

27 May 2014

Media Review Panel
c/- Ministry of Justice
National Office
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By email: mediareview@justice.govt.nz

In-Court Media Coverage consultation paper

Thank you for the opportunity to comment on the Media in Courts Review Panel's *In-Court Media Coverage* consultation paper. This submission has been prepared with the assistance of the New Zealand Law Society's Criminal Law Committee.

Law Society's position on in-court media coverage

The Law Society recognises that the media has a significant role to play in covering court proceedings and that it is now unrealistic to suggest that cameras be kept out of the court room.¹

But the Law Society opposes any relaxation of the current rules, for the reasons set out below.

Media coverage often does not present an accurate picture, especially in criminal trials, because it tends to focus on the sensational aspects of proceedings, rather than presenting the proceedings in an educative or informative way. Presenting proceedings in a sensationalist or tabloid manner trivialises proceedings, which poses a risk to public confidence in the justice system. The complexity of the issues canvassed in many hearings poses a further challenge to accurate reporting.

It is of concern that 7% of judges considered that current media practices have given rise to fair trial issues² and that 30% of judges perceived that witnesses were affected by television coverage.³

The New Zealand courts have insisted that the right to a fair trial must prevail over the principles of free speech in this context.⁴

The risks to fair trial rights arise from:

- How the defendant is portrayed, and in particular the extent to which the media reporting conveys an impression or opinion of the defendant's innocence or guilt.

This raises fair trial issues because of the risk that juries may see television coverage and

¹ See consultation paper at [89].

² Consultation paper at [50].

³ Consultation paper at [45].

⁴ See discussion at [13.10.5]-[13.10.8] of Butler & Butler *The New Zealand Bill of Rights Act: A Commentary*, LexisNexis, Wellington, 2006. See also *Hansen v R* [2007] 3 NZLR 1 (SC) at [264].

commentary of the trial they are determining, or that they may be influenced by other people who have formed a view of the trial based on media reporting. The interplay between media coverage and the relaxation of the rules about sequestration of jurors during the trial and deliberations is significant in this context. This has increased the risk that jurors may be influenced by the perception of the case formed by family members or others with whom they may come into contact.

- The effect on the parties including witnesses, lawyers, judges and jury.
The presence of television cameras and/or large numbers of media representatives in court can be distracting and obtrusive. It can affect the performance and sometimes the judgement of those unused to it and therefore the integrity of the process.

The effect of media coverage, and in particular cameras, on witnesses raises fair trial issues because:

- if witnesses are more diffident than they would otherwise be, judges and juries may be more ready to question their credibility and the reliability of their evidence; and
- potential witnesses may be discouraged from attending court or feel pressure to tailor their evidence out of fear of negative reactions to their testimony as portrayed in the media.

These issues are particularly relevant to the question whether there should be a reduction of protection for witnesses.

Reduction of protection for witnesses and defendants

The consultation paper raises the question whether the current restrictions on television coverage of witnesses in criminal trials should be relaxed. The proposal at [81] of the consultation paper is that the court only prohibits the filming of a witness if satisfied of various criteria such as demonstration of real hardship to the witness or third parties.

The Law Society opposes any change that reduces the protections available to witnesses.

It is important that every measure be taken to facilitate witnesses attending and testifying with as little stress as circumstances allow. Although people in the public gallery can see witnesses and the defendants, this is not the same as television footage with its close-ups, editing and focus on the witness or defendant to the exclusion of others present in the courtroom and the general court room context. The process of testifying is daunting and being filmed makes most people nervous, adding to the pressure that is already on witnesses and raising the fair trial issues identified above.

The proposal at [81] of the consultation paper also raises practical issues in relation to witnesses other than the defendant. It is not clear how the requirement that a witness demonstrate real hardship would operate in practice. Witnesses do not have legal representation. This raises the question who would be responsible for placing the witness's position before the court and whether, in addition to managing their attendance, defence counsel and the Police would be responsible for obtaining protection for witnesses, including placing evidence before the court relating to the hardship they are likely to suffer from being filmed.

Where they conflict, the interest in the integrity of witness testimony must prevail over public interest in knowing what a particular person looks like.

Mechanisms to achieve balance and fairness in reporting

The Law Society does not support a return to the two minute rule and requirement that both sides be given equal time.⁵ It is hard to see how this approach is workable in practice because, for example, there will be whole days when one party does not present anything. In any event it does not provide any real guarantee of balance or fairness.

