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## Introduction

### **A An overview of the history of the debate**

Whether media organisations should be permitted to photograph or otherwise record vision and/or sound of court proceedings has been debated for as long as such technology has existed.

Thus the debate in Britain dates back to the introduction of press photography, while in the United States the issue first gained prominence through the filming of trials for cinema newsreels.

Several factors account for the disquiet caused by the media's incorporation of visual images in courtroom reporting, which led such visual coverage to be prohibited in Britain and virtually banned in the United States. Early courtroom photography was undoubtedly disruptive and distracting to participants, not only because it involved the use of cumbersome and obtrusive technology, but also because it was novel. Courts and other authorities also deemed visual coverage undesirable because it facilitated unprecedented levels of public access, further fueling interest in and debate of judicial proceedings.

Disquiet at the potential impact of such intrusive publicity on courtroom participants and on public respect for legal institutions has continued to dominate the debate long after technological advances eliminated the bases of concerns relating to physical distraction and disruption. The belief that respect and confidence in the judiciary is promoted and protected through the maintenance of judicial mystique and detachment has also served to provide a rationale for a denial of electronic media access to proceedings, even where the interests of parties and participants cannot be adversely affected.

Judicial resistance to audio-visual reporting may also be explained in terms of judges' traditional distrust and ambivalence towards media reporting, a factor predating audio-visual technology. It is only in recent years that courts in common law jurisdictions have begun to view media publicity not as a necessary evil but as a desirable aid to ensuring that

justice is done and is seen to be done, and to maintaining public confidence in the law and judicial system.

The pervasive culture of rights in the United States, largely attributable to the freedoms of speech and of the press enshrined in the Bill of Rights, ensured that the unqualified prohibition on audio-visual reporting of court proceedings first imposed in the 1930s was lifted as soon as it could no longer be justified on the basis of disruptive and distracting technology. While all American states now permit some proceedings to be broadcast, in practice many judges choose to exercise their discretionary power to deny such coverage. Federal judges and in particular the Justices of the Supreme Court of the United States remain opposed to the televising of court proceedings. Though largely unheralded and overshadowed by negative publicity surrounding the televising of high profile cases, the most positive and informative American experiences have been those of state courts which in increasing numbers actively and routinely promote and facilitate public access via media broadcasting or even their own webcasting.

The enactment of similar rights in Canada via the Charter of Rights and Freedoms and in New Zealand via the Bill of Rights Act 1990 has also led to a recognition that prohibitions on audio-visual reporting are, as a matter of legal principle, no longer able to be maintained.

Due in large measure to the commitment of key judicial figures, in the late 1990s New Zealand successfully experimented with and adopted closely regulated audio-visual reporting of its proceedings. In Canada, where the relaxation of common law bans on cameras in courts had been largely championed by the media, the courts have been more reluctant to permit camera access. However, with judicial opposition waning, Canadian jurisdictions are beginning incrementally to permit audio-visual coverage.

American and Canadian experiences reveal that where camera access is perceived in terms of media rights, it may be accepted in principle, yet in practice may continue to be resisted by the courts.

The British government has recognised that its enactment of the Human Rights Act 1998, which implements the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms into British domestic law, called for the promotion of a culture of rights, requiring a re-examination of the role of the judiciary and public access to courts. While in the early 1990s Scottish courts recognised that the new legal culture was incompatible with the maintenance of a prohibition on cameras in courts, a revision of the

statutory prohibition on cameras in English and Welsh courtrooms is currently under way.

Australia's position is distinguishable in that Australian law has not moved towards entrenching or even enacting a statute protecting or guaranteeing fundamental rights. However, the Australian judiciary continues to move towards embracing a more proactive role in facilitating public access and understanding of court proceedings. This has led courts to take significant steps designed to assist and promote accurate reporting of court proceedings. Even in the absence of pressure from the media, some Australian courts have instigated and encouraged restricted audio-visual coverage as a means of addressing public criticism of judicial activism and of promoting greater understanding of the role of courts.

## **B Current issues of the debate**

The key issues of the current debate are identified and addressed throughout this book.

A number of key issues relate to the impact of developments in communication and information technology. Technological advances have ensured that audio-visual recording of court proceedings need not distract nor disrupt proceedings. The utilisation of recording technology by courts has also made it increasingly possible for audio-visual recordings of proceedings to be undertaken utilising courts' installed recording equipment. While the mere knowledge of being recorded may still have an effect on participants, it could be said that the pervasiveness and extensive public use of audio-visual communication and information technology makes audio-visual coverage less daunting for courtroom participants and more acceptable to the public.

