Media Access to Court Documents

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This paper aims to deal with media access to and use of administrative and judicial information held by the courts, with a particular focus on Tasmania. The question of what level of media access to court documents should be allowed is one which is bound up with several important issues facing society today. Restrictions placed on *any* information conflict with freedom of speech; restrictions on court-held information conflict with the principle of open justice as well. The level of restriction on the access to and use of information contained in court documents may also affect the effect that the media has on individuals and organisations, including the system of justice itself.

It has long been recognised that the media *can* play an important role, as an independent quasi-political institution. The 'duty' of this 'institution' is to investigate and expose abuses of power, to be a 'watchdog': this is known as the media's Fourth Estate role.[1]

This role is an idealised one and frequently conflicts with the money-making aims of a media entity's owners. Recognition of the watchdog role and the credibility and advantages it brings waxes and wanes. It increased during the 1980s when the media was responsible for investigations which eventually led to the establishment of Royal Commissions on corruption.[2] At present, there seems to be growing emphasis on entertainment, and as considerations of public good grow less important, abuses of media power grow increasingly more likely. It may be considered somewhat paradoxical that as the media gradually receives recognition for its role in the community, commercial pressures are also increasingly recognised and the resulting emphasis on entertainment and gossip grows.

As the media has grown rapidly in significance and strength, always battling attempts to impose restraints on it, there are few controls requiring it

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1 Schultz J, *Reviving the Fourth Estate: Democracy, Accountability and the Media*, Cambridge University Press, Cambridge, 1998. Referring to the media as an adjunct to the three arms of government: the executive, the legislature and the judiciary. It is not anomalous to have an arm which is largely independent but subject to some controls - the judiciary is that already.

2 Ibid., pp 195 ff.

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to comply with public benefit. As the committment of the media to its role as a benefit to society is inconstant, it follows that some regulation is required where public curiosity is satisfied at the expense of public interest.

In the last few years there have been two major trials in Tasmania which have captured public attention on a national and international scale. These trials are the those of Martin Bryant, the gunman in the Port Arthur massacre, and the upcoming trial of well-known Australian cricket umpire Stephen Randell for alleged indictable offences contrary to the Tasmanian *Criminal Code* ss 124 and 127.

Because of the nature of the crime alleged (Bryant) and the status of the alleged offender (Randell) these cases provide a good opportunity to observe media reporting of court-held information.

The Randell trial has hardly begun. At the time of writing Randell had entered a plea of not guilty to eleven complaints containing twenty-six counts of offences contrary to ss 124 and 127. However the case has already sparked great media interest, to the extent of proceedings being brought by one media entity to test its right to access and publish court-held information.[3]

As a result of the high level of public curiosity surrounding these trials the rules and practices to be observed with regard to media access and use of information before and during a legal procedure (criminal trial) have been clarified.

One other Tasmanian decision, *Re Application made by Bruce Montgomery Pursuant to Order 77 of the Rules of the Supreme Court*,[4] considered the media's right of access to documents held by the Registry of the Supreme Court of Tasmania after the legal process had been completed.[5]

These two decisions have clarified the media's right of access to and use of information in criminal trials, from before charges are laid right through until after the period for appeal has expired. It has been established that the media has a sufficient interest in information held by the courts in criminal cases to allow access to some information that an indi-

3 *R v Clerk of Petty Sessions; Ex parte Davies Brothers Ltd*, Supreme Court of Tasmania, unreported, 19 November 1998. Davies Brothers Ltd publishes a major Tasmanian daily newspaper, *the Mercury*.

4 Decision of Wright J, unreported, 16 October 1997.

5 In the '**Aftermath**', see below.

vidual who was a stranger to the action[6] would not be able to obtain.[7] The application of the principles to information in civil trials is less clear.

This depends to some extent on whether the media entities are seen (and act) as purely commercial, scandal-brewing sensationalists, or as an integral part of society, providing in this instance a link between the law and its subjects, and a check on abuses of power. The ambiguity is contributed to by the variation in media entities themselves. Some have high standards and aim to inform, others aim to entertain or to shock. There is no differentiation, however, between reputable and disreputable entities when access to information is sought.

Regardless of their respectability, it must be remembered that media entities are commercial entities and therefore subject to commercial pressures. A media entity's loyalty is to its owners, the main source of income is usually advertising clients and its main concern is the size of its readership or audience. The media may indeed provide a check on abuses of power, but it is also capable of perpetrating them. Knowledge can equal power - when a media entity has some control not only of what people know but can affect their opinion of individuals and organisations it can be very influential indeed. There is the potential to cause great harm, to individuals or to society as a whole.

There has been a gradual change in the courts' view of the media. Although its usefulness in informing society of the law has been recognised for a long time,[8] it is more recently that that it has been recognised that the media are essential to keeping the public informed and can be used in the interests of providing justice. This change has occurred as the struggle for a recognised freedom of speech has occured worldwide.

In *Ex parte Davies Brothers Ltd*,[9] decided recently, Slicer J said that:

> '[t]he nature of a [media entity] is both to respond to community interest and select for publication items which it regards to be of public interest and for the general information of the community. Its task, like that of judicial officers, is to give fair balance to competing interests and principles.'

6 That is, someone who has no interest in the action: someone who is not a party, and not a representative of a party, and does not have any other recognised interest in the action.

7 *Gerard v Hope and Others* [1965] Tas SR 15; approved in *Ex parte Davies Brothers Ltd*, see note 3 above.

8 *Daubeny v Cooper* (1829) 1 Barnewall & Creswell's Reports 237.

9 At page 1, see note 3 above.

'The problem for a court is that the dissemination of information can be used equally by both the responsible and the frenzied purveyors of fear and prejudice.'[10]

In the last decade or so discussion papers have been prepared on contempt, sub judice contempt[11] and blasphemy,[12] recommending that the resrictions the law imposes in these areas be reduced. Changes have also occurred in other areas, such as legal professional privilege,[13] defamation,[14] and Freedom of Information legislation.[15]

Determining the appropriate level of regualtion and consequences of violation requires some balance between the competing principles. There are strong arguments in favour of complete freedom and of tight control, arguments which may be dependant on the particular circumstances in question. There follows a brief discussion of each of them.

Of course, a balance is already being applied in the courts today. That balance seems to be that, in civil trials, everything may be published unless there is some specific reason why it should not be, but in criminal tri-

10 Ibid, at 3.

11 Australian Law Reform Commission, *Reference on Contempt of Courts, Tribunals and Commissions*, Research Papers no.s 1-6A, Sydney, 1984-7. These papers do not give the final opinions of the Law Reform Commission, but they do largely recommend an increase in the circumstances in which information is made available and increases in the defences available for contempts of court and a decrease in the number and width of offences punishable.

