CRIMINAL LAW ASSOCIATION OF SOUTH AUSTRALIA

INTERNATIONAL CRIMINAL LAW CONGRESS

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PRE-TRIAL PUBLICITY - FREE SPEECH V FAIR TRIAL

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The Hon. Justice M.D. Kirby, CMG*

RIGHTS IN CONFLICT

One of the problems with the Ten Commandments is that, as with any statement of fundamental duties (and rights) on occasion, the fundamentals come into conflict. You should honour your father and mother. But what if they commit adultery? You should not kill. But what of a mortal attack on God's people? In earlier times these disputes taxed the intellects of theologians and philosophers. The modern inheritors of their mantle, judges and lawyers, now have the task. And it is a very practical and almost daily task, especially in the higher courts.

I must approach the topic assigned to me with special circumspection. In New South Wales, the Court of Appeal has a particular assignment in matters involving contempt of court.[1] Cases alleging contempt are before the Court almost every week. As a glance at the current issue of the National Times[2] will reveal, there stands reserved in the Court, judgment in a contempt proceeding brought against a media publisher and a journalist (Wendy Bacon)[3]. I did not participate in that proceeding. But I do have reserved another case, of equal

importance, relevant to pre-trial publicity. I refer to proceedings brought by the Attorney-General against Michael Willesee concerning statements put to air in the midst of a criminal trial prejudicial to the fair trial of the accused. The trial was then aborted by the District Court judge (Judge Jane Matthews).[4] Faithful to our traditions, I must not, by word or hint, suggest any pre (or post) conception, least I be disqualified from deciding these interesting and taxing cases.

THE GROWTH OF SUPPRESSION

But even if I were released from the burdens of contempt litigation, by an indiscreet word at this conference, recent experience in the Court of Appeal shows that applications for proceedings in closed court and/or for the suppression of the names of parties, are a growth industry. Often the applications are made in civil proceedings. In a number of recent decisons, the Court of Appeal has affirmed the importance of the open administration of justice. The normal consequence of openness, the potential of media reporting and wide spread publicity, are acknowledged as possible sources of unfair embarrassment and even occasional injustice. They must be tolerated, so it is said, because the alternative of closed courts and secret justice is normally a greater evil.[5] Techniques have been adopted by the courts, condoned by decisions of high authority[6] to avoid the unnecessary disclosure of confidential matter - particularly where this could attract sensational or privacy invasive publicity, out of proportion to its importance for the trial. Sometimes these techniques are adopted to avoid disclosing business confidences.[7] But even in criminal or quasi criminal

cases (such as proceedings for contempt) the number of applications for suppression of the name of a party, his associates or other identifying circumtances[8] or the suppression of other details of the public trial, or its closure altogether, have been increasing. The increase can be directly traced to a concern about the risks of "trial by media". Judicial fears about unfair, disproportionate, sensationalised or trivialised publicity of matters raised in court, and in some cases the impact which that publicity may have upon an accused's entitlement to a fair trial, have sometimes resulted in orders limiting publication. In some jurisdictions, it is questionable whether the power exists to make such orders.[9] In others, specific legislation has been enacted to permit such orders to be made. In England, s 11 of the Contempt of Court Act 1981 gives judges the power to prohibit the publication of a name or other fact withheld from the public in court. There is a growing body of concern in the academic literature[10] and in the courts themselves[11] about the excessive use of this power, particularly in the absence of effective judicial review of such orders. It has recently been suggested that legislative changes should be introduced to diminish the judge's power or to render its exercise more susceptible to judicial review. Meanwhile, the courts themselves are beginning to react.[12]

In Australia, legislation in South Australia facilitates suppression orders.[13] In other jurisdictions, such orders are rarely, if ever, made either because of a want of power or because of deference to the principle of open justice, deemed specially important in the case of criminal trials. Lately, however, there have been increasing numbers of critics of the

media in Australia, suggesting a growing opinion, in a number of quarters, that the balance between the right of free speech and of the free press and the right to a fair trial have come out of joint. Every society strikes its balance somewhat differently. The point of the fulcrum varies over time, responding to changing social attitudes and the changing media of communication. In 1890, Lord Justice Cotton said that "everything done to prejudice the judge or jury in a trial of an action is a criminal act, because it is an attempt to prevent the course of justice".[14] It is for that reason that the publication of material which is either designed or calculated to interfere with the due course of justice in any pending litigation is, on its face, a criminal contempt of court, punishable by the court.[15]

