

ACHIEVING THE AIMS OF OPEN JUSTICE? THE RELATIONSHIP BETWEEN THE COURTS, THE MEDIA AND THE PUBLIC

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This article begins by outlining what the principle of open justice is intended to achieve. It then investigates the nature of the relationship that exists between the courts and the media, and between the media and the public, and suggests that these relationships are not always conducive to realising the aims of open justice. While the reporting role of the traditional news media will undoubtedly persist, at least for the foreseeable future, it is argued that, since courts now have the means to deliver to the public a fuller and truer picture of their work than the media can, they should seize the opportunity to do so.

I INTRODUCTION

Open justice is a utilitarian concept and is a means to an end, but not an end in itself.¹ The chief object of courts is not to be open and accessible, but to ensure that justice is done according to law.² In *Re Hogan; Ex parte West Australian Newspapers Ltd*, the Western Australian Court of Appeal decried the ‘tendency to identify the principle of open justice as the ultimate object, divorced from the rationale for its existence’.³ With that caution in mind, the first part of this article will outline what the principle of open justice is intended to achieve. The remainder of the article will examine how the courts (the object and focus of the principle), the media (the primary channel through

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¹ *West Australian Newspapers Ltd v Western Australia* [2010] WASCA 10 [30]. But see s 6 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW), which declares that a primary objective of the administration of justice is to safeguard the public interest in open justice. Insofar as this provision treats open justice as an end rather than a means, it appears to be misguided.

² *Scott v Scott* [1913] AC 417, 437.

³ [2009] WASCA 221 [32].

which the work of the courts is made known), and the general public (the audience to whom it is made known) interact with each other. The aim of this examination is to ascertain whether the nature of these relationships is conducive to realising the aims of open justice and, if not, what possibilities exist for best achieving them.

II THE RATIONALE FOR OPEN JUSTICE

A *An Oversight Function*

Historically, open justice has been lauded for its salutary effect on the quality of justice administered by the courts. Bentham regarded the principle as ‘a bastion against the arbitrary exercise of judicial power’.⁴ The same assessment has been made by numerous judges: ‘[a]n open court is more likely to be an independent and impartial court’;⁵ ‘[i]f the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice’;⁶ and openness ‘deters inappropriate behaviour on the part of the court’.⁷ Open justice has a similar disciplining effect on the behaviour of prosecutors and counsel.⁸

The open court principle is not the only mechanism for ensuring that judges perform to an acceptable standard. Other important safeguards include: the existence of avenues of appeal; having appropriate procedures in place to ensure that judges are appointed on their merits⁹ and can be dismissed if they misbehave or lose their capacity to function properly; having appropriate

⁴ John Bowring (ed), *Works of Jeremy Bentham* (1843) vol 4, 316–17 as cited in Garth Nettheim, ‘The Principle of Open Justice’ (1984–86) 8 *University of Tasmania Law Review* 25, 28. See also *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120, 122; *R (On the Application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 [38].

⁵ *Named Person v Vancouver Sun* [2007] 3 SCR 253 [32].

⁶ *Attorney General (UK) v Levenson Magazine* [1979] AC 440, 450.

⁷ *R v Legal Aid Board; Ex parte Kaim Todner (a firm)* [1999] QB 966, 977. See also *Re Applications by the Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275 [25]; *Television New Zealand v Rogers* [2008] 2 NZLR 277, 312; *Broadcasting Corporation of New Zealand v Attorney-General (NZ)* [1982] 1 NZLR 120, 122; *R (Guardian News & Media Ltd v City of Westminster Magistrates Court)* [2012] EWCA Civ 420 [1].

⁸ Of course it is primarily the responsibility of the presiding judge to ensure that the other participants behave in a proper manner.

⁹ See Sir Anthony Mason, ‘The State of the Judicature: An Address to the 28th Australian Legal Convention’ (1994) 20 *Monash University Law Review* 1, 8.

means to handle complaints about judges;¹⁰ and maintaining a clear separation between the judiciary and the other arms of government in order to preserve judicial independence.

Open justice has also been acclaimed for its connection with the pursuit and attainment of truth. Blackstone and Wigmore both postulated that witnesses are more likely to be truthful if they have to testify in public.¹¹ It is also claimed that openness in court proceedings may 'induce unknown witnesses to come forward with relevant testimony'.¹² Open justice also benefits litigants, not only in the aforementioned ways, but also because the public accessibility of the forum in which a dispute is resolved gives the victor a sense of public vindication.