Significantly, it is in the Family Court, where issues and effects on individuals can be complex and it may be important to protect people involved in proceedings that the recommendations are the most piecemeal and least specific: Research Paper no. 6A *Contempt and Family Law*, Riseley A C (ed.), Sydney, 1985. This is an illustration of the commonsense statement: if one has a general aim in mind (such as the proper administration of justice), the achievement of that aim is reliant upon flexibility in the specific circumstances.

12 New South Wales Law Reform Commission, *Discussion Paper on Blasphemy*, Sydney, 1992. This paper *provisionally* favours the express abolition of the common law offence of blasphemy without a specific legislative replacement. It is proposed that any harm which might result can be avoided by the inclusion of ethno-religious groups in racial vilification provisions of the Anti-Discrimination Acts.

13 Legal professional privilege applies also under Freedom of Information (FoI) Legislation. There have been many determinations of the Queensland Information Commissioner concerning the s 43(1) exemption (in effect, a relevant body may choose not to disclose documents which would be subject to legal professional privilege at common law). See **'Personal Rights'** below.

14 As one example, in *Theophanous v Herald and Weekly Times Ltd* (1994) 124 ALR 1 the capacity of politicians and persons in government to sue for defamation was diminished.

15 Following the implementation of Australia-wide FoI legislation, which would tend to increase the availability of information, there is some question of whether the acts are now being reduced in their scope by amendments and funding cuts.

als access to and use of information is limited until it is clear that there is no danger of prejudice. There remains the question of whether this is the best basis to work from. It may be that the approach in criminal trials has the advantage of avoiding appeals and retrials, but so too would restricting the right to appeal to circumstances where some prejudice has clearly been suffered.

Open Justice

Open justice gives the public the opportunity to scrutinise the judicial process. It ensures that any abuse of process by the powerful is exposed and that the status of the litigant does not result in favour or prejudice. Public awareness of the legal process can excite debate, which in turn can lead to productive change by legislative or other means. If the public is given information, it is more likely to accept the legal process as fair.[16] The principle of open justice was stated by Bayley J in *Daubeny v Cooper*:

> 'It is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be 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 - have a right to be present for the purpose of hearing what is going on.'[17]

This right to be present is therefore subject to the decision that there is no specific reason why the person should be removed. It has never been expressed as an absolute right. This means that the overall guiding principle is that the court shall be open, but it is recognised that in some specific circumstances exceptions may apply. The question is therefore what constitutes a 'specific reason why they should be removed'.

> 'Of course there must be exceptions to the general rule and these exceptions may also be found to be justified by other considerations of public interest and public policy in the administration of justice ... But these considerations should not detract from the general principal of openness in judicial proceedings ... Furthermore, there is a clear advantage in enabling the public to know with certainty and accuracy what has passed in court rather than leaving them to rely on rumour or speculation and the reporting of proceedings may be found to be unfair or misleading if access to [information] in open court is not allowed.'[18]

16 *Ex parte Davies Brothers Ltd*, at 3, see note 3 above.

17 (1829) 1 Barnewall & Creswell's Reports 237 at 240.

18 *Cunningham v The Scotsman Publications Ltd* (1987) SLT 698 at 705-6 per Lord Clyne; quoted with approval in *Ex parte Davies Brothers Ltd* at 8-9, see note 3 above.

One answer to this is when the circumstances bring the open justice principle into conflict with the whole purpose of the courts - to do justice as far as practicable. As this is the *raison d'etre* of the justice system, there can be no exceptions. The open justice principle is subordinate to it. Examples of when conflict occurrs include where the information is subject to a personal right, where publication would tend to prevent victims from coming forward and where publication would somehow impair the ability of the courts to do justice.

Nevertheless the open justice principle is very important and publication of proceedings and orders of the court ought to be facilitated, even if representatives of the media are either not present, or unable to make a complete record of the details of those proceedings.[19]

Freedom of Speech

The importance of freedom of speech is recgnised by its inclusion in the Universal Declaration of Human Rights 1948[20] and the International Covenant on Civil and Political Rights 1966[21] and it is recognised in Australian law.[22] Freedom of speech is another right which favours the widest possible access to court documents being given. In fact the open justice principle can be seen as a reflection of the importance of freedom of speech. Yet this too is a qualified privilege. Exceptions are made for defamation, racial vilification, and injury to other rights, such as confidentiality and property in trade secrets, copyright, etc.

The Right to a Fair Trial

There are two aspects of the right to a fair trial relevant to access to documents. The first is that in an open court the parties are made aware of everything they need to argue their cases. Also, if there is bias, underhand dealings or other unfair circumstances affecting the outcome this can more easily be detected and appealed. This aspect is consistent with freedom of speech, open justice and the requirement of doing justice and is in favour of full disclosure of information.

The second aspect is that, inside the courtroom, the rules of admissibility apply. Many of the rules of admissibility are exclusionary rules, designed to avoid having a decision made on the basis of information of little pro-

19 *Ex parte Davies Brothers Ltd*, at 15, see note 3 above.

20 Article 19.

21 Articles 19, 20.

22 *Lange v ABC* (1997) 145 ALR 96.

bative value.[23] These rules would be undermined if the jury[24] is exposed to the prejudicial information outside the courtroom. It is the requirement of doing justice which developed the rules relating to admissibility, and it would subvert justice if those rules were undermined. Fairness and the expense of having to retry affected cases favour the restriction of access and publication of such information.

Personal Rights

These personal rights are largely made up of the exceptions to the privilege of freedom of speech and the principle of open justice. This involves the protection of personal rights, like the right to protect one's reputation (defamation[25]), the right to protect information in which one has property (copyright, trade secrets) and the right to have confidential communications protected (where a duty of confidentiality is owed). The publication of certain kinds of information may be restricted by individuals or government organisations who can show standing. These kinds of information are those which constitute are racial vilification,[26] blasphemy,[27]

23 Examples of this include evidence with regard to confessions to the police (*Criminal Law (Detention and Interrogation) Act* 1995 (Tas) s 8(2)), sexual history of the victim in sexual offence cases (*Evidence Act*1910 (Tas) ss 102A-104) and the rules applying to hearsay (the hearsay rules are contained in the common law, changed slightly in some jurisdictions by the Uniform Evidence Acts) and eyewitness identification (*Domican v R* (1992) 173 CLR 555).

24 It is considered much more difficult to prejudice a judge. However, if publication occurs at a time when it is not clear how the case will be determined there is a potential prejudicial effect.