The problem for the courts, and for society, is to reconcile two competing rights. This is not a tension between good and evil. It is a battle between two desirable attributes of our type of society. The tension is not between the public's interest in the free press and free speech and a purely private interest of the accused (with perhaps his family and associates) in a fair trial. The interest in fair trial is equally a public and community concern. This is not only because of the inconvenience and cost caused to the community when a criminal trial must be aborted and repeated, because of unfair publicity before or during the trial. It is also because our community asserts its own interest in having the assurance that criminal trials are justly conducted and determined if not exclusively, then substantially, on the evidence presented during the trial. I say "not exclusively", because it is impossible for jurors (or judges for that matter) to approach their tasks completely free

of their experiences and attitudes gathered over many years. Thus, one juror may know precisely the privilege (if any) of the accused to make an unsworn statement. In that event, he is less likely to be affected by a feature article, during the course of a trial, condemning such statements, than a juror totally ignorant of such matters.[16]

Citizens, including doubtless judges, bring to the resolution of the tension between the claims of free speech and fair trial, basic predilections. Scalograms, analysing judicial performance over time, could perhaps assist in identifying those judges who tend to put a higher store on the paramountcy of fair trial (when it conflicts with pretrial publicity) and those who tend to allow greater latitude, in deference to the perceived importance of the open administration of justice and the attendant publicity which is its price. It is dangerous to stereotype judicial responses here. The cases are almost infinite in their variety. The borderland is obscure and uncertain at the best of times. Numerous criteria may be identified as relevant.[17] The House of Lords recently nudged forward the claims of "free speech" when it took a broad view of s 5 of the English Contempt of Court Act, 1981. This section protects from contempt proceedings, publication made as part of a discussion in good faith of public affairs or other matters of general public interest where "the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion".[18] The extent to which the common law, without benefit of statute, takes a similarly lenient view is a matter reserved in the Willesee case.

THE SPECIAL PROBLEM OF CELEBRITIES

The recent attention to the problem of pretrial publicity in Australia is not simply the result of official conduct, whether in applying for the punishment of publishers, or journalists for contempt or applying for the suppression of names under legislation permitting such orders. It is also the result of widespread public and professional discussion of the role of the media in publicising matters relevant to the trials of people who either are, or soon become, "celebrities" and whose trials may thereby be specially effected.

In the August, 1985 issue of the Journal of the Law Institute of Victoria, there is a thoughtful article by a member of the Victorian Bar suggesting that the combination of leaks from police and public prosecutor offices and sensational reporting by the media of charges brought or considered against "celebrities" represent a serious threat to civil liberties. Instances are cited by reference to observations made by Mr. R. Castan, QC, President of the Victorian Council for Civil Liberties. They include the publicity given to the cases of Robert Trimbole, Kerry Packer and Lindy Chamberlain. In the case of Kerry Packer, Mr. Castan is reported as saying:

> "The Costigan Royal Commission Report led to massive publicity. The media usurped the role of judge and jury."[19]

In the case of Mrs. Chamberlain, her trial had to be moved from Alice Springs to Darwin, as an attempt to counter-act media publicity and the difficulty it occasioned in securing an uncontaminated jury. It must be acknowledged that it would be difficult for Mr. Trimbole, if he ever were returned to

Australia, to stand his trial before a jury totally ignorant of what was alleged against him, in the massive coverage that accompanied the efforts made to procure his extradition from Ireland.

Professor Henry Mayer, a well known commentator on the Australian media, expressed total incredulity at the lawyers' naive concern with fair trial in the context of the media. He said:

> "The media is concerned with conflict and drama. Hence when an issue arises, the media will stress those aspects rather than any other. The reality is that news is made by journalists not found like a stone. Journalists won't admit that it's an artificial product. They rationalise their position with notions of fairness, while they play on people's beliefs that all accused are guilty. Solutions would require a restructuring of what people conceive to be interesting and attractive. Not as long as news feeds on people's anxieties and they on it in turn."[20]

Are the solutions really so difficulty, even impossible, as Professor Mayer suggests? Can we do no better than to commit to the courts, in language of great generality, the evaluation of the competing claims of free speech and fair trial in each particular case? Are the facts of each case so infinitely varied; social attitudes so unstable; and the technology of information, so rapidly developing, that we must just approach each case on an ad hoc basis, guided by a few rules laid down, in words of great generality, either in legislation or in judicial pronouncements?