While treaties and bills of rights that enshrine a right to a fair and public hearing invariably confer this right on the litigants,¹³ enhancing the accountability of judges and witnesses does not benefit only those who become involved in legal proceedings. This is because judges are not merely umpires in a contest played out between parties in a courtroom.¹⁴ The laws that judges create, interpret and apply in the course of adjudicating a dispute have an impact that extends beyond the parties; they form precedents that bind the public. Therefore, the public has a collective interest in being apprised of whether the litigants were treated fairly and equally and whether the law was applied accurately, judiciously and impartially to produce a just outcome. In addition to treating the right of public access to the courts as fundamental to the administration of justice, it has also been argued that the public has a right

¹⁰ For example, New South Wales has a Judicial Commission which handles complaints about judges, and the Commonwealth has enacted legislation that deals with complaints handling for federal judges and magistrates: *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth); *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

¹¹ Sir William Blackstone, *Commentaries on the Laws of England* (3rd ed, 1768) vol III, 373; *Wigmore on Evidence* (Chadborne Revision, 1976) vol 6, 436. See also *DPP (Vic) v Theophanous* [2009] VSC 325, [40]; *West Australian Newspapers Ltd v Western Australia* [2010] WASCA 10, [30].

¹² *Gannett Co, Inc v DePasquale*, 443 US 368, 383 (1979). But of course the opposite might equally be true; witnesses might be prepared to testify in private what they would fear to say in public: Max Radin, 'The Right to a Public Trial' (1931–32) 6 *Temple Law Quarterly* 381, 384; *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835, 883. This will be the case if a witness perceives that telling the truth would imperil his or her safety.

¹³ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14, Sixth Amendment to the *United States Constitution*, *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) art 6. But note that Radin doubts that the principle was developed with the needs of accused persons in mind: Radin, above n 12, 384.

¹⁴ *Richmond Newspapers, Inc v Virginia*, 448 US 555, 595 (Brennan J) (1980).

to know what the courts are doing because the judiciary is an arm of government.¹⁵ In this sense, public access to the courts ‘has a democratic or governmental aspect’.¹⁶ By contrast, a public that is unaware of what is happening in the courts has ‘no control over the courts and in effect, no control over the powers of the state’.¹⁷

B An Educative and Confidence-Building Function

Having established that the principle of open justice acts as a stimulus to appropriate behaviour on the part of the participants in a judicial proceeding, judges and jurists usually go one step further and explain that the accountable, impartial and well-functioning judicial system that openness is expected to produce engenders public confidence in the courts.¹⁸ It is said to be critical for preserving the rule of law¹⁹ and the stability of society that members of the public have confidence in the courts and are willing to submit to their authority, obey their orders and accept the outcomes, even when they are unfavourable to the individual, controversial or unpopular.²⁰ Indeed, it is public confidence that ultimately gives courts their real legitimacy and effective authority, since courts have ‘no influence over the sword or the purse’, and the judiciary has ‘neither force nor will, but merely judgment’.²¹ In the words of Burger CJ:

The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public

¹⁵ John Doyle, ‘The Courts and the Media: What Reforms Are Needed and Why?’ (1999) 1 *UTS Law Review* 25, 26.

¹⁶ *Ibid.*

¹⁷ Claire Baylis, ‘Justice Done and Justice Seen to be Done — The Public Administration of Justice’ (1991) 21 *Victoria University of Wellington Law Review* 177, 184.

¹⁸ This is somewhat of an article of faith, as public confidence in the courts is notoriously difficult to assess. See, eg, George Zdenkowski, ‘Magistrates’ Courts and Public Confidence’ (2007) 8(3) *The Judicial Review* 385, 398.

¹⁹ Lord Neuberger, ‘Open Justice Unbound?’ (2011) 10(3) *The Judicial Review* 259, 260.

²⁰ See, eg, *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 607; *R (Guardian News & Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420 [1]. See also *Re Hogan; Ex parte West Australian Newspapers Ltd* [2009] WASCA 221, [33] where the Western Australia Court of Appeal held that the exposure of court proceedings to the public scrutiny is essential for the maintenance of confidence in the integrity and independence of the courts.

²¹ Alexander Hamilton, James Madison and John Jay in Benjamin Wright (ed), *The Federalist: The Famous Papers on the Principles of American Government* (Belknap Press of Harvard University Press, 1961) 489 as cited in Susan Kenny, ‘Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium’ (1999) 25 *Monash University Law Review* 209, 214. See also Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration Publications, 1998) 15.

trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.²²

...

