¹ *Ibid* 286-288.

⁶² *R v Kent; ex parte McIntosh* (1970) 17 FLR 65, 76 per Fox J.

⁶³ John Seymour, *Committal for Trial. An Analysis of the Australian Law together with an Outline of British and American procedures*, (Australian Institute of Criminology, 1978), 1. This work appears to be the only modern, full-scale study of committal proceedings in Australia.

many jurisdictions. In particular, provision made in the English Criminal Justice Act 1967 for acceptance of written statements of witnesses in some circumstances in committal proceedings has been followed, with variations, in all Australian jurisdictions except New South Wales; and even in New South Wales similar changes have been proposed.⁶⁴ In New South Wales and other jurisdictions, committal proceedings may be avoided when the accused pleads guilty, and some jurisdictions allow an accused to waive a committal proceeding.⁶⁵

If there is no committal proceeding, or if a person is "committed on the papers", the issue of access or publicity scarcely arises. Subsequent discussion focusses on the issue of openness and publicity in those circumstances when an oral committal proceeding is held.

Openness

In Australian jurisdictions the situation concerning openness of committal proceedings has been governed by local counterparts to s 19 of Jervis' Act (1848). Thus, in New South Wales, the Justices Act 1902, s 32, declares that the place in which committal proceedings occur is not deemed to be an open court, and the section gives the magistrate power to order that no person shall have access to the proceedings "if it appears to him that the ends of justice will be best answered by so doing". Similarly worded provisions still operate in all other Australian jurisdictions.⁶⁶

The Victorian provision has been elaborated in recent years by the addition of alternative bases on which a magistrate may exclude the public; namely, considerations of public morality and of the reputation of a victim of an alleged sexual assault or extortion. (Such considerations might have been adequately served by the less drastic step of restrictions on publicity). In addition, s 47A of the Magistrates (Summary Proceedings) Act 1975 (Vic) provides for a general non-discretionary exclusion of the public during portions of committal proceedings in respect of certain offences involving rape.

In Queensland, persons may be excluded while a child is giving evidence in a case involving a sexual offence against a child.⁶⁷

In contrast to the common law position concerning trial courts, the question of access to committal proceedings lies entirely in the discretion of the magistrate. Thus in one case, *Re Gibson; Ex parte Price*,⁶⁸

64 Ibid 81-82. Department of Attorney-General and of Justice, Criminal Law Review Division, *Proposals for Revision of the NSW Justices Act, 1902* (NSW Govt Printer, 1980) 12; New South Wales Law Reform Commission, *Criminal Procedure-First Issues Paper* (1982).

65 Justices Act 1886 (Qld) s 110A (2); Justices Act 1959 (Tas), s 57(2); Justices Act 1921 (SA), s 106(2); Magistrates (Summary Proceedings) Act 1975 (Vic), s 46(1) and (2); Justices Act 1902 (NSW), s 51A; Court of Petty Sessions Ordinance 1930 (ACT), s 90 AA(1); Justices Ordinance 1928 (NT), s 105B(1). For discussion of the procedures see Seymour supra n 63, ch 1.

66 Justices Act 1886 (Qld) s 71; Justices Act 1959 (Tas), s 56; Justices Act 1902 (WA), ss 66 and 67; Justices Act 1921 (SA), s 107; Magistrates (Summary Proceedings) Act 1975 (Vic), s 43; Court of Petty Sessions Ordinance 1930 (ACT) s 52; Justices Ordinance 1928 (NT), s 107.

67 Justices Act 1886 (Qld) s 71A(1); Criminal Law (Sexual Offences) Act 1978 (Qld) s 5.

68 20 December 1956 (unreported); the High Court refused leave to appeal; see note (1958) 31 ALJ 629, 630.

Manning J, in the Supreme Court of New South Wales, refused mandamus to compel a magistrate to conduct committal proceedings in open court. More recently, in *Thomas v Brown*,⁶⁹ Yeldham J, in the New South Wales Supreme Court, refused to order that committal proceedings (in the "Alleged Social Security Frauds Case") should be closed during the giving of evidence by a police informer; he so ruled for the reason that s 32 left the decision to the magistrate, and it had not been shown that he had failed to exercise his discretion properly.

Publicity

For the most part it seems that, in practice, committal proceedings are conducted in open court. And the general position appears to be that fair and accurate reports of such proceedings are privileged, notwithstanding that they may tend to the prejudice of a fair trial. Thus, in *Cassidy v Mercury Newspaper Pty Ltd*,⁷⁰ a person accused of murder moved the court to commit for contempt the proprietors and the acting editor of a newspaper which had reported the committal proceedings. Chambers J held: (a) that proceedings for contempt do not lie for a fair and accurate report of a court of law published in good faith; (b) that this rule applies to committal proceedings held in open court; and (c) that it is irrelevant that such a report may prejudice an accused person in his defence (since he is not bound to have committal proceedings) and the magistrate may, if he thinks fit, take them in private.