25 Imputations which are likely to injure a person's reputation, induce others to shun a person, or injure a person in his or her business or profession are actionable. The law is not consistent throughout Australia, which may prove problematic where media entities have wide audiences. Liability is not limited to the creator of the defamatory material, for example under s 6 of the *Defamation Act* 1957 (Tas) a person who publishes a defamatory imputation is also liable. Thus media entities must always be careful.

Public or government bodies cannot sue: *Derbyshire County Council v Times Newspapers* [1993] 2 WLR 449. Contempt of Court (see below) is the mechanism which restrains publications likely to undermine the justice system.

26 There are Acts in the Commonwealth and many States to punish conduct which is likely to incite racial hatred: *Racial Hatred Act* 1995 (Cth); *Anti-Discrimination Act* 1991 (ACT); *Anti-Discrimination Act* 1977 (NSW); *Anti-Discrimination Act* 1991 (Qld); *Criminal Code* (WA) ss 76-80.

27 Blasphemy is the public expression of views designed to attack, insult or ridicule a particular religion. It is contained in statute and the common law. In Tasmania the *Criminal Code* s 119(3) provides that:

obscenity,[28] or a threat to national security or public safety. For these rights to be properly protected, where information of this kind is disclosed in court it must not be further published.

Legal professional privilege covers information communicated confidentially between lawyer and client for the sole purpose of seeking or giving legal advice or professional legal assistance for pending/anticipated legal proceedings. The party holding the documents covered by legal professional privilege may refuse to disclose the documents and the matters which they contain. There is a clear personal interest in denying access to these documents as they may contain admissions or confessions of guilt. There is a recognised public interest in protecting these communications; it enhances the administration of justice by facilitating the representation of clients by legal advisers.[29] Legal professional privilege extends to communications between public officials and lawyers because public interest lies with officials being encouraged to obtain sound legal advice.[30]

The privilege is not granted where, in particular circumstances, the public interest does not lie with the concealment of the information. There are a number of exceptions set out in the common law. It was held in *Grant v Downs*[31] that legal professional privilege 'should be confined within strict limits'. If legal professional privilege is invoked to protect from production documents that do not properly fall within its ambit the public purposes it is intended to serve will be undermined.

'it is not blasphemous to express in good faith and in decent language, or to attempt to establish by argument in good faith and conveyed in decent language, any opinion whatsoever upon any religious subject.'

28 Obscenity refers to material of a pornographic nature. In *R v Hicklin* [1867-8] 3 Law Reports (QB) 360 it was held that the test of obscenity is:

'whether the tendency of the matter charged as obscene, is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.'

Therefore, if a publication is found not to be obscene because of its limited circulation, and that material is published again in a report on the case, whether it is approving or condemning the original publication, that report may in fact be obscene.

29 *Smith and Administrative Services Department* (1993) 1 QAR 22; *Fergusson and the DPP* (1996) 3 QAR 324, discussing the decisions of the High Court of Australia in *A-G (NT) v Maurice* (1986)161 CLR 465; *Waterford v Commonwealth of Australia* (1987) 163 CLR 54; *A-G (NT) v Kearny* (1985) 158 CLR 500; *Baker v Campbell* (1983) 153 CLR 52; *Grant v Downs* (1976)135 CLR 674.

30 *Murphy and the Queensland Treasury*, Decision No. 98009 of the Queensland Information Commissioner, 24 July 1998.

31 (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ.

Documents will not be protected where they are brought into existence for the purpose of guiding or helping in the commission of a crime or fraud, or for the furtherance of an illegal purpose, including an abuse of statutory power, or for the purpose of frustrating the purpose of law itself.[32] In these circumstances the production, not the protection, of the document would ensure the better administration of justice.

The privilege, although not subject to time limitations, may be waived where there is an intentional disclosure of the information,[33] where the document or the matters it contains are tendered in evidence, [34] or where it becomes unfair to maintain the privilege.[35]

Communications between or with lawyers in the Department of Public Prosecutions (DPP) are privileged, if the documents are created for the sole purpose of use in the Crown case.[36] Therefore the accused (and the media) will not be able to obtain these documents unless the privilege is waived.

From this it may be seen that the question of which principles apply and which is decisive must be answered with reference to the particular circumstances.

Protection of Court Functions

There are a number of ways in which court functions can be undermined by the disclosure of certain kinds of information. These include criticism of a judge, the court or court system likely to undermine respect for the law, publication of information likely to prejudice a decision and publication of information where that publication makes it much less likely that a victim will come forward so that justice may be done.[37]

The access to and use of all information in the media permitted by the courts is of great importance in a democratic society. Media access to the courts is of particular significance because public attendance at court (apart from people connected to the parties or victim and 'famous' cases)

32 *A-G (NT) v Kearny* (1985) 158 CLR 500.

33 Legal professional privilege has no application to a document the purpose of which is to communicate information to others: *A-G (NT) v Maurice* (1986) 161 CLR 465 at 496 per Dawson J.

34 Ibid. Although the fact that they are used in proceedings and continue to be held does not constitute waiver: *Caloraft v Guest* [1898] 1 QB 759.

35 *Uski, R & S J and Radcliffe City Council* (1995) 2 QAR 629, para 22.

36 *Price and the Department of Public Prosecutions*, Decision No. 98009 of the Queensland Information Commissioner, 24 October 1997.

37 Examples include suppression of the names of victims of blackmail or sexual assault.

is not high, and generally the public relies on the media to keep them informed of current issues and events.

No matter how important a role the media may play in working for the benefit of the courts or the benefit of the public, it must be remembered that the media does not exist in order to play this role. The bottom line is that media entities must make money, they must maintain or increase their audience and a 'good' report is one which sells. Therefore it is imperative that there are some restrictions on the use of certain kinds of information, and encouragement given to the publication of 'useful' information.

The media's interest is ultimately in the publication of information. Therefore, for their purposes the difference between information which may be accessed and not published and information which may not even be accessed is academic. It follows that prohibition of publication is as effective as denying all access to certain information for these purposes, and may involve less of a conflict between the principles.

Restrictions on Publication

Legal proceedings move through various stages, from the commission of the crime or happening of the event or events in question to the final resolution. The relevance and application of the various principles may change at each stage, so that different levels of access and use are permitted at different stages.[38]

'Pre-Legal'

There is a period of time before an event or issue becomes subject to legal processes. During this time the courts will usually have no information, and do not restrict access or use, other than the normal controls regarding defamation, confidential information, etc.