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.²³

Openness secures public confidence only if the public approves of what it sees.²⁴ In the event that members of the public are displeased with what they have observed, they are free to criticise the courts and agitate for change. In the celebrated words of Lord Atkin in *Ambard v Attorney-General for Trinidad and Tobago*:

Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.²⁵

Public confidence in the courts depends on the public's perception of the courts. Open justice makes it possible for the public to develop reliable perceptions through direct observation of judicial behaviour and the processes and outcome of a case.²⁶ Therefore, the principle of open justice produces an outcome — the 'bracing effect'²⁷ it exerts on participants' conduct — and allows the community to observe the result it has produced. It is therefore a concept in which cause and effect are intertwined.

²² *Richmond Newspapers, Inc v Virginia*, 448 US 555, 570–1 (1980). See also R E McGarvie, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) 1 *Journal of Judicial Administration* 236, 267; Doyle, above n 15, 26.

²³ *Richmond Newspapers, Inc v Virginia*, 448 US 555, 572 (1980).

²⁴ For some suggestions as to the conditions that must exist in order for the public to have confidence in the courts see Zdenkowski, above n 18. It should also be noted that different sections of the public will have different expectations: Enid Campbell and HP Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 278.

²⁵ [1936] AC 322, 335. See also *Home Office v Harman* [1983] 1 AC 280, 316 where Lord Scarman stated that: 'Justice is done in public so that it may be discussed and criticised in public'.

²⁶ Reports of judicial proceedings held in secret may still emerge, but they will be based on hearsay and speculation, and cannot be authoritatively confirmed or denied: *Mirror Newspapers Ltd v Waller* [1985] 1 NSWLR 1, 18–19.

²⁷ *London Borough of Hillingdon v Neary* [2011] EWHC 413 (COP) [15].

The educative effect of open justice is diminished by the fact that members of the public rarely observe the judge or the witnesses firsthand. Instead, their impressions of a case are overwhelmingly mediated by the way in which it is reported by the media.²⁸ To the extent that media reports are detailed, accurate and give a comprehensive account of typical cases that come before the courts, the media augment the educative effect of the principle; to the extent that reports and commentary are inaccurate, biased, ill-informed, superficial or sensational, their educative effect must be questioned.

Media reporting can shape judges' views of the public as well as the public's view of the judges.²⁹ While judges should never be swayed by public sentiment in reaching a decision, they are frequently called upon to apply community standards. Indeed, Judge Gibson has recently observed that, historically, judges 'played an active role in identifying social mores', and the general customs that judges observed were then reflected in their decisions, which formed part of the common law.³⁰ The media are a significant avenue through which judges acquire an impression of community standards.

C A Free Speech Function

Open courts not only produce a quality of justice superior to that which is capable of being delivered by a secret court; they also advance free speech. Indeed, free speech and open justice are said to run parallel, although the latter is a much older principle.³¹ In this context, free speech has two interrelated aspects: the public has a right to receive information about the courts; and the media have a right to transmit that information to the public. Constraints on access to the courts or on the freedom to report what has occurred therein are likely to be resisted on the basis that they constrict both the media and the public's right to freedom of expression. The principle that the public has a 'right to know', and that the media are the vehicle through which the public is apprised of what it has a right to know, is likely to be pressed by media organisations when they are resisting or challenging in camera or non-publication orders, or when they are seeking leave of the court

²⁸ This idea is developed in more detail in the next section of this article.

²⁹ Robert E Drechsel, 'Uncertain Dancers: Judges and the News Media' (1987) 70(5) *Judicature* 264, 265.

³⁰ Judge Judith Gibson, 'Should Judges Use Social Media?' (Speech, 31 May 2013) <<http://glj.com.au.ezproxy.lib.monash.edu.au/files/judgesandsocialmedia.pdf>>.

³¹ Jonathan Barrett, 'Open Justice or Open Season? Developments in Judicial Engagement with the New Media' (2011) 1 *QUT Law and Justice Journal* 1, 8.

to gain access to documents on the court record.³² That is, media organisations tend to view the justifications for open justice from a free speech perspective. They do not venerate open justice for its salutary effect on judicial performance and witness veracity, since it is neither the function nor the responsibility of the media to improve the judicial system.³³ As explained earlier, it is the prospect of publicity that produces the discipline in the participants which, in turn, enhances the quality of justice. Open justice is the means to this end, and it is the means — freedom of expression — with which the media are concerned, not the effect.³⁴