THE WAY AHEAD

Legal Reform: There are some who suggest that it is possible to do better. A major undertaking of the Australian Law Reform Commission is currently addressing an attempt to improve and clarify that body of the law which is described under the unsatisfactory general rubric of "contempt".[21] The Commission, under Professor Michael Chesterman, will not be publishing its report on the topic until 1986. But a few indications are coming forth, including the interesting preliminary results of a survey of judicial attitudes on the law of contempt. At the very least, a Federal statute on contempt law (particularly if it were to give rise to counterpart reforming legislation in the State sphere) could help to promote the legitimate objects of contempt law by clarifying it and making it available to journalist, lawyer and citizen alike. The prospect of such instructive legislation has been welcomed by at least some journalists.[22]

One issue being explored by the Law Reform Commission is the clarification and definition of particular types of material which should never be published when a criminal trial is pending. These could include:

* Allegations as to the criminal record of an accused.
* Allegations that an accused had been, or is about to be, charged with other offences to be charged separately.
* Any suggestion that an accused has confessed to a crime.
* Matters relating directly to the credibility,

proclivities and associations of an accused or any witnesses or prospective witnesses.

As one leading Australian journalist has pointed out, most of these prohibitions are already observed by the media in Australia. However, the fact that they are not written down in specific terms has "led the media into error occasionally". He cited the recent case of a criminal trial in Canberra which had to be aborted when a radio station and a television station referred to a prior conviction of the person who was then facing charges of a related kind.[23] The difficulty of completing the list of "taboo" subjects, and the difficulty of providing a mechanism which is flexible to the changing circumstances and attitudes in the media and in the community generally, represent major hurdles for the Law Reform Commission to overcome in achieving its endeavour.

New remedies: One means of tackling the problem of pretrial publicity would be to enhance, under strict condictions, the power of coroners, magistrates and judges involved in pretrial judicial investigations, to order the suppression of publication of particular evidence or of names or identifiers, where there is a risk that such publication would significantly damage the possibility of the fair trial of an accused person on a criminal charge. In New South Wales, the power of the coroner under legislation, to do this has recently been reviewed by David Hunt, J.[24] Interestingly, his Honour held that Mirror Newspapers Limited, had a "special interest" in an order of suppression and thus had sufficient standing to seek from the Supreme Court prerogative relief in relation to that order. However, his

Honour refused to intervene in the exercise by the coroner of his discretion under the statute.

Committal proceedings present a different problem. Endeavours in Australia and New Zealand to introduce legislation prohibiting or restricting the publication of committal testimony, have so far foundered on the rock of media opposition and their cries about the public's right to know. There is no doubt that, on occasion, pretrial publicity surrounding committal proceedings has damaged the chance that an accused person can have his trial heard before a jury completely uncontaminated by the publicity. Judges can say, as often as they like, that jurors and citizens know the presumption of innocence, disregard the media and disbelieve it, and put out of their minds the things they have seen on the television, heard on the radio or read in the newspaper.[25] However, the lingering doubt remains that, sometimes, the background material "sticks", to do a great injustice to the accused person. In the recent trial of a judge in New South Wales, Maxwell, J was reported as telling the jury:

> "These issues are not to be decided by ill-informed or emotionally evoked expressions of opinion about other like cases published in the media in recent months ... To decide the issues which arise on the basis of the misconceived ideas of some academic lawyers and others upon some other cases would negate the whole basis of trial by jury and result in grave prejudice to either the accused or the Crown."[26]

In that case, the accused was acquitted. So also was the accused, Dr. Adams, in the trial recently recounted in the book by Lord Devlin.[27] Lord Devlin, instructing the jury, used a

telling phrase:

> "I should like to say this, and I say it with the approval of the Lord Chief Justice ... I think it would have been wiser in this case if the preliminary hearings before the magistrates had been held in private."