Arrest

The first stage in a criminal case begins when an arrest is made. At this stage the court still has no information, but there are controls on publication. The 'basic facts' of the crime may be reported.[39] The journalist must take care not to prejudice the people who will become members of a jury, should one be empanelled. One major source of prejudice is where a sus-

38 Table adapted from pp 46-7 Pearson M, *The Journalist's Guide to Media Law*, Allen and Unwin, Sydney, 1997.

39 *Packer v Peacock* (1912) 13 CLR 577 at 588.

pect is identified in connection with the offence. This is particularly important where identification is an issue.[40]

Charges

The second stage, which usually follows shortly after arrest, is charging. Again, the bare facts of the crime and the content of the charges is usually all that is permitted.

On 19 May 1988 Randell appeared in the Court of Petty Sessions in response to two complaints alleging indictable offences contrary to the Tasmanian *Criminal Code* ss 124 and 127. He was represented by counsel. He was not called upon to plead and no charges were read out in open court. Attending reporters were provided with the defendant's name, the generic name of the offence alleged, its date and place of occurrence and the relevant statutory provision, all of which appear in the Court's daily list. The complaints were later withdrawn, and a new set were substituted on 16 July 1998. One journalist, on 19 May, sought particulars of the charge, which would include the names, ages and gender of the alleged victims and the nature and form of the alleged conduct.

Access was refused by the Clerk of Petty Sessions on the basis that:

- the information given was sufficient;
- the provision of further information involved a risk of prejudice outweighing community interest in that information;
- allowing access to more information would make the right of access too wide;
- the applicant's employer had, in the past, published restricted information; so that
- exercising the discretion to deny access to the information was in accord with the court's policy of making available the daily list.[41]

40 It was held in *R v The ABC; R v Davies Bros Ltd and Others; R v Northern Television (TNT9) Pty Ltd and Others; R v Tasmanian Television Ltd and Others* [1983] Tas SR 161 that:

- It is always likely that identification may arise as an issue at trial, unless there are special circumstances indicating otherwise.
- The general rule therefore is that at or about the time a person is charged and thereafter, no photograph of him should be published.
- It is for the person relying on special circumstances to show what they were.

41 *Ex Parte Davies Brothers Ltd*, at 2, see note 3 above.

This refusal was overturned in *Ex parte Davies Brothers Ltd*.[42] The rationale was that the media may have access to information where it is in the public interest for publication to occur.

The relevant public interest is in the proper administration of justice. Before the charges are used in open court they constitute no more than the statement of a single person, and are not part of the administration of justice, so that there is no public interest in disclosure.[43]

It has been held that:

> 'A document prepared for, filed and even served is not in that sense part of the court's proceedings, at least until it is deployed as part of the judicial process.'[44]

There is no access as of right and a media entity may be liable in contempt and/or defamation for the publication of the contents of a document not yet used in court proceedings, whether or not it is already filed. An officer of the court allows access to that information at his or her own risk.[45] However, once a document is used in open court, the principle of open justice applies.

If identification is an issue, no photographs of sketches of the accused may be published.

Pre-Committal and Committal Hearings

The next stage in a criminal trial involve pre-committal and committal hearings. These may be reported with care. Again, identification may be an issue.

Access to and publication of the contents of a complaint is allowed as of right once a document is used in open court. Once a pleading is used in open court the status of a document initiating proceeding changes. This applies only to pleadings (civil or criminal) used, read out or referred to in open court.[46] Where an accused has pleaded, guilty or not guilty,

> '[t]he principles of open justice require knowledge of that to which he has made answer. That the information might prejudice the individual does not outweigh the central issue of open justice.'[47]

42 See note 3 above.

43 Dicussed at length in *Ex parte Davies Brothers Ltd* at 6-8, see note 3 above.

44 *Smith v Harris* [1996] 2 VR 335 at 341 per Byrne J.

45 *Manning and Church of Scientology v Hill* (1995) 2 SCR 1130.

46 *Berry v Piggot* 24/1963, at 5 per Burbury CJ (civil); *Homestead Award Winning Homes Pty Ltd v State of South Australia*, Butterworths, unreported, 1998, 15 September 1997 at 8 per Prior J (criminal and quasi-criminal).

47 *Ex parte Davies Brothers Ltd*, at 11, see note 3 above.

The prejudice that the individual suffers is in any case reduced by public knowledge of the justice system and the fact that the accused is innocent until proven guilty.

> 'Member of the public must be taken to understand that allegations of [misconduct] in a Writ are merely ex parte and may be without the slightest foundation.'[48]

The principle of open justice requires that access may be had to the content of documents referred to (but not read out) in court.

> '[If] the public are to be informed of the proceedings, the proceedings ought to be intelligible ... The public must at least have the opportunity of understanding what is going on ... If the hearing is a public hearing then it does not seem to me that that characteristic is destroyed simply because for perfectly proper reasons of convenience a document is referred to and not read out in full. Where a document has been incorporated into what counsel has said, the proceedings cannot be said to be open to the public unless the terms of the document can be seen by the public ...
>
> The test in my view is not what is actually read out - although all that is read out is published - but what is in the presentation of the case intended to be published and so put in the same position as if it had been read out. If it is referred to and founded upon before the court with a view to advancing the submission which is being made, it is taken to be published.'[49]

The rationale is that 'reference to the terms of the Complaint [is] necessary to understand what [is] going on in a Tribunal open to the public.'[50]

In a criminal trial, the change in status of the document occurs even where a case is adjourned before an accused is called upon to plead, which may occur without charges being read.[51]

The right to access these documents accrues at the time the document is used in open court, and continues from that time onwards, even where the document is withdrawn, and a new document substituted.[52] The fact that the document has been withdrawn and another substituted is relevant to what can be published: accuracy is still a concern. Publication of a court sheet which did not reflect the actual charges found by the magistrates

48 *Berry v Pigott*, at 8, see note 44 above.

49 *Cunningham v The Scotsman Publications Ltd* (1987) SLT 698 at 705-6 per Lord Clyne; quoted with approval in *Ex parte Davies Brothers Ltd* at 8-9, see note 3 above.

50 *Homestead Award Winning Homes Pty Ltd v State of South Australia*, see note 44 above.

51 *Ex parte Davies Brothers Ltd* at 11, see note 3 above.

52 The withdrawal on 16 July 1998 of the first set of complaints made on 19 May 1998 did not affect the status of the complaints as at 19 May:*Ex parte Davies Brothers Ltd*, at 11, see note 3 above.

was found not to be protected from defamation or contempt proceedings.[53]

Exchange of Pleadings

The first stage in civil procedure is the exchange of pleadings. These are kept in the registry of the court in which the case will be heard. Access to court registries may differ between courts.