In 1969 the Victorian Parliament inserted a new s 42A in the Justices Act 1958, which allowed a justice a broad discretion to restrict publication of a report if satisfied that it would be likely to prejudice the fair trial of any person for the offence. This provision was replaced by s 44 of the Magistrates (Summary Proceedings) Act 1975. Under s 44(1) there is a prohibition against publication of a report of any admission or confession unless the accused has been discharged or not directed to be tried, or, if directed to be tried, until after the trial. Section 44(2) also imposes a prohibition on publication of reports of any opening statement made on behalf of the prosecution. Section 44(3) echoes the Northern Ireland provision by authorising a justice to prohibit reports of any statement or document when an objection is made in good faith that it is not admissible in evidence. And s 44(4) confers a broad discretion (similar to the 1969 provision) to prohibit reports of the proceeding or part thereof if the magistrate is satisfied that such reports "would be likely to prejudice the fair trial of any person".

In Queensland, a magistrate is empowered to prohibit publication of the whole or part of the proceedings when the offence in question is a sexual offence.⁷¹

In Western Australia, a 1976 amendment to the Justices Act 1902 provides by s 101D:

"where there is a preliminary hearing the justices may at any time state that in their opinion in the interests of justice it is undesirable that any report of or relating to the evidence or any

69 1 May 1980 (No 11672 of 1980).

70 [1968] Tas SR 198 (NC 29).

71 Justices Act 1886 (Qld) s 71A(2).

of the evidence given or tendered at the proceedings before them should be published. . .”

And, thereafter, any such publication is punishable as contempt of court.⁷²

The South Australian Parliament in 1979 enacted a new s 69 of the Evidence Act 1929, which is as follows:

“(1) Where a court considers it desirable to exercise powers conferred by this section —

- (a) in the interests of the administration of justice; or
- (b) in order to prevent undue prejudice or undue hardship to any person,

it may, by order —

- (c) direct that any persons specified (by name or otherwise) by the court, or that all persons except those specified, absent themselves from the place in which the court is being held during the whole or any specified part of the proceedings before the court;
- (d) forbid the publication of specified evidence, or of any account or report of specified evidence, either absolutely, or subject to conditions determined by the court;

or

- (e) forbid the publication of the name of —
 - (i) any party or witness;
 - or
 - (ii) any person alluded to in the course of proceedings before the court,
 and of any other material tending to identify any such person.”

Any suppression order made under para (d) or (e) has to be reported to the Attorney-General. An order to make or not to make an order under the section is subject to appeal.

Section 68 defines “court” to include not only trial courts, but also a justice conducting a preliminary investigation and a coroner holding an inquest.

Section 71a, enacted in 1976, imposes a non-discretionary prohibition on media reports of committal proceedings for sexual offences, and a temporary ban on reports of the identity of persons charged with sexual offences until committed for trial or sentence or until the charge is dismissed or the proceedings lapse. (It also prohibits any report which would identify the victim of a sexual offence unless he or she consents or the judge authorises such publication).

These South Australian provisions are clearly concerned with reputation and privacy as well as with fair trial. But the earlier version of s 69 (first enacted in 1917) was interpreted as having similar scope despite being in

⁷² Justices Act 1902 (WA) s 101D. And see the report of the Law Reform Committee on Committal Proceedings (1970), paras 34-36, 40.

terms confined to considerations of “the administration of justice”. In *R v Hermes; ex parte V*⁷³ the accused was charged with having behaved in an indecent manner in a public place. The magistrate adjourned the hearing and made an order under s 69 forbidding publication of his name “until further order”. The case was heard before another magistrate. The complaints were dismissed but the magistrate indicated that he intended to revoke the suppression order. Prohibition was sought to prevent him from doing so. The Full Supreme Court held, *inter alia*, that the words “administration of justice” should be interpreted broadly:

“We think it desirable — at least while a case is still *sub judice* — that there should be the power to forbid the publication of the name of the party charged, if from the nature of the proceedings, the mere publication of his name would be likely to injure the party; and we have no doubt that this was within the intention of Parliament when enacting s 69”.⁷⁴

The Court held that the first magistrate had power to make the suppression order, but the second magistrate had equal power to terminate it even though they seemed to consider that he ought not to have done so:

“Whether he does so or not is a matter for his discretion. That would not be a matter for review by way of prohibition. It might be challengeable on appeal, but that would be equivalent to locking the stable door after the horse is gone. In these circumstances it may be proper for us to express the opinion that, where a Court has seen fit to forbid the publication of the name of a defendant until further order, and the complaint is eventually dismissed, the Court need—and, perhaps, should—not, in the exercise of its discretion, make an order releasing the name of the defendant for publication, unless at the request of the defendant. Although, as a matter of pure logic, it may be said that no harm is done to a man by publishing the fact that he has been acquitted of a particular charge, there is little doubt that people are inclined to believe that there is ‘no smoke without fire’; and the mere knowledge that a man has been accused of a crime which the community regards as particularly sordid may suffice to condemn that man in the eyes of many, even though (as in this case) he has been acquitted on the merits by the Court hearing the charge.”⁷⁵

As noted above, the 1979 amendment provides that the decision to make or not to make a suppression order may be subject to appeal.⁷⁶

Thus it can be seen that there is a discernible trend towards legislative authorisation of “suppression orders”, not only in regard to committal proceedings but also in regard to certain trials. Not surprisingly, this trend is not appreciated by the press. The Australian Press Council has voiced press concern that

73 [1963] SASR 81.