It is not always easy to rectify prejudice and opinion once formed. It is easy to say that opinions should be put out of mind. It is disputable as to whether this miracle of psychological dexterity can actually be achieved, particularly by those unaccustomed to the feat. These are the concerns which have led some people to urge that, on balance, it would be better not to have publicity or pretrial hearings at all or, at least, in particular cases by judicial order. This is not just a local controversy. It arose in the United States Supreme Court in 1979. Significantly, by a 5 to 4 majority, the Court rejected a challenge to a judge's order to exclude the media in a pretrial hearing on a criminal charge where the judge did so to avoid the risk of "the unabated build up of adverse publicity" which would jeopardise the prospect of a fair trial for the accused.[28] The closeness of the decision indicates the strong competition in fundamental values which cases of this kind engender.

In France, the nation has been divided in recent weeks by the Gallic equivalent to the Chamberlain case. It concerns a charge of murder brought against Christine Villemin following the discovery of her four year old boy whose body, tied hand and foot, was found near the family home in the Vosges. The Juge d'Instruction, or examining magistrate, has been giving the media a running commentary on his inquiries and has freely voiced his own suspicions which have altered from time to time. The case has

led to a great debate in the French media concerning the freedom to express suspicions publicly which, in that country, are virtually unfettered by sub judice laws.[29]

In many European countries, such as the Netherlands, no publicity at all is permitted prior to a public trial. In newspapers, the accused may be referred to by initials only and identifiers must not appear. Yet nobody would accuse the Netherlands of being a closed society. They simply strike their balance here in a way more tender to the concern of the fair trial of accused persons and less sensitive to the competing claim of the media to publish and the public to know.

Public figure defence: One possible line of demarcation, responding to legitimate claims of public interest, would be to extend the "public figure" defence available in the United States in defamation proceedings[30], so that it would permit a distinction to be drawn between criminal accusations against "public figures", whilst protecting ordinary citizens from invasive pretrial publicity damaging to the right to a fair hearing. However, the public figure distinction is not congenial to the more egalitarian attitudes of the Australian community and its law. It was rejected by the Law Reform Commisson in the context of defamation.[31] It is a difficult distinction to draw at the best of times. And in the United States, it has lately come under criticism.[32] A recent decision of the Federal Appeals Court in Washington upheld a verdict in favour of the former President of Mobil Oil Corporation, on the basis that "sophisticated muck-racking" by the Washington Post was to be taken as evidence of malice, thereby destroying the public figure defence.[33] The

strong language of the Appeals Court indicates a less than whole hearted embrace of the praise heaped upon the Washington Post by the media following its role in the exposure of Watergate.[34].

Bill of rights: Beyond the endeavours of the Law Reform Commission to restate and reform the law of contempt are the concurrent efforts to develop a Bill of Rights for Australia. Recent reports indicate that the Federal Cabinet has authorised the enactment of a Federal Bill of Rights.Its precise form and operation are still to be disclosed by Federal Attorney General Bowen. Presumably, the Australian Bill of Rights will draw upon the provisions of the International Covenant on Civil and Political Rights. Article 14(1) of that Covenant, which Australia has signed, guarantees:

> "14(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order ... or national security in a democratic society, or when the interest of the private lives of the parties so requires or to the extent strictly necessary in the opinion of the court where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Similar principles appear, in varying forms, in the European Convention for the Protection of Human Rights and Fundamental Freedoms[35] and the American Convention on Human Rights.[36]

It would seem that Australia is now following much the same course as Canada did by enacting a statutory Bill of Rights, with the prospect that this may, at some future time, with the consent of the people, pass into a constitutional form. It was in this way that Canada moved from a statute to the Canadian Charter of Rights and Freedoms.[37]

Early decisions in Canada, under the Charter, illustrate the difficulty of reconciling the fundamental rights and freedoms here in competition.[38] In one early case, a United States journalist was convicted of violating a judicial pretrial order banning publication of evidence. He was in court when the order was made. He nonetheless wrote an article which was subsequently published in a Maine newspaper in the United States. Copies went on sale in New Brunswick, Canada. The phenomenon of transborder publication is one of increasing importance. Recent news reports indicate proceedings against the distributors of the Sydney Morning Herald for publication of copies of the newspaper in Hong Kong concerning a criminal trial there.[39] Likewise, publication of a Japanese journal may sometimes breach Australian laws.[40] In the Canadian case, the United States journalist was convicted. He voluntarily travelled to Canada to contest the trial. He contended protection under that provision of the Canadian Charter which guarantees freedom of the press. The case went off on the basis that the Charter had no application, not being in force at the relevant time. But the judge made the point that freedom of the press would, even under the Charter, have to give way to the

right of the accused, also under the Charter, to have a fair trial before an independent and impartial tribunal.[41] There are numerous other more recent cases to similar effect.[42]