Civil trials do not normally involve juries, and so the question of prejudice is not as important. Any report should be fair and accurate, as defamation, disclosure of confidential information and contempt are still punishable. However, it is arguable that public interest in 'private' disputes is not as great.[54]

Trial

During trial, all reports must be fair and accurate. In criminal trials, again the bare facts of the crime may be reported, and photographs or sketches of the accused are not permitted until all identification evidence is in if identification is an issue. Documents which are referred to but not read out may also be accessed.[55]

Images or descriptions of documents and exhibits may be permitted, as long as the report is fair and accurate. There is no right to obtain copies of the orders, process used in court or documentation used in the hearing except at the discretion of the keeper of records.[56] Alterations other than those necessary to enable publication are not advisable,[57] although summaries are permissible if accurate.

It was held in *Ex parte Davies Brothers Ltd* that:

> 'A reporter or other representative of the media is doubtless an interested party in all matters commenced by a public officer and that person has a

53 *Furniss v The Daily Cambridge News Ltd* (1907) 23 Times Law R 705.

54 It is also arguable that, as regards the decisions of the courts in regard to situations where there is an imbalance of power between the parties, or where there has been some form of wrongdoing by one of the parties, there is a public interest in publication.

55 See note 43 above.

56 Eg: videotaped confessional material. *France et al and Others v R et al; Thompson Newspapers Company et al Intervener* (1988) 122 CCC 449 which is a decision of the Canadian courts, and dependent upon the *Canadian Charter of Rights and Freedoms*. It was given as an example in *Ex parte Davies Brothers Ltd*, at 14, as regards access to the records of the Court of Petty Sessions, see note 3 above.

57 In a report on the Port Arthur massacre the eyes of the suspect in a photograph were altered. The media entity involved was warned by the DPP (responsible for prosecutions of contempt) but no further action was taken.

> right to inspect the originating process, orders made by the court and documents tendered in open court, on the hearing.'[58]

Judgment and Sentencing

The judgment is a very important document. It also must be fairly reported. Generally it is desirable that as many people as possible are made aware of the judgment, as it is this document which is a statement of the law.

The media is not allowed access to reports from probation officers and forensic examiners tendered during the course of a sentencing hearing, although the portions which have been read to the court during proceedings may be published.[59]

Appeal

After the trial, before the expiry date for an appeal is past, there is always the question of prejudicing a jury on retrial. Therefore, reporting is still restricted to the bare facts of the crime and fair and accurate reports of the proceedings.

'The Aftermath'

After the expiry date for appeal is past, or the accused is acquitted, there are no sub judice restrictions. There are still restrictions on reports constituting defamation or breach of confidentiality. In addition, if a jury was empanelled, information about jury-room discussions must not be disclosed.

After a trial is long over, the media may have some reason for wanting to find and publish details about it again. This reason is usually public entertainment or interest, revivified by 'anniversaries' of significant events; retrospectives, histories or biographies; or the happening of similar events.

If the contents of a document have been disclosed in open court then they remain able to be accessed, provided that the restrictions on publication of special kinds of information are observed.

58 See note 3 above.

59 *The Commonwealth of Australia v John Fairfax and Sons Ltd and Others* (1980-81) 147 CLR 39 at 51 per Mason J, cited with approval by Slicer J in*Ex parte Davies Brothers Ltd* at 14, see note 3 above.

> 'Whether or not the prosecution is over and a matter of the past and the restraint on publication lifted, any confidentiality expired when the contents of the statement were disclosed in open court.'[60]

This position was upheld in *Re Application of Bruce Montgomery* ...[61] as regards the Supreme Court of Tasmania, civil division. The Acting Deputy Registrar refused the court reporter for *The Australian* access to the civil file of *Cyril Elliot Clark v The Law Society of Tasmania and Fabian Dixon* which had been settled out of court. This refusal was appealed in accordance with Order 77 rule 29 of the *Rules of the Supreme Court.* Wright J gave an ex parte summary direction that public access may be had to all documents filed in the Registry of the Supreme Court.

Sources of Information

There are several alternative sources of the information which may go on record: counsel for the parties or the DPP (who in turn receive their information from the police), the court (through attendance at court, or requesting information from the Registrar or the judge), Freedom of Information legislation or the Court Information Officer (or equivalent, should there be one in the jurisdiction).

Each source will receive and hold information at a different stage in the legal process, so that the journalist must be aware of what stage the process has reached in order to decide which is the best available source. The Registry is not informed of the content of charges, for example, until documents are filed for some form of hearing to take place. After a case has been decided the judge will return all the papers to the Registry.

Most sources have particular advantages and disadvantages - for example counsel may reveal more contentious and sensational information, but there is no certainty that that information can be published with impunity, whereas a judge makes information available only if it is publishable. Attendance at court means a journalist hears almost everything in a trial, but court cases can be very long and very dry.

Freedom of Information legislation can also be used for access to a court's administrative information, but it is subject to perhaps some of the greatest disadvantages of all - significant costs, potential delays and uncertainty as to whether (after incurring the costs) the information will be withheld because exemptions apply. It is also the easiest to avoid as a

60 *Bunn v British Broadcasting Corporation and another* [1998] 3 All ER 552 at 557 per Lightman J.

61 See note 4 above.

source - the information is usually available from the other party to a dispute.

Recently, beginning in New South Wales and gradually spreading to other jurisdictions,[62] an attempt has been made to simplify access to court-held information for all non-parties. All requests for information may be made to a Court Information Officer, who either accesses the information or is unable to do so, and then relays the result to the seeker. Thus the Court Information Officer becomes a sort of 'one-stop shop', aware of all sources and restrictions.

The Registrar

Each court has a registry which keeps files of all proceedings in that court. The rules of access vary between jurisdictions. The documents held by the Registrar of the Supreme Court's Office include:

- Exchange of pleadings;
- Transcripts of proceedings;
- Documents introduced in evidence;[63]
- Judges' summings-up and decisions.

Access to documents held by the Registry of the Supreme Court is governed by Order 77 of the *Rules of the Supreme Court.*

The effect of this rule is that access may be had during office hours to any document (aside from those sealed by order of the judge or judges sitting) by any member of the public.[64]

Where the application concerns a case from which the public has been excluded, there is a requirement to make available as much of the judgment and orders arising from the case as possible, without disclosing the confidential information.[65] Suppressed information is filed in sealed envelopes with the case. Documents relating to matters heard in chambers are filed with the case, but taken out of the file before it is made available to the public.

Judgments of all courts are made available.

62 Victoria, Western Australia, South Australia and the Federal Court.

63 Documents not tendered in evidence are not kept on file.

For these purposes 'documents' include papers, computer records, audio and video cassettes, photographs, maps and some other exhibits in evidence.