Arguments along these free speech lines are most compellingly advanced in countries such as the United States, Canada and the United Kingdom, each of which has a bill of rights that confers a right to freedom of expression. For example, the Supreme Court of Canada in *Named Person v Vancouver Sun* stressed the association between the open court principle and section 2(b) of the *Canadian Charter of Rights and Freedoms*, which states that ‘everyone has the following fundamental freedoms: ... b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication’.³⁵ LeBel J stated:

The open court principle, which was accepted long before the adoption of the *Charter*, is now enshrined in it. This is due to the fact that the principle is associated with the right to freedom of expression guaranteed by s 2(b) of the *Charter*. It is clear that members of the public must have access to the courts in order to freely express their views on the operation of the courts and on the matters argued before them.³⁶

In a similar vein, in *Edmonton Journal v Alberta (Attorney-General)*, Cory J stated that

members of the public have a right to information pertaining to public institutions and particularly the courts. ... It is only through the press that most individuals can really learn of what is transpiring in the courts. They as ‘listeners’ or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the

³² The media’s profit motive means that the alignment between the media’s interest and the public interest is not as accurate or altruistic as counsel appearing for media organisations might suggest. This idea is developed below.

³³ The role of the media vis-à-vis the courts is considered below.

³⁴ *West Australian Newspapers Ltd v Western Australia* [2010] WASCA 10 [30].

³⁵ [2007] 3 SCR 253 [88].

³⁶ *Ibid.* See also *Ruby v Canada (Solicitor General)*, [2002] 4 SCR 3 [53]; *Guardian News and Media Ltd, Re HM Treasury v Ahmed* [2010] UKSC 1 [34].

receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.³⁷

In *Richmond Newspapers, Inc v Virginia*, Brennan J of the United States Supreme Court stated that the court's 'special solicitude for the public character of judicial proceedings' was 'bottomed upon a keen appreciation of the structural interest served in opening the judicial system to public inspection' and impelled by the 'classic protections afforded by the First Amendment to pure communication'.³⁸

The Australian media are more constrained in their ability to argue along free speech lines, as Australian courts have been generally reluctant to accept the proposition that open justice is an aspect of free speech. The most overt statement to this effect was made by Spigelman CJ in *John Fairfax Publications Pty Ltd v Ryde Local Court* where he said that 'the principle [of open justice] has purposes related to the legal system. Its purposes do not extend to encompass issues of freedom of speech and freedom of the press'.³⁹ Moreover, freedom of expression is not enshrined in a bill of rights and is protected only via an implication in the *Constitution*, and then only in relation to political communication. The upshot is that, in Australia, the principle of open justice remains more closely tied to its contribution to the administration of justice than in the United States or Canada.⁴⁰ Conversely, in jurisdictions where open justice is an aspect of constitutionally protected speech, the free speech arguments are less anchored to the disciplining effect that open justice has on the participants in a trial than they are in Australia, and more focused on media organisations and the public as independent beneficiaries of the right of free speech.

III THE HISTORICAL RELATIONSHIP BETWEEN THE MEDIA, THE COURTS AND THE PUBLIC

Open justice has a very long history — so long, in fact, that its precise origin is unclear. In *Terry v Persons Unknown*, Tugendhat J described it as 'one of the oldest principles of English law', 'going back to before Magna Carta'.⁴¹ In *Raybos v Jones*, Kirby J declared that '[t]he courts of England were open from

³⁷ [1989] 2 SCR 1326, 1339–40.

³⁸ 448 US 555, 592 (1980).

³⁹ (2005) 62 NSWLR 512 [60]. *Contra Re Bromfield, Stipendiary Magistrate; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153, 164 (Malcolm CJ).

⁴⁰ *West Australian Newspapers Ltd v Western Australia* [2010] WASCA 10 [30].

⁴¹ [2010] EWHC 119 (QB) [106].

the earliest times', and pointed to evidence of the existence of open justice in both the Saxon and Norman periods.⁴² In *Richmond Newspapers, Inc v Virginia*, Burger CJ traced it back 'beyond reliable historical records'.⁴³

The history of the news media is more recent. It is generally traced back to the development of the movable type printing press by Johannes Gutenberg in the mid-1400s. However, it was not until the 1600s that newspapers began to be published, and it was not until the development of the telegraph in the 1800s that news was able to be transmitted quickly across distances. The New Zealand Law Reform Commission observed that:

The 'news media' has existed as a distinct commercial entity for only a relatively short period in historical terms. Its evolution is inextricably tied to the development of the commercial printing press in the 17th and 18th centuries.⁴⁴