While technology provides the means for enhancing the openness of judicial proceedings, it also provides public access to information relating to court proceedings, the unavailability of which appears to be assumed in traditional principles regulating courtroom reporting through the balancing of principles of open justice and fair trial. This has served to temper the extent to which courts relying on preventative measures to counter the effects of prejudicial publicity embrace technology to promote open justice.

Another set of key issues flows from the perceived inconclusiveness of evidence regarding the effect of televising. In seeking to balance the interests of open justice and rights to access and publish information

about court proceedings on the one hand with the right to a fair trial on the other, the inconclusiveness of evidence as to the effect of broadcasting on participants has led many judges to deny camera access. This factor has caused the central question of the debate to be whether inconclusive evidence as to the effects of televising justifies prevailing statutory and other prohibitions and restrictions and common law presumption against such coverage. The perceived inconclusiveness of evidence continues to play a key role in the enforcement of the legal rights of those seeking to record and broadcast or gain access to audio-visual recordings of court proceedings and in the judiciary's exercise of discretionary powers to authorise audio-visual coverage.

A number of further key issues concern the impact of the recognition of legally enforceable rights of those seeking to record, broadcast or access audio-visual recordings of court proceedings. The experiences of Canada and Britain illustrate some aspects of the impact of the recognition of rights on the debate and in particular on the impasse created by the perceived inconclusiveness of evidence and on judicial reluctance to address the issue. Thus in Canada, the question whether rules placing the onus of establishing the absence of detrimental effect on those seeking to record and broadcast proceedings or making audio-visual coverage subject to the consent of parties are justified under section 1 of the Charter of Rights and Freedoms remains hotly contested and yet to be ruled on by the Supreme Court of Canada. However, even in the absence of such a ruling, the embracement of a rights culture and the acceptance of the benefits of courtroom publicity make routine broadcast of at least appeal proceedings inevitable.

In the United Kingdom, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is forcing the courts and government to address the issues of whether court televising should be permitted and what restrictions are compatible with the provisions of the Convention, in spite of continuing concerns regarding the inconclusiveness of evidence as to the effects of recording and broadcasting. In Scotland the issue appears to be whether the potentially detrimental effects of televising justify the blanket prohibition on the televising of current trials. In England and Wales, the government's promotion of a rights culture, judicial reforms and focus on enhancing public participation, debate, access and understanding of law has led the government and senior judges to conduct an experiment with the recording of appeal proceedings. If the experiment is deemed a success it is highly likely to lead to the amendment of the statutory

prohibition on audio-visual coverage and thus to permit at least the televising of appeal proceedings. Irrespective of this development, it remains doubtful whether the retention of a blanket statutory ban on the televising of first instance hearings could withstand a direct challenge of its compatibility with the Convention.

A key issue also addressed throughout this book relates to the decisive role played by the attitude of judges. Thus the view held by some judges in all the jurisdictions considered in this book – that the requirements of open justice are satisfied in the absence of televised proceeding – is shown to pose an ongoing obstacle to the introduction of audio-visual coverage. The American experience also reveals that a lack of judicial support can in practice severely restrict the implications of legal rights to record, broadcast and access audio-visual recordings of proceedings. Thus, with few exceptions American courts continue to reject media argument seeking the recognition of a presumptive constitutional right to televise proceedings. Even if federal legislation were to override the objections of the Federal Judicial Council and grant federal judges the discretion to permit the televising of their proceedings, it would be unlikely to lead to a significant increase in the number of cases broadcast as public antagonism towards trial by media is currently causing courts in high-profile cases to restrict media coverage in order to safeguard the right to a fair trial and avoid the perception of trial by media.

New Zealand's experiences as outlined in this book reveal the decisive role played by influential members of the judiciary in the admission of audio-visual coverage, and illustrate that judicial willingness to accommodate and cooperate with the electronic media is required for such coverage to become accepted. Thus, although New Zealand courts have permitted proceedings to be routinely televised since 2000, and have recognised a presumption in favour of such coverage, the severity of restrictions imposed on such coverage had caused court televising to remain contentious. However, recent relaxation of the regulations and the acceptance by New Zealand's new Supreme Court of audio-visual coverage of its proceedings as a norm appear to have finally made extended coverage acceptable to all stakeholders and to the public.