64 This interpretation of the rule was successfully argued in an application made under Order 77 Rule 29, which allows for an ex parte summary application to a judge for access to documents, where such access has been refused by the registry.

65 *David Syme v General Motors - Holden* [1984] 2 NSWLR 47 at 50-3.

Similar but not identical provisions apply in the Federal Court.[66]

Under the *Evidence Act* 1910 (Tas) the records of the Court of Petty Sessions (including complaints and applications, evidence recorded on machines and the record of proceedings) are in the care and custody of the Clerk of Petty Sessions. Other officers of the court have similar powers and duties.[67]

The Clerk has a discretion whether to allow access under s 50A(2) of the *Evidence Act* and the *Justices Rules* rr 63(9) and (10).

In *Gerard v Hope and Others*[68] the status of the Court of Petty Sessions as a court of record was discussed. The concusions drawn were that:

- There is no right of inspection of Court files.
- An order made by the Court is a matter of record.
- A person with sufficient interest is entitled to inspect the order made.
- 'Interest' is determined by a combination of:
    - the status of the person seeking access; and
    - the nature of the material sought.

It has been held in *Ex parte Davies Brothers Ltd*[69] that:

- The media would be an interested party in each prosecution commenced by a public officer in the exercise of a statutory power.
- Interested parties may seek access to originating processes used in open court.

Attendance at Court

Journalists may obtain the same information as that recorded in the Registrar's Office by attending court.

Attending open court is the most common method of obtaining material for court reports or news items. The Australian Associated Press (AAP) provides information to many media entities throughout Australia and even overseas. Although the AAP reports most cases, the quality of the

66 Rule 6 of the *Federal Court Rules*.

67 *Evidence Act* 1910 (Tas) s 18(2).

68 [1965] Tas SR 15.

69 At 15, see note 3 above.

reports varies,[70] and some media entities restrict journalists to reporting on cases they have themselves attended.[71]

There are two main factors restricting attendance (other than the availability of human resources). The first is where matters are heard in chambers, or the public are excluded. The public has no right of access and the media are not privileged here. It may be particularly dangerous (as far as legal liability for contempt of court or defamation is concerned) to report on matters in chambers from other sources.

Exclusion of the public is not common, it has been held that the public can only be excluded if it can be shown that justice cannot otherwise be done.[72] This requires something greater than a desire to save parties or witnesses embarrassment or ridicule,[73] but does include trade secrets, cases where there is such a justified fear of tumult or disorder that justice cannot be done without excluding the public, and the affairs of wards of court and lunatics.[74]

Matters in chambers usually concern the administrative, procedural or non-contentious aspects of a case, and are not covered by the open justice principle. The law regarding reporting on these matters is unclear.[75]

By far the most wide-ranging exceptions to the open justice principle are provided in legislation. Situations include cases involving committal proceedings, children, adoption, coroner's inquests, sexual offences and public decency.[76]

The second (which happens rarely in Tasmania, but every so often does occur) is considerations of space. A journalist has no more entitlement to information than any member of the public.[77] A certain amount of space is given over to the press, but where a case is of such interest that journalists outnumber seats, the Court is not obliged to make special provision.[78] Attendance may be on a first-in-best-seated basis, or preference may be given to local journalists.[79]

70 Interview with Bruce Montgomery, Court Reporter for *The Australian* in Hobart, 10am, 23 October 1998.

71 Ibid.

72 *Scott v Scott* [1915] AC 417.

73 Ibid.

74 Armstrong M, Lindsey D, Watterson R, *Media Law in Australia*, 3rd ed., Oxford University Press, Melbourne, 1995, p 128.

75 Ibid., p 129. *Wallersteiner v Moir* [1974] 3 All ER 217 and*Re de Beaujeu* [1949] 1 All ER 439 are cited are cited as examples of conflicting approaches.

76 Ibid., p 129.

77 *Journal Printing Co v McVeity* (1915) 7 Ontario Weekly Notes 633 at 634.

78 Journalists have no right to special accommodation: *Re Dunn* [1932] St RQ 1.

Counsel/The Department of Public Prosecutions

Information (whether or not otherwise available) may be garnered from counsel for the parties to the case. This is largely dependent on:

- Whether counsel is of the opinion that it is in the interests of the client to reveal information (which certainly includes whether the giving out of information is likely to be censured by the judge);
- Whether the client consents to counsel giving out information.

There is, of course, a requirement to give a fair and balanced report. This has been expressed as an obligation to seek balance, rather than an obligation to be balanced, so that if one party refuses to give information, that does not prevent the journalist from reporting.

The DPP will give the details of charges in most circumstances, [80] although this information may also be available from the Police or from attending committal courts.

The Judge and His or Her Associate

The only documents made freely available by the Judge are copies of summings-up and judgments. This is done for two reasons:

- It is advantageous to have the law publicised;
- It is recognised that journalists have to meet deadlines, and may not receive the information in time from other sources.[81]

Summings-up and judgments are usually the only information sought. These are available from most judges, in the Supreme Court, the Magistrates Court and the Federal Court. Frequently these contain all the information necessary to make a balanced and accurate report.

Journalists may also seek access to other documents or exhibits tendered in evidence. This access may be allowed or refused by the judge. Provided that information sought in this manner and allowed is not distorted

Once the space provided is filled, there is no entitlement to more space: *Ex parte Tubman, Re Lucas* (1970) 72 SR (NSW) 555.

79 Interview with Bruce Montgomery, Court Reporter for *The Australian* in Hobart, 10am, 23 October 1998. During the trial of Martin Bryant, which attracted national and international attention, local journalists were allowed in the courtroom, 'excess' journalists watched the trial from another room which contained three television sets showing the courtroom.

80 Again information is not available in certain situations, for example charges of sexual assault.

81 A particular source of complaint is that findings handed down in the afternoon are frequently not typed up from the tapes and available until the following morning.

or presented in an unfair manner, no adverse legal consequences will flow from use of that information.

More 'informal' information may be available. According to some local journalists,[82] due to the relatively small number and slow turnover of people involved, journalists (and the quality of their work) are often well-known to the judge, and may, if approved, be told approximately when newsworthy evidence may be presented, or an interesting judgment may be handed down. This 'helpfulness' may not exist in larger jurisdictions where there are more judges, and many more journalists (who may change posts throughout the week and may be assigned elsewhere after 12 or 18 months) so that the same rapport is not established.[83]

Freedom of Information Legislation

The principle of open justice does not apply to information concerning the administrative matters of the courts. Therefore, these records are not necessarily available to the public, or to the media. The documents may, however, be accessible under Freedom of Information (FoI) legislation.[84] Applications may be made to the entity concerned (in this case the Court) and appeal may be made to the Ombudsman.