Other countries of the Commonwealth of Nations now have experience in the operation of human rights guarantees in this area. For example, there are a number of decisions of the Privy Council on appeal from Jamaica concerning pretrial publicity and whether this has infringed the rights to fair trial guaranteed to the criminal suspect by the Constitution.[43]

If Australia secures a Bill of Rights, we will hear more of these debates. But I do not believe that the resolution of the rights in conflict is likely to be made any easier by the adoption of a Bill of Rights.

Robust juries and trial judges: There is another view. It is that we should not be too concerned about pretrial publicity. Judges can, as Maxwell, J did in the recent case, warn juries. Modern juries may be more robust than their predecessors were taken to be. If judges feel that grave damage has occurred during or shortly before a trial, they have a discretion to abort the trial. This discretion will be reviewed on appeal as was done recently in Victoria, in Vaitos[44], and in South Australia, in Donald.[45] In Vaitos, P.Murphy, J drew attention to the matters to be considered in exercising this discretion. They included:

> "... the nature and degree of prejudice or possible prejudice to the defence case, the courses open to cure or ameliorate the prejudice; the origin and at times the purpose of the offending material, the stage, the nature and the length of the trial, and the attitude of the

> parties. It is not possible to foresee and I do not attempt to enumerate the almost infinite variety of circumstances which may arise."[46]

A strong judicial direction to the jury and reliance upon the superior education and experience of modern juries (and perhaps their scepticism of the media, in any case) may cure the wrong in some cases. But it may not in other cases. The difficulty of the editor when an important public figure is suspected or accused or where foreign agents are arrested and put on trial is acute. The story is a newsworthy and interesting one. It will sell papers. But more importantly, the public have a legitimate interest in it. On the other hand, even celebrities are entitled to a fair trial. Perhaps this explains the reported request of New Zealand to Australia and other friendly countries, not to comment further on the matters incidental to the trial of those accused of involvement in the sinking of the Greenpeace Warrior in Auckland Harbour and the death of a crew member. They are standing their trial and, as far as possible, it is important, in the public interest, that it should be fairly conducted.

Judges have difficulty enough in putting material out of their minds. Whether jurors can really do so, as judicial instructions enjoin, is a matter of grave psychological doubt. The instructions continue to be given. The discretions continue to be exercised having regard to factors such as those mentioned. Perhaps, among the new remedies he is considering, Professor Chesterman of the Law Reform Commisson could contemplate the possibility of holding the media liable where a trial is aborted, for the costs incurred to the community as a result. If the trial is in an advanced stage, those costs will be considerable. They

will include the costs of judicial time, the costs of the Crown Prosecutor. Nowadays they will normally include the costs of public defenders or legal aid for the defence. They will include shorthand, the costs of witnesses, transcript and indirect capital and other costs lost or thrown away. If the price of causing trials to abort had to be paid by those responsible (rather than from the public purse) it is at least arguable that greater care might be taken on occasion, than now.

Self discipline: In some quarters, there is a growing appreciation of the need for self discipline in the media. Sometimes this is put forward as an alternative to legal control. Generally, however, it is recognised as a supplement. Laziness, sloppiness and ignorance on the part of the media are condemned by the best journalists.[47] Sometimes, the Press Council will intervene to condemn unfair pretrial publicity in the print media. The ever present supervisory powers of the Australian Broadcasting Tribunal make the offences on the part of the electronic media less frequent, although more devasting when they occur.

A recent study of the American Society of Newspaper Editors found that 71% of the audience said that the press often convicted accused people before trial. The survey also revealed a strong feeling that reporter bias found its way consistently into news copy.[48] Responding to these perceptions, efforts are now being made to improve standards of journalism at the grass roots. A conference of Australian editors organised by Australian Associated Press in May, 1985, was told by Mr. Max Suich, chief editorial executive of John Fairfax & Sons Ltd. of the higher

qualifications of the recent intake of journalists. They included three economists, a pharmacist, a biochemist, a mathematician, a medical practitioner and four lawyers. But one journalist present at the conference said that training for journalists was still "sink or swim".[49] Efforts in the United States to improve the standards of journalists, by better education and training, may point the way.[50] We should not despair about the improvement of our journalists. The first step is to ensure that they know the law and the second is to ensure that they are made sensitive to the competing public interests which include the right to fair trial.