This book also identifies and addresses issues flowing from the factors which distinguish Australia's experiences of court televising from those of the other common law countries – the lack of relevant legally enforceable rights, and the Australian judiciary's dominant role in the introduction of court televising. With Australian courts rather than the media instigating the occasional broadcasting of proceedings,

audio-visual coverage remains ad hoc and largely confined to documentaries, judgment summaries, sentencing remarks and occasionally some legal argument. In the absence of enforceable rights, on the basis of which a legal challenge to Australia's de facto prohibition of televising could be mounted, further innovations remain in the hands of the judiciary. In view of a lack of media interest and continuing judicial reservations regarding media access, it is likely that regular televising of proceedings will only occur through arrangements with public or dedicated broadcasters or through webcasting by the courts, which is currently under consideration by some Australian courts.

### C The key arguments

The cameras in courts debate has been dominated by arguments over the effects of the recording and broadcasting of court proceedings. Yet, studies, experiments and experiences in the United Kingdom, the United States, Canada, Australia and New Zealand have revealed such effects to be incapable of being established conclusively.

What they have revealed is that appropriate regulations and controls are capable of minimising if not eradicating potentially detrimental effects, and that personal experience of televised court proceedings tends to make participants more favourably disposed to such coverage. However, factors such as judicial and public distrust of the electronic media's motives for seeking access to record and broadcast court proceedings and the absence of evidence substantiating the touted potential benefits have served to stalemate the debate.

It is submitted in this book that the effects of audio-visual coverage are intrinsically incapable of being conclusively established and thus ought not to be the focus or determining factor of the debate.

Accepting the inescapable fact that effects can only be measured in terms of perceptions has implications not only for how the effect of audio-visual coverage is assessed but also for whether and the manner in which such coverage is introduced, by whom it is introduced, and the basis on which it is regulated and controlled.

The continuing insistence on a substantiated absence of effects as a prerequisite to audio-visual recording and broadcast of court proceedings, it is argued in this book, is also incompatible with the principles of open justice, which recognise inherent costs and dangers of the public administration of justice, and with the contemporary reality in which television is the dominant source of public information regarding court proceedings.

In this book it is proposed that while the minimisation of and acceptance of unavoidable risk is contingent on numerous factors, whether proceedings are subject to audio-visual coverage and whether the benefits of audio-visual coverage are attained is ultimately determined by three factors: the recognition of a legally enforceable right to record and broadcast and/or access audio-visual footage of court proceedings; the availability of technology capable of ensuring that such coverage is compatible with judicial proceedings; and above all, judicial attitudes which deem such coverage to be in the interests of the administration of justice and do not see it merely as a media right.

The analysis of the experiences in the common law jurisdictions considered in this book reveals that a willingness by courts to facilitate open justice, the presence of or a promotion of a culture of rights and the availability of suitable technology have been determinative in the successful introduction of audio-visual coverage.

On this basis, it is submitted that whether audio-visual coverage of court proceedings is permitted and how it is regulated ought to be determined not as a media right acceded to on the basis of conclusive evidence that it will not affect judicial proceedings, but rather as a medium of public information capable of enhancing public access and understanding of judicial proceedings.

## D Structure

Chapters 2 to 6 undertake an examination and analysis of the experiences of British, American, Canadian, Australian and New Zealand courts with audio-visual reporting of court proceedings. In the light of the history of each country's experiences the chapters evaluate the two key arguments regarding the determinative factors and the inconclusiveness of evidence as to effects.

The choice of the United Kingdom, United States, Canada, Australia and New Zealand as the countries whose experiences with audio-visual coverage would be the focus of my comparative study is attributable to a number of factors. To ensure that meaningful inferences could be drawn, the chosen jurisdictions needed to share key legal and political traditions. Thus, all five jurisdictions share a British common law tradition, an independent judiciary in which judges perform a comparable role in adversary proceedings and appeal hearings, and have a commitment to democratic rights and a transparent publicly accountable judicial system. Chosen countries also had to have sufficient experience with audio-visual



coverage for meaningful comparison. In this respect, the inclusion of the United Kingdom, Canada and New Zealand was partly motivated by a desire to reveal their significant experiences which are relatively unknown outside and in some cases even within their borders. While the United States was included because of the wealth of its studies and experiments, its jurisprudence in this area, and because it continues to be popularly equated with courtroom television, the book has confined its attention to those aspects of the American experiences which influence or carry inferences for the other countries considered.