74 *Ibid* 84. Parliament’s intention in this regard was made more clear in the 1979 amendment.

75 *Ibid* 85.

76 In a recent decision, Mitchell ACJ, on appeal, ordered continuation of a suppression order: *J v Holmes* (unreported, 16 July 1981, No 2006 of 1981).

"judges, magistrates and coroners apparently had ordered suppression of names or evidence on points of law, rather than in the public interest and often against the strongest protests by the police." ⁷⁷

And the former Chairman of the Press Council, Sir Frank Kitto (formerly a Justice of the High Court of Australia) referred to the sphere of judicial discretion to forbid the publication of names and evidence:

"True, in many cases these should be suppressed, but surely only where the likely harm from disclosure, damage to society or individuals, is clearly out of all proportion to the interest of the people to be shown all that is being done in the name of Justice." ⁷⁸

The South Australian provisions for orders suppressing the names of persons involved in court proceedings have attracted particular criticism which came to a peak in December 1982 over a series of cases which led the Attorney-General to promise a review of the position.⁷⁹

(iii) *New Zealand*

In New Zealand, as in England and most Australian jurisdictions, provision was made in 1976 for the admission of written statements in committal proceedings. The court is deemed not to be an open court and, in line with the extended Victorian provision, the magistrate has a discretion to exclude persons from the court when he is of the opinion that this is in the interests of justice or of public morality or of the reputation of any victim of any alleged sexual offence or offence of extortion. However, the magistrate may not exclude an accredited newspaper reporter. The court has a general power to prohibit publication of any report of the whole or part of the evidence. The court may also forbid publication of the name of the accused or of any other person involved in the proceedings.⁸⁰

(iv) *Canada*

Preliminary inquiries in Canada are governed by the Criminal Code. In language similar to Jervis' Act, s 451 (j) and (k) of the Code provide that where it appears to a judge that the ends of justice will be best served by so doing he may close the proceedings to the public. He may also regulate the course of the inquiry in public. He may also regulate the course of the inquiry in any way that appears to him to be desirable and not inconsistent with the provisions of the Criminal Code. In addition, s 455 provides that there shall be no publication of any admission or confession tendered in evidence at a preliminary inquiry unless the accused is discharged or, if committed for trial, until the trial is ended. S 467 allows a justice, at the accused's request, to ban publication of any of the evidence until the accused is discharged or, if committed, until the trial is ended.⁸¹

⁷⁷ Australian Press Council, Fifth Annual Report (30 June 1981), 10.

⁷⁸ Ibid 5. See also for further protests, Australian Press Council, Seventh Annual Report (30 June 1983), 7-8, 10-11. Eighth Annual Report (30 June 1984), 14.

⁷⁹ *Sydney Morning Herald*, 2, 3 and 4 December, 1982; *The Australian* 2 December 1982.

⁸⁰ Summary Proceedings Act 1957 (NZ), s 156; Criminal Justice Act (1954) (NZ) s 46. Seymour *supra* n 63, 84-85.

⁸¹ Newett, "Public Criminal Trials" (1978-79) 21 *Criminal Law Quarterly* 199.

The Ontario Royal Commission of Inquiry into Civil Rights (the McRuer Commission), in considering the Tucker Report and differences in the Canadian position, noted the existing restriction on publication of admissions and confessions under s 455, the rarity in Ontario of opening speeches by the prosecution, and the fact that committal proceedings in Ontario are mostly presided over by magistrates who are qualified lawyers. The Commission also noted that only 2.7% of persons charged with indictable offences were eventually tried by jury and, in discussing existing safeguards against prejudice, noted that the right of voir dire examination of potential jurors for partiality is frequently exercised. In the outcome, the Commission recommended that there should be no further restriction provided by law on the reporting of proceedings at preliminary hearings.

In 1974 the Law Reform Commission of Canada recommended abolition of the preliminary inquiry.⁸²

(v) *United States of America*

The American situation is influenced by the Bill of Rights amendments to the Constitution which guarantee both freedom of the press and fair trial. The Sixth Amendment, inter alia, guarantees a criminal defendant the right to a trial that is public "and by an impartial jury".

The Supreme Court, in *Gannett Co v De Pasquale*,⁸³ held by a 5-4 majority that the Sixth Amendment confers the right to a public trial only upon a defendant, and affirmed that pre-trial proceedings might be closed to the public and to the press. Burger CJ confined his concurrence to pre-trial proceedings. Subsequently the decision itself was confined to pre-trial proceedings by the Court's judgment in *Richmond Newspapers Inc v Commonwealth of Virginia*.⁸⁴ The Court held unconstitutional an exclusion of the press from a trial under Virginia legislation, the effect of which was to authorise exclusion of "any persons whose presence would impair the conduct of a fair trial", at least where the record disclosed no basis to justify the exclusion. The basis for the decision in favour of the right of public access to a trial rested on the First (and Fourteenth) Amendment guarantees of freedom of speech and of the press and of the right of peaceful assembly.