Since the news media did not exist when open justice first developed, in its original inception open justice chiefly meant that persons were freely permitted to attend and watch judicial proceedings. It appears that people readily availed themselves of this opportunity. In *Richmond Newspapers, Inc v Virginia*, Burger CJ commented that attendance at court was once 'a common mode of "passing the time"'.⁴⁵ While courts today remain open to the public, very few members of the public choose to attend. The reasons for this are likely to be twofold: first, members of the public no longer have the time, opportunity or inclination to attend judicial proceedings;⁴⁶ and, second, those who do have an interest in the courts can obtain information about their workings without the necessity of personal attendance, due to the technological developments that have made it possible for the media to rapidly disseminate information to mass markets. The upshot is that the direct relationship that once existed between the courts and the public has been

⁴² (1985) 2 NSWLR 41, 50–2.

⁴³ 448 US 555, 564 (1980). See also Radin, above n 12.

⁴⁴ New Zealand Law Commission, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, Issues Paper No 27 (2011) [4.6].

⁴⁵ 448 US 555, 572 (1980). See also Lord Neuberger, above n 19, 268. For a fascinating account of public attendance at English courts over the course of time see Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011) ch 5.

⁴⁶ See, eg, *Police v O'Connor* [1992] 1 NZLR 87, 95; *Canadian Broadcasting Corporation v New Brunswick (Attorney-General)* [1996] 3 SCR 480 [23]–[26]; Sir Ivor Richardson, 'The Courts and the Public' (1995) 5 *Journal of Judicial Administration* 82, 89. Lord Neuberger has proffered some reasons for this lack of interest, including the 'vast quantity' of home entertainment, greater opportunities for travel and 'the increased tempo of life', which mean that court cases do not satisfy the demand for quick solutions: Lord Neuberger, above n 19, 268.

largely displaced;⁴⁷ the modern public relies heavily — often exclusively — on the news media to provide it with information about the courts.⁴⁸ Accordingly, it is not possible to engage in a serious assessment of the principle of open justice and its various manifestations without reference to the traditional media.⁴⁹

The rise of the mass media and their assumption of the role of intermediary between the courts and the public raise a number of questions about the nature of the relationship between the courts and the media, and the media and the public. This article will examine these relationships and their impact on the principle of open justice. It will also investigate whether any meaningful form of direct relationship exists between the courts and the public and, if so, whether it is capable of producing outcomes for open justice that are less likely to ensue when information about the courts is mediated by the media.

It is important to bear in mind that, were it not for the principle of open justice, these questions simply would not arise, as it is the principle of open justice that has spawned the various access and dissemination rights that have produced this tripartite relationship. However, the principle of open justice does not prescribe how and by whom these rights are exercised. Moreover, it does not stipulate the responsibilities, if any, of those who choose to access the courts and disseminate information about them. Nor does it determine whether judges have any obligation to advance the principle of open justice other than to recognise and observe its requirements when acting in a judicial capacity.

IV THE MUTUAL DEPENDENCE OF THE MEDIA AND THE COURTS

It has often been noted that the courts and the media enjoy a mutually dependent, even symbiotic, relationship.⁵⁰ Where there are constitutional rights that support the media, the media depend on the court to be the

⁴⁷ However, technological developments have provided the courts with an unprecedented opportunity to reinstate a direct liaison with the public. These developments are discussed below.

⁴⁸ The public also develops impressions about the courts from the entertainment media as well as the news media, primarily through watching television shows and movies that feature courtroom drama.

⁴⁹ The advent of Web 2.0 means that dissemination of court reports and commentary on the judicial system to large audiences is no longer the sole province of the traditional media.

⁵⁰ Justice John Basten, 'Court and Media Relationships' (Speech delivered at the National Judicial College, Beijing, 30 October – 4 November 2005) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_basten301005>.

guardian and expositor of those rights.⁵¹ Even in Australia, which lacks an express constitutional guarantee of freedom of expression, the media still depend on the law and the courts for the protection of free speech and bear the consequences when it is not accorded.⁵² On a more pragmatic level, the media are the beneficiaries of the ‘rich source of human drama’⁵³ that court cases can be relied on to provide on a daily basis.