The characteristics which distinguish these five common law countries were found to be equally relevant to the focus of this book, in that the identification of differences has served to highlight the implications of the adoption of differing policies and approaches to what this book presents as the key variables or determinative factors in the success and acceptability of audio-visual reporting of court proceedings. Thus, the significance of the presence of a culture of rights was able to be considered through an analysis of the influence of the American Bill of Rights, Canada's Charter of Rights and Freedoms, New Zealand's Bill of Rights Act 1990 and the United Kingdom's Human Rights Act 1998, and able to be contrasted with the absence of any relevant entrenched rights in Australia. A consideration of the different ways in which technology has affected the nature and debate of court reporting in these comparably affluent Western societies, and the divergent manner in which the judges have responded to the prospect of audio-visual coverage of courts, has facilitated comparisons conducive to the drawing of translatable inferences and substantiated conclusions.

Chapter 7 undertakes a comparative review and analysis of the findings of studies, experiments and experiences of the jurisdictions dealt with in Chapters 2 to 6. It emphasises that such findings reveal the detrimental and beneficial effects of electronic media coverage to be incapable of being established conclusively to everyone's satisfaction. It is argued in Chapter 7 that although some deem the findings to be inconclusive, those evaluating audio-visual coverage have consistently found feared detrimental effects to be either unfounded or capable of being acceptably minimised through appropriate regulation and control. Chapter 7's discussion also notes that though such findings have tended to reassure other jurisdictions considering electronic media coverage, they are shown not to be determinative of whether such coverage is permitted. Pilot projects and experiments are shown to have been undertaken only after jurisdictions have become persuaded



of the desirability for such coverage. The function of such experiments is consequently held to be largely to reassure those unconvinced of the desirability of such coverage, to acclimatise courtroom participants and the public, and to determine the most appropriate and effective methods of regulation.

The comparative analysis is shown to confirm that the key determining factors are the presence of a legal rights culture, which ultimately promotes an acceptance of audio-visual coverage; changes in courts' perceptions of their role (sometimes imposed on courts) which lead them to alter their relationship with the media and proactively promote public access to and understanding of judicial proceedings in order to bolster public confidence in the judiciary; and technological developments, which have eliminated some of the perceived dangers, concerns and adverse effects of televising.

In conclusion, Chapter 7 posits a new context in which audio-visual coverage of court proceedings should be considered and regulated. It proposes that in the light of earlier discussion and analysis audio-visual decisions as to whether the recording and broadcast of court proceedings ought to be permitted and how it should be regulated should be determined not in terms of the right of the electronic media's access to court proceedings, but rather as the utilisation of courtroom technology to enhance public access and understanding of proceedings and court rulings by the wider public.

## **E Scope and terminology**

While the main focus of this book is on television camera recording and broadcast of courtroom proceedings, the book also incorporates the consideration of related media issues such as still photography by the press, audio recordings by radio broadcasters, and courts' webcasting of their own audio and or visual recordings of proceedings.

Terms such as 'courtroom televising', 'broadcasting of proceedings', 'audio-visual coverage', 'extended media coverage', 'in-court televising' and 'electronic media coverage' are used interchangeably throughout. However, whenever relevant, factors distinguishing various forms of media, nature of recordings and broadcast formats are highlighted and addressed. For example, live broadcasts may be distinguished from delayed transmissions; audio recordings and broadcast from video recordings; civil proceedings from criminal proceedings; first instance hearings from appeal hearings; overlay footage from actual excerpts of

hearings; the recording and broadcast of segments of hearings from 'gavel to gavel' coverage; edited from unedited broadcasts; and broadcast with commentary from broadcasts without commentary.

The term 'access to courtroom proceedings' may encompass levels of access ranging from severely restricted access, bordering on prohibition, to unrestricted access. While the book argues against an unqualified absolute ban on audio-visual coverage of court proceedings, it does not advocate a particular minimum level of access. It is the basis on which access is restricted or prohibited rather than the extent of permitted coverage which the book challenges. Thus, the book argues that whether and to what extent access is granted ought to be determined not in terms of such access being a media right, or contingent on it being established that such access will not adversely affect proceedings, but rather on the basis of such access being seen as the utilisation of a medium capable of enhancing public access to information and understanding of court proceedings. This suggests that various levels of access may be appropriate for different types of judicial or quasi-judicial proceedings, with the nature of some proceedings and other issues justifying a total exclusion of audio-visual media coverage while others may warrant virtually unrestricted access.

The term 'open justice' as used in this book relates to the principle that deems it desirable that the public be afforded access to court proceedings and to information about the work of courts in order to enhance public confidence in and ensure meaningful public accountability of the administration of justice through informed commentary and criticism. This book argues that it is undesirable and inappropriate to equate the concept of 'open justice' with rights, as such an approach tends to lose sight of why it is deemed important that justice be administered openly.