The First Amendment reasoning in *Richmond Newspapers Inc v Commonwealth of Virginia* could extend to pre-trial proceedings, and has been so extended in some American cases. But the Supreme Court decision in *Gannett Co v De Pasquale* still stands and it may be that some exclusion of the public or some restrictions on reporting of pre-trial proceedings, based clearly on necessity to protect the Sixth Amendment guarantee of an impartial jury, may not be unconstitutional.

The Fifth Amendment provides constitutional preservation of the old Grand Jury mechanism in federal courts before a "person shall be held to answer for a capital, or other infamous crime", and grand juries have always excluded the public. About half of the States use the grand jury. Some States use the grand jury after a preliminary hearing; others use

82 Law Reform Commission of Canada, *Criminal Procedure — Discovery*, Working Paper No 4, 1974; Seymour supra n 63 at 92-93.

83 443 US 368, 61 L Ed 2d 608, 99 S Ct 2898 (1979).

84 448 US 555, 65 L Ed 2d 973, 100 S Ct 2814 (1980).

only a preliminary hearing; others dispense with preliminary hearings altogether.⁸⁵

Other forms of pre-trial proceedings may be highly significant, especially pre-trial suppression hearings brought to exclude admission at trial of specific confessional and other evidence, as in *Gannett Co. v De Pasquale*. Such proceedings will be judicial proceedings, in contrast to the essentially investigative or preliminary nature of committal or grand jury proceedings. In suppression hearings, particularly, there will be a strong public interest in openness for a variety of reasons, including oversight of the conduct of law enforcement officials as well as of the judiciary. But it is equally evident that free reporting of suppression proceedings may serve to bring to the attention of potential jurors information which is not admissible at trial, with the possibility of prejudicing the fairness of the trial. Of the two major protective strategies available in the Anglo-Australian system — closure of the court and restriction on publication — the latter strategy, generally preferred in England and Australia, confronts the formidable barrier of the First Amendment and the Supreme Court's heavy bias against prior restraints on the press. (First Amendment freedoms also limit the protection that may be afforded against general comment on pending cases, as distinct from reports of courtroom proceedings). This may explain considerable American resort to the alternative strategy of closing courts to avoid a prejudiced trial, though since the *Richmond Newspapers* decision this too may present First Amendment problems. Closure is frequently regarded as too Draconian a step in view of the interests of press and public. Frequently American courts have indicated that reliance should be placed on other techniques to avoid prejudice: change of venue, adjournment, voir dire examination of potential jurors, instructions to the jury. The last resort when all else fails is reversal and retrial.

It is evident that constitutional considerations in the United States complicate the situation considerably. Restrictions on publicity for pre-trial proceedings and even closure of such proceedings need not be inherently unconstitutional, but the courts appear not yet to have established the threshold at which such steps may become permissible. The decisions are diverse, and the recent Supreme Court decisions do not finally resolve the issues.

Possibly the appropriate test to reconcile the competing public interests (and the competing constitutional guarantees) so as to protect the proper administration of justice will be much the same as the "necessity" test propounded by the House of Lords in *Scott v Scott*.⁸⁶ Recent Supreme Court opinions canvass the applicability of a test of "strict and inescapable necessity".

In all jurisdictions surveyed, and in others,⁸⁷ there is deemed to be some value in establishing a "screening mechanism" between the stage of

85 For a survey of American procedures and proposals, see Seymour, *supra* n 63 at 85-93.

86 For discussion of these issues and a similar conclusion, see Watson, "Exclusion of the Press and Public from Pre-trial Criminal Proceedings to Guarantee Fair Trial" (1979) 25 Wayne Law Review 883.

87 See eg Brouwer, "Inquisitorial and Adversary Procedures — a Comparative Analysis" (1981) 55 ALJ 207.

police investigation and the stage of formal trial, at least in regard to the more serious offences.

The Anglo-Australian systems entrust this screening function to a magistrate, but the question whether this function is to be regarded as a judicial or executive function is not satisfactorily resolved. The traditional view that it is not deemed to occur in "open court" reflects the more traditional concept that the function is closer to the investigatory than to the judicial model; by contrast, the practice generally accords more closely with the judicial model.

It is beyond the scope of this article to canvass further the functions of the committal proceeding or to consider possible alternative screening procedures.⁸⁸ It does, however, demonstrate the diversity of developments in this area in the several jurisdictions, and those developments included diverse responses to the questions of openness and publicity for such proceedings. Such responses have largely been directed to the issue of fair trial though some, as noted, are also concerned with considerations of privacy and reputation. It is submitted that, so long as committal proceedings continue to approximate to the judicial model, they should, in the normal course, be conducted in open court so as to permit scrutiny of the performance of magistrates and law enforcement officials. This, however, is not inconsistent with provision for restricting publicity so as to avoid jury prejudice in a subsequent trial. Other restrictions in the interest of protecting reputations may also be justifiable but such claims need to be carefully balanced against the general public interest in the openness of all aspects of the criminal justice system.

(b) *Royal Commissions and Other Injuries*

The issue whether a Royal Commission inquiry might prejudice pending court proceedings has been considered in several recent Australian cases.

In *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*,⁸⁹ the High Court discussed the appropriate "threshold" at which an interference with the course of justice arises. The judges also considered the question of a public interest in the openness of the proceedings of the Royal Commission itself.