It would be difficult to justify the intrusion on freedom of expression represented by the controls suggested at [86] of the consultation paper (the courts organising the filming and making the footage available with rules and potentially customised directions for each case, setting out what the media can and cannot publish), after media coverage without such controls has been allowed for so many years. Those controls would need to be considered necessary to ensure a fair trial.

The proposal that there be a re-emphasis of a requirement for balance and a monitoring regime to ensure that this happens⁶ does warrant further consideration. However it seems likely that there would be practical issues, including resources and expertise, with a monitoring regime (as there certainly would be with formal court control of audio-visual coverage).

It will often be difficult for reporters without legal training to understand and report accurately on the issues that are being canvassed before the court where, for example, the issues are complex or relate to documentary material which the reporters do not have before them. Similar difficulties arise for any monitoring regime: determining whether media reporting of court proceedings is fair or balanced is not necessarily a straightforward task. It is often only the participants and the judge who understand the case sufficiently to be able to determine whether reporting is fair or not.

Setting up a new monitoring regime may duplicate existing protections such as those in place under the Broadcasting Act 1989. It is currently open to the parties or other concerned observers to make complaints to the Broadcasting Standards Authority (or Press Council). The Free-to-Air Television Code contains standards requiring broadcasters to make reasonable efforts, or give reasonable opportunities, to present significant points of view, and to ensure reporting is accurate and that people or organisations are dealt with fairly. It would be useful for the Guidelines to refer to the fact that the media needs to be aware of other legal rules that apply to them, including the Broadcasting Act and the law of contempt.

If resources allowed, a body of judges and a media representative as described at [85] could be set up to identify issues with the coverage of hearings, which could be referred to the Broadcasting Standards Authority or Press Council. It may be more realistic for the Media and Courts Committee to be tasked with referring issues which are brought to its attention (likely to be the more egregious cases) to these complaints bodies.

Finally, it is important that there be clarity as to which entities qualify as “media” for the purposes of the Guidelines, to ensure that new and emerging forms of media (for example “citizen journalists” who may be bloggers or publish news through social media) understand that they do not qualify for the privileges accorded to mainstream media (such as access to criminal cases when the public is excluded). This is appropriate given that they are not subject to the accountability mechanisms of the Broadcasting Act 1989 and the Press Council.

⁵ Discussed at [82]-[84] of the consultation paper.

⁶ Consultation paper at [84].

Streamlining and improving existing processes

The consultation paper raises the question whether existing processes could be streamlined.⁷ The existing procedure for applying for in-court media coverage set out in the Media Guide for Reporting the Courts and Tribunals⁸ is comprehensive and makes it clear that matters relating to in-court media coverage are at the discretion of the court. The principles set at [2.2] should be central in the exercise of this discretion.

It is not clear that there is any need to reduce the timeframe from 10 working days as suggested at [90] of the consultation paper given that the Guidelines contemplate that applications made less than 10 working day before the trials will still be considered.⁹ If this timeframe is to be reduced, the three working day time frame for other parties to respond (Guidelines at [7]) should be preserved.

Filming of young people

The international conventions to which New Zealand is a signatory require that it ensure the privacy of young defendants be fully respected at all stages of proceedings and that they be protected from the risk of unbalanced and inaccurate media coverage. The Law Society therefore endorses the consultation paper's proposal that all filming of defendants under 18 be prohibited.¹⁰

There should be similar restrictions on filming witnesses under the age of 18.

It may also be desirable to go further and prevent the playing of audio recordings of the testimony of young people on radio or other media.

Other issues that arise in this context

An issue which the Law Society considers could usefully be considered in this context is the question of media coverage prior to the first court appearance. Where the media publicises the arrest, details of the suspect, including previous convictions, and information about the alleged crime before the suspect's first appearance, it is effectively able to pre-empt and thwart any restrictions that may be put in place by the court and prejudice a fair trial. This issue, and other cases where a fair trial is put at risk by publication, can also be addressed by publication contempt, which the Law Commission is currently reviewing.¹¹

The Law Society hopes this feedback is of assistance. If you wish to discuss the feedback please contact the Criminal Law Committee convenor, Jonathan Krebs, through the committee secretary, Rhyn Visser (phone (04) 463 2962 or email rhyn.visser@lawsociety.org.nz).

Yours sincerely



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President

⁷ Consultation Paper at [91].

⁸ Edition 3.1, July 2013: see Appendix C (In-court Media Coverage Guidelines 2012).

⁹ Guidelines at [6.3]; Schedule 1 Application for In-court Media Coverage at [7].

¹⁰ Consultation Paper at [95]-[96].

¹¹ *Contempt in Modern New Zealand*, May 2014, NZLC IP36.