CONCLUSIONS

This debate is endless. Indeed, we are going to see more of it. The work of the Law Reform Commission on contempt law reform is a guarantee of that. So are the numerous cases coming before the courts, including those by reason of transborder publication. Claims will sometimes have to be evaluated to close courts and limit the publication of names or other evidence. It is to be hoped that those powers will be developed sensitively to the open trial and fair trial principles. Thought will have to be given to whether full reportage of the arrest, charge and committal proceedings involving accused persons may not sometimes effectively deny them a fair trial, particularly if they are celebrities. If, as seems likely, we are to have a general Charter of Rights, new duties will fall upon judges to weigh the competing rights to free speech and fair trial and to determine where paramountcy lies. The experience in Canada, at least, in the early cases, suggests a judicial tendency to prefer fair

trial, inevitable perhaps from the intimate concern and duty of judges in securing that end.

Some reliance can surely be placed, especially in trials by judges alone, in judicial robustness. But whether juries are so robust and whether, as judges tell them, they can, in fact, put matter out of their minds following a barrage of sensational publicity, is a moot point, disputed amongst psychologists.

Perhaps the most we can hope for is the clarification of the relevant law, the provision of some of it in clear legislation for the instruction of journalist and citizen alike and improvements in the selection and education of journalists so that they become more sensitive to the high duties of their profession. Those duties include an appreciation of the legal and moral obligations they owe to the community, and to fellow citizens, to ensure that fair trial and due process of law remain the boast of our criminal justice system, even in the age of mass media.

FOOTNOTES

* President of the Court of Appeal, Supreme Court, Sydney. Formerly, Judge of the Federal Court of Australia and Chairman of the Australian Law Reform Commission. The views expressed are personal views only.

1. Rules of the Supreme Court (NSW), Part 55.

2. National Times, 5 October, 1985, 3.

3. Attorney General for New South Wales v John Fairfax & Sons Limited & Anor, CAV.

4. Registrar of the Court of Appeal v Willesee & Ors (CA 210 of 1984), CAV.

5. Raybos Aust Pty Limited & Anor v Jones, unreported, Court of Appeal, 21 June, 1985; (1985) NSWJB 145.

6. Attorney General v Leveller Magazine Limited & Ors [1979] AC 440, 471 (Lord Scarman).

7. Glennan & Anor v Hornibrook, unreported, Court of Appeal, 19 September, 1985. Cf Alexander & Ors v Cambridge Credit Corporation Limited (Receivers Appointed) & Anor, unreported, Court of Appeal, 4 September, 1985; (1985) NSWJB 19.

8. See Raybos, n 5 above, and cf ex parte The Queensland Law Society Incorporated [1984] 1 Qd R 166 (McPherson, J).

9. See discussion in Raybos; Taylor v Attorney General [1975] 2 NZLR 675 and Attorney General v Leveller Magazine Limited & Ors op cit.

10. "Court Confidences" in (1984) 128 Solicitors' Journal 105; "Surreptious Spread" ibid, 337. "Reviewing Publicity Bans" (1985) 135 New LJ 404.

11. F. Gibb, "Ban on Naming Kidnapped Victim Condemned by High Court Judges", The Times (London) 8 November, 1984, 5, 16.

12. Newspaper to challenge secrecy in JPs' names, The Times (London), 20 July, 1985, 3.

13. See eg R v Wilson; ex parte Jones [1969] SASR 405; G v The Queen (1984) 35 SASR 349.

14. O'Shea v O'Shea & Parnell (1890) 15 PD 59, 60.

15. Cf P.Murphy, J in Vaitos (1981) 4 A.Crim.R. 238, 259.

16. Cf Donald (1984) 11 A.Crim.R. 47.

17. See eg P.Murphy, J in Vaitos, ibid, 261.

18. Attorney General v English [1982] 2 WLR 959; [1982] 3 WLR 278. For discussion see "Fair Trial and Free Press" in [1982] Public Law, 343; "Curate's Egg (1982) 132 New LJ 693. This subject will be dealt with in the forthcoming judgment of the Court of Appeal in Willesee. Cf Jordan, CJ in Ex parte Bread Manufacturers Limited; re Truth and Sportsman Limited (1937) 37 SR (NSW) 242, 249.