Mr Winneke QC was appointed on 20 August 1981 by both the Commonwealth and Victorian governments as a Royal Commissioner to inquire whether the Federation, or any officer or member, in the course of or in relation to the affairs of the Federation, had engaged in illegal, improper or corrupt activities. He was required to report by 28 February 1982, or such later date as might be fixed. He commenced his inquiry on 10 September 1981.

On 25 September 1981, the governments of the Commonwealth, and Western Australia (and, later, South Australia) applied to the Federal

88 Such canvassing has occurred in the many reports referred to. See also Seymour, *supra* n 63, ch 7.

89 (1982) 41 ALR 71. For a useful discussion of earlier cases and discussion on the question whether proceedings of Royal Commissions might be in contempt of court, see Hallett, *Royal Commissions and Boards of Inquiry: Some legal and procedural aspects*. (1982), Chapter XIII.

Court of Australia under the Conciliation and Arbitration Act for an order directing cancellation of the Federation's registration.

On 1 October 1981, the Federation sought an order in the Federal Court to restrain proceedings of the Commissioner until the deregistration proceedings were completed. The Federation argued that continuance of the Commissioner's inquiry with its attendant publicity would interfere with the fair hearing of the deregistration proceedings and would constitute a contempt of the Federal Court. Northrop J rejected the contention and refused the motion. He said, *inter alia*, that Mr Winneke's inquiry could not have any effect upon the Federal Court in the hearing and determining of the application before it, and that he was not persuaded that it would have an effect on witnesses adverse to the proper administration of justice. The Federation appealed to the Full Court of the Federal Court.⁹⁰ The reasons for the Full Court's decision were given by Deane J, with whom Bowen CJ and Evatt J agreed:

"It does . . . seem to me that the continued public proceedings of the Royal Commissions inevitably involve a degree of public pre-trial of matters which are plainly directly relevant to the proceedings in this court, that they are likely to create undesirable public prejudice in relation to the proceedings in this court, that they are calculated to create an atmosphere which will lead to pressure being brought upon witnesses in the proceedings in this court and, let it be said, that they are liable to bring, albeit subconsciously, pressures upon the judges who ultimately deal with the proceedings in this court."⁹¹

Deane J went on to consider the law of contempt of court, and continued:

"I have found the resolution of the present case in the light of the above principles a more than ordinarily difficult task. On the one hand one has the legitimate public interest in the matters the subject of inquiry by the Royal Commissions. Indeed, the very fact that the Royal Commissions were established by co-operative action on the part of the Governments of the Commonwealth and of the State of Victoria underlines the presence of that legitimate public interest. Publicity during the course of the Commissions' proceedings is, I would think, likely to lead to new witnesses coming forward to give evidence and new relevant material being disclosed. The public interest will, no doubt, be served by the ultimate availability to the Commonwealth and the Victorian Governments of the report of the Royal Commissioner. On the other hand, as I have indicated, I am persuaded that the continued public proceedings of the Royal Commissions are calculated to prejudice or bias the public mind against the Federation in relation to questions involved in the proceedings in the court and are liable to have an undesirable effect on prospective witnesses in those proceedings. The continued public proceedings of the Commissions will also, in my view, tend to create an adverse environment for the future and proper conduct of the proceedings.

⁹⁰ (1981) 37 ALR 470.

⁹¹ *Ibid* 474.

Weighing up the competing public interests, I have come to the conclusion that, subject to a number of questions of law which remain to be considered, the adverse effect of the continued public proceedings of the Royal Commissions upon the judicial proceedings in this court outweighs the public interest involved in having those proceedings continue in public. In my view, the overall balancing of public interest does not require an unqualified prohibition of the continued proceedings of the Royal Commissions. It does, however, require that any such continued proceedings not take place in public pending the disposal of the proceedings in this court.”⁹²

And the court enjoined the Commissioner, until further order, not to conduct his inquiry in public.

The decision was taken on appeal to the High Court which, by majority, set aside the order of the Full Court. Gibbs CJ made reference to two conflicting principles of public policy as presented by the law of contempt of court in cases such as the present:

“on the one hand, the need to safeguard the proper administration of justice and on the other the protection of freedom of speech (and this principle must extend to freedom of inquiry). . . The law strikes a balance; in the interest of the due administration of justice it will curb freedom of speech, but only to the extent that it is necessary to prevent a real prejudice to the administration of justice.”⁹³

Unlike Deane J, he found no such necessity in the case before him. He found it quite impossible to believe that any Federal Court judge would be influenced by anything he may have read or heard of the Commissioner’s proceedings. As to the possible effect on witnesses, the Chief Justice noted:

“Deane J did not consider that witnesses would be deterred from giving evidence; on the contrary he said he thought that publicity during the course of the Commission’s proceedings would be likely to lead to new witnesses coming forward and new relevant material being disclosed.”⁹⁴

He then considered the possible effect on the evidence that witnesses might give in the Federal Court proceedings and found “no more than speculation” that there would be any effect. The possibility of such “incidental or unintended prejudice” was insufficient to constitute contempt in the face of the strong public interest in the open discussion of public affairs. In particular, there had not been established the threshold for contempt of court, namely a “real risk” of interference with the administration of justice in pending proceedings. Mason, Aickin and Wilson JJ also concluded that there was insufficient basis for a finding of contempt. Stephen and Brennan JJ dissented as did Murphy J, but on other grounds.