One of the striking features of all FoI acts is that an applicant does not need to show any specific interest in the information contained in the document requested. This means that the media are not excluded from applying under FoI legislation.

There are two reasons why FoI is not used by the media in gathering information. These are, firstly, that the information is most often also available from another source, which means fewer delays and less cost; and secondly, administrative information will only in exceptional circumstances be newsworthy.

82 Interview with Bruce Montgomery, Court Reporter for *The Australian* in Hobart, 10am, 23 October 1998; Interview with Mike Swinson, Court Reporter for the ABC in Hobart, 9am, 21 October 1998. This source of information was denied by the reporter for the *Mercury* (telephone conversation with the Court Reporter for the *Mercury*, 4.30pm, 25 October 1998).

83 Interview with Bruce Montgomery, Court Reporter for *The Australian* in Hobart, 10am, 23 October 1998.

84 There are acts for each State and one for the Commonwealth:
Freedom of Information Act 1982 (Cth); *Freedom of Information Act* 1991 (Tas); *Freedom of Information Act* 1989 (NSW); *Freedom of Information Act* 1989 (ACT); *Freedom of Information Act* 1991 (SA); *Freedom of Information Act* 1992 (WA); *Freedom of Information Act* 1992 (Qld).

Court Information Officers

There is some question of how much reporters should be able to rely on the courts for the provision of information, and whether the courts are only one of the sources a journalist can rely upon. Given the importance of the open justice principle for the proper administration of justice, the role of the media in informing the public about the law and specific issues, and the fact that misuse of information is penalised, some amount of supply and guidance would seem essential.

The importance of giving the public easy access to information held by and concering the courts has been recognised, firstly in New South Wales and gradually in other jurisdictions, by the appointment of a Court Information Officer.[85] The CIO ensures that the media has access to information about trials, and also ensures that trials are reported correctly - making the media aware of any, and of restrictions on information to which access may have been granted but which cannot be published as it may jeopardise fair trial. Reporters and members of the public may always go directly to those sources of information, or may make enquiries throught the CIO, who has contacts there.

Methods of Restricting Access and Use

Court Enforcement

Suppression Orders:

The Court has the power to prohibit the reporting of proceedings or a part of the proceedings. This is less of an infringement of the open justice principle than closing the court would be, but the result for the media is the same. The application is made by counsel of the party wanting to suppress the information. Although consent of all parties to the application for a suppression order may be relevant, it is not decisive.[86]

There may be an inherent ability to order suppression, coexistent with statutory provisions[87] but the extent is questionable, and probably does not exist without a compelling reason for secrecy.[88] If the secrecy is important for the proper administration of justice then the order is more likely to be granted. Examples include the suppression of names in cases

85 The title varies from jurisdition to jurisdiction. The Federal Court has a 'Director of Public Information', the Victorian Supreme Court has a 'Media Liason Officer' who also serves all the Victorian State courts.

86 *ABC v Parish* (1979-80) 29 ALR 228 at 254.

87 *Family Law Act* 1975 (Cth) s 121; *Evidence Act* 1910 (Tas) Part IV, ss 102A-104.

88 *Raybos v Jones* [1985] 2 NSWLR 47; *Rockett v Smith* [1992] 1 Qd R 660.

involving blackmail, sexual offences, extortion, national security, informants (and other witnesses in danger of retaliation[89]), and children.[90] However a lot more than just names may be suppressed, whether at trial or in reporting proceedings.

Suppression orders generally bind the media only where they expressly do so,[91] although if it is clear that suppression is occurring within the courtroom, the document may not be published outside.[92]

It is recognised that the media play an important role in reporting cases. In *John Fairfax & Sons v Police Tribunal of NSW*[93] it was held that the media had the right to challenge suppression orders in court even though they are not parties to the action. This does not extend to challenging the suppression of information within a trial.[94] Some journalists assert that there is currently a trend towards increasing the number of suppression order made concealing the names of one of the parties.[95] There is some concern that this suppression will prevent other enquiries being made:

> 'It follows that the media should not be independently researching the man's story, for the media is not even meant to know his name.'[96]

Contempt of Court:

A court has the power to punish where the dissemination of information interferes with the proper administration of justice. There is no difference in the manner in which television, radio and newspaper contempts are to be treated, as 'the immediate impact [of a television broadcast] balances out its impermanence.'[97]

89 *Cain v Glass (No 2)* (1985) 3 NSWLR 230.

90 Armstrong M, Lindsey D, Watterson R, *Media Law in Australia*, 3rd ed., Oxford University Press, Melbourne, 1995, p 130.

91 *A-G v Leveller Magazine* [1979] AC 440.

92 Ibid.; *R v Socialist Workers* [1975] QB 637. This may include information given on the *voire dire* until the jury has given verdict.

93 (1986) 5 NSWLR 230.

94 *John Fairfax Group v Local Court of NSW* (1992) 26 NSWLR 131.

95 'Suppression is not in the Public Interest', Editorial, *The Weekend Australian*, 21-2 November 1998, p 18. The suppression order concerns the name of a Somalian refugee, 'SE', denied asylum in Australia. Members of his family have died as a result of clan warfare, so that his identity as a member of that clan might endanger him if published (although probably only in Somalia). However, the reasoning of the High Court 'is not clear'. His name has been published internationally by Amnesty International, he is well-known in Somalia. 'In this case suppression seems to serve no purpose here.'

96 Ibid.

97 *R v The ABC; R v Davies Bros Ltd and Others; R v Northern Television (TNT9) Pty Ltd and Others; R v Tasmanian Television Ltd and Others* [1983] Tas SR 161.

There are three main kinds of publication which may constitute contempt of court.

Criticising and Scandalising the Courts

The aim of this restriction is to maintain respect for the justice system. It involves a balance between granting protection and the desirability of upholding freedom of speech and public scrutiny.

This will not usually be a consideration when looking at access to court documents. Rather, there may be contempt where the court is subjected to abuse, imputations of corruption, lack of integrity, impropriety or partiality or allegations of submission to outside pressure.[98]

Critical scrutiny of the courts is allowed and approved[99] and prosecutions for this kind of contempt grow ever less frequent.

Sub Judice Contempt

This form of contempt focuses particularly on the mind of the jury, if the potential jury members are exposed to evidence which is not admissible at trial they may wrongly take that inadmissible information into account when reaching a verdict. A report is allowed if it is a 'fair and accurate' report of what takes place in an open court, published in good faith and without malice.[100] 'Fair and accurate' means free from bias,[101] so context is important, and summaries which convey the gist of the proceedings are acceptable.