19. R. Castan cited in J. Loren, "Police and Press - A Joint Threat to Civil Liberties", Law Institute Journal (Vic), August, 1985, 813.

20. ibid, 814.

21. M. Chesterman, "Controlling Court Room Publicity: Common Law Strategies", International Legal Practitioner, June, 1985. See also Australian Law Reform Commission, Contempt Law (IP 4) January, 1984.

22. D. Solomon, "Law Reform Commission to look at Contempt Law", Australian Financial Review, 27 August, 1985, 4.

23. ibid.

24. Mirror Newspapers Limited v Waller, (1985) 1 NSWLR 1.

25. Cf Mason, J in Mirror Newspapers Limited v Harrison (1982) 149 CLR 293. See also Rochfort v John Fairfax & Sons Ltd [1972] 1 NSWLR 16.

26. Maxwell, J in R v Foord, citied, Daily Telegraph, 17 September, 1985, 4.

27. Patrick Devlin, Easing the Passing, The Bodley Head, London, 1985, 27 ff.

28. Gannett Co v de Pasquale 443 US 368, 61 LEd 2d 608, 99 S.Ct.2898 (1979). For discussion see G. Nettheim, "The Principle of Open Justice" 1984/8 Uni of Tas. L. Rev. 25, 39ff.

29. M. Follain, "Why the Murder of a Little Boy is Obsessing All France", Sunday Times, 21 July, 1985, 19.

30. New York Times v Sullivan 376 US 254 (1964).

31. Australian Law Reform Commission, Unfair Publication: Defamation and Privacy, (ALRC 11), 1979, Appendix F, 247 ff.

32. S. Taylor, "Life in the Spotlight: Agony of Getting Burned", The New York Times, 27 February, 1985, 7.

33. The Tavoulareas Case, noted, The Australian, 12 April, 1985, 4.

34. See eg H. Kaufmann, cited, ibid.

35. Article 6. Cf Council of Europe, Activities in the Mass Media Field, note by the Directorate of Human Rights, Strasbourg, 31 May, 1985. (D.H-M.M 85) 2.

36. Article 8(5). See G. Nettheim, "Open Justice v Justice" (1983-85) 9 Adelaide L. Rev 487. See also Nettheim, n 28 above.

37. R v Banville (1983) 34 C.R. (3d) 20. See also R v

Southam Inc (1983) 34 C.R. (3d) 27; Re Smith (1983) 34 CR (3d) 52. See also M.D. Lepopsky, "Section 2(b) of the Charter and Media Coverage of Criminal Court Proceedings" (1983) 34 C.R. (3d) 63. Cf Re Section 12 of the Juvenile Deliquents Act (1982) 30 C.R. (3d) 72; M.D. Lepopsky "Constitutional Right to Attend and Speak about Criminal Court Proceedings - An Emerging Liberty", (1982) 30 C.R. (3d) 87; D.G. Barton "The Right to a Public Trial in Criminal Proceedings" (1982) 2 Manitoba LJ 129.

38. See Editorial "Publicity and Criminal Proceedings" in [Canadian] Criminal Law Quarterly, Vol.23, September, 1981 401.

39. Herald's H.K. Distributors Get Summons' - Sydney Morning Herald, 17 May, 1985, 4.

40. David Syme & Co Limited v General Motors-Holden's Limited [1984] 2 NSWLR 294, 299, 307.

41. R v Banville, above n 37.

42. See n 37.

43. See e.g.Grant & Ors v Director of Public Prosecutions [1982] AC 190.

44. Vaitos (1981) 4 A.Crim.R. 238.

45. Donald (1984) 11 A.Crim.R. 47.

46. Vaitos, ibid, 261-2.

47. D. Solomon, "Time for Media to Get House in Order", Australian Financial Review, 28 May, 1985, 6.

48. Reported Sydney Morning Herald, 30 May, 1985, 6.

49. ibid.

50. D. Yeldham, "Towards an Efficient & Effective

Relationship between the Judicial System and the Media", mimeo, 25 August, 1984, paper for the Australian Institute of Judicial Administration, 9.