Stephen considered that there is less need for publicity being given to the process of a commission of inquiry than in the workings of the

92 Ibid 476-477.

93 (1982) 41 ALR 71, 88-89.

94 Ibid 90.

courts. Mason J, however, took the view that there was a substantial public interest in the openness of proceedings of a Royal Commission. Wilson J expressed a similar viewpoint.

The decision thus appears to recognise that there is a public interest in the openness of proceedings before a Royal Commission and that, while restrictions might be imposed to avoid contempt of court proceedings, this should only be done if there is a "real risk" of interference with the administration of justice (per Gibbs CJ) or a "substantial risk of serious injustice" (per Mason J).

Shortly afterwards, a variation of the situation in the *Builders Labourers' case* came before the High Court in *Hammond v Cth.*⁹⁵ In September 1981, Justice Woodward was appointed by both the Commonwealth and Victorian Governments as a Royal Commissioner to inquire into a number of matters including whether malpractices had occurred in the handling of meat. He was required to report by 1 September 1982.

In October 1981, Hammond was charged with conspiracy to commit an offence against a law of the Commonwealth, namely, the export of a prohibited export. As Deane J said in the High Court: "At the heart of that charge, there lie allegations of the substitution of horse and kangaroo meat for boneless beef for the overseas market."⁹⁶ After committal proceedings, Hammond was, in April 1982, committed for trial in the County Court in Melbourne.

In June 1982, the Commissioner began to hear evidence which related to the alleged conspiracy, and Hammond applied to the Commissioner to adjourn the hearing of such evidence until after the trial. The Commissioner rejected the submission that further inquiry would constitute contempt of the County Court. But he did propose to take further evidence in private, distinguishing the *Builders Labourers' case* on two bases: first, that the County Court trial would be by jury and, thus, more susceptible to the influence of pre-trial publicity; and second, that the issues and facts to be traversed in the Commission and the court were much closer than had been the case in the *Builders Labourers' case*.

Soon after, the Commissioner resumed in confidential session to hear evidence about the alleged conspiracy. Hammond was called to give evidence but refused to do so on the ground that he might incriminate himself. He then applied to the High Court for injunctions to restrain any examination of himself, and any further inquiry or report relating to the alleged conspiracy, pending the hearing and determination of his trial. The ground for his application was that further examination of himself, and the making of the report, would constitute contempt of the County Court. The High Court granted an injunction restraining examination of Hammond himself, but refused (by a majority of 3 to 2) an injunction to restrain further inquiry and report on matters relating to the alleged conspiracy. The court proceeded on the assumption that relevant Commonwealth and Victorian legislation might authorise the Commissioner to require a witness to give evidence that might incriminate him, even though such evidence would be inadmissible in civil or criminal proceedings. Some considerable doubt was expressed as to

95 (1982) 42 ALR 327.

96 *Ibid* 338.

whether this was, in fact, the legal situation⁹⁷ but, on the assumption that it was, then there could be a contempt of court in relation to the subsequent trial.

Gibbs CJ affirmed that the test for contempt was whether “there is a real risk, as opposed to a remote possibility, that justice will be interfered with if the Commission proceeds in accordance with its present intention.”⁹⁸ On the above assumptions there was such a risk.

“Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.”⁹⁹

Mason, Murphy, Brennan and Deane JJ agreed that an injunction should be granted to restrain examination of the plaintiff.

But the Chief Justice held that no case had been made out for an injunction restraining inquiry or report on matters relating to the charge against the plaintiff because it was “a mere speculative possibility that anything in his report will affect the plaintiff’s trial.”¹⁰⁰ Mason and Brennan JJ agreed with the Chief Justice; Murphy and Deane JJ disagreed. As Murphy J put it:

“In the circumstances . . . it is inevitable that any general pre-trial publication of a report identifying the accused and finding that he was party to the conduct charged, whether or not it is expressed in terms of guilt, will tend to prejudice the trial. The prejudice will be deepened by the fact that the Royal Commissioner is a highly respected judge.”¹⁰¹

Toohy J in the Federal Court considered both *The Builders Labourers’ case* and *Hammond’s case* in *Huston v Costigan*.¹⁰² Costigan was appointed a Royal Commissioner to investigate the activities of the Federated Ship Painters and Dockers Union. In pursuance of his inquiry, he investigated an investment scheme called the Hamidan Joint Venture. Huston was summoned to give evidence and produce documents to the Commission relating to Hamidan, and did so. Subsequently Huston was charged with several criminal offences in relation to Hamidan. In the meantime, the Commissioner proposed to continue receiving evidence from other witnesses about Hamidan but he decided to do so in confidential session so as to avoid any prejudice to any trial that might take place.

97 In *Sorby v Cth* (1983) 46 ALR 237, the High Court held that, as a result of legislative amendments, Commonwealth legislation does now authorise a Commissioner to require a witness to give self-incriminatory evidence.