There may also be contempt where proceedings are pending.[102] There are strict rules of what may be reported at each stage, before, during and after trial. These restrictions only apply to the jurisdiction from which jurors will be selected.[103]

98 *Gallagher v Durack* (1983) 152 CLR 238; (1983) 45 ALR 55.

99 *Ambard v Attourney-General for Trinidad and Tobago* [1936] AC 322.

100 *Ex parte Terrill; Re Consolidated Press* (1937) 37 SR (NSW) 255 at 257-58.

101 Ibid., at 259. It must not be partial, represent a fact in issue as an agreed fact, say something happened which did not or give only one side of the story.

102 Not when 'imminent': *James v Robinson* (1963) 109 CLR 593. The period for contempt had not started even though police were conducting a manhunt.

103 For instance, during the Bryant trial the mainland received full coverage of the story and all attendant details, whether admissible in evidence or highly prejudicial. Tasmanian audiences received different editions of newspapers, and different television broadcasts. It is not always the case that the jurisdiction can be alienated so easily. Broadcasts in areas of South Australia and New South Wales overlap large areas of Victoria, so that care must be taken with South Australian and New South Wales broadcasts when discussing Victorian cases. Interview with Mike Swinson, Court Reporter for the ABC in Hobart, 9am, 21 October 1998.

Contempt may also be found where there are restrictions on the pubication of the names of certain types of victims. There is a stigma attatched to being a victim of certain types of crimes by their very nature. These crimes include blackmail and sexual offences. Justice cannot be done if crimes are not reported, and if the inevitable sequel of reporting is exposure of the victim to public disapproval then the victim will not report the crime. Therefore the names of victims cannot be published. This applies to information sought from all sources, and the DPP and the Police are also careful not to give out the names of victims of sexual offences.

Journalists are generally satisfied with the access they are given to these documents, each is decided on a case-by-case basis, although the temperament of the judge, as well as the reputation of the journalist, may be factors.[104]

This applies also to prevent prejudicial previous convictions or accounts of committal proceedings from being dredged up immediately before trial.[105] A report is not protected if it is not contemporaneous.[106]

Disclosure of Jury-Room Deliberations

In Tasmania, jury members are bound by oath not to disclose jury room deliberations.[107] There are no records made of discussions and no reasons for the decision are given. The laws vary from state to state, some also prohibit the publication of information likely to identify the juror.[108] Generally the media respect this restriction. There are exceptions. Jurors were interviewed after the Chamberlain case,[109] and there has been at least one other incident recently.[110]

There is also the question of what to do about coverage of cases on the Internet. Although usage is not really very high, and therefore the likelihood of prejudicial effect is low, it is a possibility, and increasing. The question is whether or not there is the potential to affect a pool of potential jurors. *A-G (NSW) v Fairfax and Bacon* (1985) 6 NSWLR 695.

104 Interview with Mike Swinson, Court Reporter for the ABC in Hobart, 9am, 21 October 1998.

Interview with Bruce Montgomery, Court Reporter for *The Australian* in Hobart, 10am, 23 October 1998.

105 *Minister for Justice v West Australian Newspapers Ltd* [1970] WAR 202.

106 *R v Scott* [1972] VR 663.

107 *Criminal Code* (Tas) s 365; Appendix D, Form 1.

108 *Juries Act* 1967 (Vic) ss 69, 69A; *Juries Act* 1977 (NSW) ss 68, 68B; *Juries Act* 1957 (WA) s 57(1).

109 Campbell E, 'Jury Secrecy and Contempt of Court' (1985) 11 *Monash Law Review* 169 at 171.

110 A host of talkback radio telephoned a juror to discuss the verdict while on the air. 'DPP Tunes in to Law's Juror Call' *The Australian*, 21 August 1998, p 1.

Other Methods

Defamation:

The law of defamation is extensive and complex. Fair and accurate reports, published in good faith and without malice, are protected.[111]

It is worth noting that no protection automatically attaches to writs, statements of claim or defence, answers to interrogatories, or other documents not actually used during proceedings.[112] For the same reason it may not be 'safe' to use versions of documents procured from counsel.

Protected Information:

There are many forms of protection given to specific kinds of information. It is not intended to discuss them at length. It must be bourne in mind when reporting cases that occasionally evidence will reveal information which is subject to some form of legal protection. This may include cases dealing with breach of copyright,[113] trade secrets, or breach of fiduciary relations.

Conclusions

As Schultz says:

> 'Over the past three decades Australian journalism has changed profoundly. Still far from perfect, it is now more inquisitive, more investigative, bolder, more intrusive, demanding and sceptical than once it was. It has won greater political and operational autonomy. But this has come at the cost of public cynicism, as *insufficient attention has been paid to ethical standards and public accountability*.'[114] (emphasis added)
>
> 'Australian journalists are happy to invoke the public interest, but remain somewhat disdainful of their audiences and therefore ill-equipped to fulfil the public role to which many aspire.'[115]

111 *Ex parte Terrill; Re Consolidated Press* (1937) 37 SR 255 at 257-8.

112 *Home Office v Harman* [1982] 1 All ER 532.

113 *Copyright Act* 1968 (Cth) s 42(1) provides that 'a fair dealing with a literary, dramatic, musical or artistic work ... does not constitute an infringement of copyright in the work if:

a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or

b) it is for the purpose of, or is associated with, the reporting of news by means of broadcasting or in a cinematograph film.'

114 *Reviving the Fourth Estate*, p 9, see note 1 above.

115 Ibid., p 8.

Because always imperfect, some restraints are necessary. These have been imposed by the common law and legislation and are applied by the courts, relying on journalists to be aware of and avoid the imposition of sanctions by avoiding misuse of information.

Against the background of open justice, given the growing recognition of freedom of speech and the fading of many of society's taboos access to and publication of more information is allowed. However no one of 'the arms of government' can be permitted to undermine the effectiveness of any other, when that other is carrying out its proper function in the correct manner.

The media has the potential to undermine the administration of justice by infringing personal rights, prejudicing trials and injuring the reputation of the justice system *unnecessarily*.

The courts exceed their function and endanger public benefit if access to information is restricted unnecessarily. Because the potential to do harm changes at each stage of the legal process it is appropriate that the restrictions imposed change as well. It is also appropriate that the law can be flexibly applied in each case as circumstances demand.

The development of the position of Court Information Officer is an encouraging sign that the courts have accepted the importance of the media's role in informing the public, and of informing the media of information which may not be published.

In general, the media abides by the restrictions imposed and plays its role as Fourth Estate well, at least as regards news concerning the courts. It appears that this is an area of law where gentle fine-tuning is more appropriate than sweeping change. The system can always be improved.