98 *Supra* n 95 at 331.

99 *Ibid* 333.

100 *Ibid* 334.

101 *Ibid* 336.

102 (1982) 45 ALR 559.

Huston sought judicial review to restrain the Commissioner from receiving any evidence which might prove or tend to prove that he was guilty of any of the offences with which he was charged. He did so on the basis of a broad principle which, he argued, derived from *The Builders Labourers' case* and *Hammond's case*, namely, that once criminal proceedings have been instituted against a person, the continuance of a Commission's inquiries into matters the subject of or directly relevant to those charges amounts to a contempt of court or an interference with the administration of justice.

Toohy J found some support for that broad proposition in certain remarks of Gibbs CJ in *The Builders Labourers' case* and of Deane J in *Hammond's case*. But on analysis of the judgments, he concluded that:

"so far as the *ratio decidendi* of the decisions to which I have been directed goes, they do not support the broad proposition for which the applicant contends.

That is not to say that in a particular case the proceedings of a Royal Commission may not constitute a contempt of court or interference with the administration of justice. They will if they seek to require a person to answer questions designed to establish that he is guilty of an offence with which he is charged. An inquiry which has no purpose other than to establish the guilt or innocence of the person in question may be restrained from proceeding. Where a person has been charged with an offence, it may be an interference with the administration of justice for an inquiry to proceed without offering certain safeguards to the person charged, for instance by restricting the publication of evidence which may prejudice his trial.

In the present case none of those considerations operates. The Commissioner has stated his intention to hear any evidence relevant to the applicant's activities in confidence."¹⁰³

And he concluded that, in the circumstances, the fact that charges were pending against the applicant was not of itself a reason for restraining the Commissioner.

The High Court returned to a related topic in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*.¹⁰⁴ Two distinct proceedings were concerned with the question whether certain companies had entered into an agreement in contravention of s 45 of the Trade Practices Act 1974 (Cth). One of those proceedings was an inquiry by the Trade Practices Commission; the other was an action under the Act, brought independently by other companies in the Federal Court, seeking an injunction and damages. The issue in both sets of proceedings was substantially the same.

The Trade Practices Commission, for the purposes of its inquiry, issued a notice under s 155 of the Act requiring the companies under investigation to produce information and documents relevant to the question of a possible breach of s 45.

¹⁰³ Ibid 563-564.

¹⁰⁴ (1982) 43 ALR 449.

The companies gained a decision from Lockhart J in the Federal Court that service of the s 155 notices amounted, in the circumstances, to contempt of court. On appeal, the Full Court of the Federal Court disagreed. So, on further appeal, did the High Court. Gibbs CJ said:

“No doubt it is right to say that the power conferred by the section might, in some cases, be used so as improperly to interfere with judicial proceedings. I incline to think that if the power were used to assist a party in proceedings already pending, in a way that would give such a party advantages which the rules of procedure would otherwise deny him, there would be a contempt of court. As at present advised I would agree with the decision in *Brambles Holdings Ltd. v Trade Practices Commission*.¹⁰⁵ However, not every investigation into facts which are the subject of pending proceedings constitutes a contempt of court: see *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*, and the authorities there discussed. In the present case it was not shown that the person who gave the notice had any intention to interfere with the course of justice, or that there was a real risk that the exercise of the powers under s 155 would in the circumstances have that effect. The power is a drastic power and is capable of abuse and must be exercised with care. However, it was not shown that its exercise in the present case would amount to a contempt of court.”¹⁰⁶

Mason, Murphy and Brennan JJ agreed.

(c) *Reports of Trials*

Hitherto, attention has been concentrated on the issue of prejudice to a fair trial arising from fair and accurate reports of non-trial proceedings. In many jurisdictions some restrictions on openness or on reporting have been deemed appropriate, while leaving the principle of open justice applicable to the trial itself (subject only to such derogations as common law or statute may allow).

But may not reports of an actual trial also prejudice the fair trial of subsequent proceedings?

This may occur where further proceedings are outstanding, whether against one of the defendants to the original charges, or against other persons who are to be separately tried for an offence arising out of the *same incident*.¹⁰⁷ The situation may also arise if an appeal court should order a new trial. There may be dangers of prejudice, but it would seem to be unacceptable on that basis to close trials or to prohibit the publication of fair and accurate reports. Other techniques should be applied to reduce the risk of prejudice in the later trial.

The matter was considered in the Report of the Committee on Contempt of Court (the Phillimore Committee) in Great Britain.¹⁰⁸ The Committee referred to the second *Kray* murder trial¹⁰⁹ in which accused

105 (1980) 32 ALR 328.

106 *Supra* n 5 at 453.

107 See Miller, *Contempt of Court* (1976).

108 Cmnd 5794 (1974), paras 134-141.

109 (1969) 53 Cr App Rep 412.

persons contended that they had been prejudiced by reports of an earlier trial, at which some of them had been convicted for another murder. Lawton J upheld the right of the press to report trials even when other charges were pending. He continued:

“. . . the mere fact that a newspaper has reported a trial and a verdict which was adverse to a person subsequently accused ought not in the ordinary way to produce a case of probable bias amongst jurors expanded in a later case.”¹¹⁰

He went on to express his confidence in the ability of juries to disregard such reports in reaching a verdict on the evidence. He did permit defence counsel to challenge jurors for possible bias against Ronald Kray, and Kray was, in the event, subsequently acquitted on the second charge.

The Phillimore Committee also referred to *R v Poulson and Pottinger*,¹¹¹ in which Waller J ruled that certain items of evidence given at the trial should not be published because of the risk of prejudicing other criminal trials which had already commenced.¹¹² The press complied with the ruling, but made representations on the matter to the Committee.

The Committee considered that a strong case could be made out for applying the same contempt rules to published reports of legal proceedings as apply to other publications, but that the case against doing so was stronger. They noted the statutory restrictions on reports of committal proceedings, and continued:

“But the greater public interest in freedom of press coverage of a public trial, as opposed to committal proceedings, in our view tilts the balance of public advantage the other way when the accused comes to be tried. We think that the inherent risk in the *Poulson* situation of successive trials involving some of the same persons, which is fortunately rare, must be accepted.”¹¹³

The Committee went on to recommend:

“that it should be provided by statute that it is a defence to contempt proceedings to show that the publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith.”¹¹⁴

But even if there are no subsequent proceedings, there may be dangers of a trial being influenced by publication of reports during the course of the trial itself. Few jury trials, and probably fewer newsworthy trials, are completed within one day. Publication of even a fair and accurate report of the proceedings may influence the trial in a number of ways. For one thing, the general rule is that witnesses should not be in the courtroom prior to giving their own evidence, lest they be influenced by testimony given by earlier witnesses. If such a witness learns the gist of earlier

110 Ibid 414.

111 January 1974.

112 Considerable reliance was placed on *R v Clement* (1821) 4 B and Ald 218; 106 ER 918.

113 *Supra* n 9, para 139.

114 Ibid, para 141. This is implemented in s 4(1) of the Contempt of Court Act 1981.

evidence by means of the newspaper (or radio or television), the desired insulation will be lost.¹¹⁵ For another thing, a jury may be influenced by media reports of proceedings that take place in a trial during the jury's absence, particularly a "trial within a trial" on the admissibility of certain evidence.¹¹⁶

The Phillimore Committee was concerned by the problem presented by the "trial within a trial" but, initially, was not prepared to recommend any specific exception to the defence of "fair and accurate report"; the Committee was content to rely on the record of voluntary press compliance with requests not to publish particular items of evidence or name particular witnesses. However, their confidence in this regard was shaken by the *Socialist Worker case*,¹¹⁷ in which a newspaper published the names of two blackmail victims who, the judge had ordered, should not be identified in court. So, after the Phillimore Committee's report was completed, a footnote was added which concluded:

"We incline to the view that the important question of what the press may publish concerning proceedings in open court should no longer be left to judicial requests (which may be disregarded) nor to judicial directions (which, if given, may have doubtful legal authority) but that legislation. . . should provide for these specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial."¹¹⁸

The Contempt of Court Act 1981 enacted the "fair and accurate report" defence in s 4(1) and added, in ss (2) of that section, a qualification which authorises postponement of publication of reports of proceedings or parts of proceedings when necessary to avoid "a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings, pending or imminent." The meaning and scope of the section was considered in *R v Horsham Justices; ex parte Farquharson*¹¹⁹ in which the judges stressed that such an order should be made only when necessary in the interests of justice, and should be no wider in its terms than such necessity requires.

Is it possible to achieve the complete insulation of a trial from all possibility of outside influence? The Phillimore Committee thought not, and the quotation that follows may serve as a fitting conclusion to this article:

115 S 70 of the Evidence Act 1979 (SA) seems to be specifically directed to this problem: "Where in the course of any proceedings before any court witnesses are ordered out of court and it appears to the court that for the furtherance or otherwise in the interests of the administration of justice it is desirable to prohibit the publication of any evidence given or used in such proceedings the court may make an order forbidding, for such period as the court thinks fit, the publication of such evidence or any specified part thereof."

116 For a recent illustration, where a jury was discharged and a murder trial aborted, see *Sydney Morning Herald*, 3 November 1983.

117 [1975] QB 637.

118 *Supra* n 9, para 141 and n 62. See also Lord Chancellor's office, *Contempt of Court. A Discussion Paper* Cmnd 7145 (1978), paras 25-27.

119 [1982] 2 All ER 269.

“we conclude that in the interests of personal freedom, especially freedom of speech, it is not possible or even desirable to attempt to protect the course of justice completely from all outside interference.”¹²⁰

120 *Supra* n 108. Concern for influence from reporting of an on-going trial has come to the forefront in recent years in the context of the American debate as to whether new media technology, such as cameras and microphones, should be permitted direct access to the court room. For Australian comment, see Garth Nettheim, “Cameras in the Courtroom” (1981) 55 ALJ 855; New South Wales Law Reform Commission, Community Law Reform Program – Fourth Report, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties* (LRC 39) (March 1984), and Issues Paper, *Proceedings of Courts and Commissions – Television Filming, Sound Recording and Public Broadcasting, Sketches and Photographs*, (1984).