For their part, the courts rely on the media to attend and report their proceedings to the public. Some judges readily acknowledge this dependence and have variously described the media as ‘the eyes and ears of the general public’,⁵⁴ the ‘window of the courts to the world’⁵⁵ and the ‘watchdog of justice’.⁵⁶ Judge Brennan of the United States Supreme Court wrote that

the Court has a concomitant need for the press, because through the press the Court receives the tacit and accumulated experience of the nation, and — because the judgments of the Court ought also to instruct and inspire — the Court needs the medium of the press to fulfill this task.⁵⁷

Similarly, the Lord Chief Justice of England and Wales, while stressing the critical importance of an independent judiciary and an independent press to the upholding of the rule of law, emphasised the crucial importance to society of the engagement between the judiciary and the media.⁵⁸ Other judges have embraced the role of the media in reporting the courts’ activities with less

⁵¹ In *Pennekamp v State of Florida*, 328 US 331, 335–6 (1946), Frankfurter J stated: ‘The freedom of the press, in itself, presupposes an independent judiciary through which that freedom may, if necessary, be vindicated’.

⁵² One of the main bones of contention between the courts and the media in terms of free speech protection is the courts’ longstanding refusal to accord journalists an evidentiary privilege which would entitle them to refuse to reveal their sources in a court of law. Journalists maintain that the courts’ refusal to afford them such a privilege has a detrimental effect on free speech, as it disrupts the free flow of information to themselves, and ultimately, to the public. Recent improvements to the journalists’ position in a number of Australian jurisdictions have come from legislatures, not the courts.

⁵³ Roderick Campbell, ‘Access to the Courts and its Implications’ (1999) 1 *UTS Law Review* 127, 128.

⁵⁴ *Attorney-General (UK) v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 183.

⁵⁵ P D Cummins, ‘The Benthamite Principle of Open Courts’ (2007) 142 *Victorian Bar News* 53, 55.

⁵⁶ Lord Denning, ‘A Free Press’ (1984) 17 *Bracton Law Journal* 13, 13.

⁵⁷ William J Brennan Jr, ‘Why Protect the Press?’ (1980) 18 *Columbia Journalism Review* 59, 59.

⁵⁸ Lord Judge, Lord Chief Justice of England and Wales, ‘The Judiciary and the Media’ (Speech delivered at Jerusalem, 28 March 2011) <www.bfhu.org/images/download/lcj-speech-judiciary-and-the-media.pdf>.

enthusiasm and would probably make admissions of reliance on the media in more grudging terms.⁵⁹

The fact that the media and the courts acknowledge their mutual dependence, whether positively or with misgivings, does not mean that there is a consensus regarding their respective roles and responsibilities or the extent, if any, to which they should work in conjunction with each other. Nevertheless, the nature of their relationship has implications for open justice and the degree to which it serves its intended purposes.

A *The Proper Role of the Media vis-à-vis the Courts*

While neither institution would balk at the proposition that when the media report proceedings in the courts, they should do so in a fair, accurate, responsible and objective manner,⁶⁰ what is likely to be contested is the proper role of the media vis-à-vis the courts. Are the media apologists for the courts? Should the media shoulder responsibility⁶¹ for educating the public about the courts? Or are the media simply free to treat the courts as a source of news?

While it is theoretically possible that a judge might hold the view that the media should act as defenders of the courts, the overwhelming majority of judges appreciate that if the media are to fulfil their role as the fourth estate, such an alignment between the media and the courts should be neither sought nor desired.⁶² For their part, media organisations value their independent

⁵⁹ That there is judicial disillusionment with the media is acknowledged in Justice Michael Kirby, 'Improving the Discourse between the Courts and the Media' (Speech delivered on the presentation of the Victorian Legal Reporting Awards, Library of the Supreme Court of Victoria, Melbourne, 8 May 2008).

⁶⁰ Journalists' codes of ethics, broadcasting codes of practice and newspapers' editorial policies inevitably espouse these principles. The existence of a qualified privilege for fair and accurate reports in defamation suits and the existence of a ground of exoneration from sub judice contempt for fair and accurate reports demonstrates that the courts expect (and reward) fairness and accuracy.

⁶¹ The word 'responsibility' is not used here in a legal sense. Rather, it refers to a perception of the media's proper role.

⁶² See, eg, Sir Gerard Brennan, 'The Third Branch and the Fourth Estate' (Lecture delivered at the Faculty of Law, University College, Dublin, 22 April 1997) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_irish.htm>; Daryl Williams, 'The Courts and the Media: What Reforms Are Needed and Why?' (1999) 1 *UTS Law Review* 13, 15; Patrick Keyzer, 'What the Courts and the Media Can Do to Improve the Standard of Media Reporting of the Work of the Courts' (1999) 1 *UTS Law Review* 150, 151; Lord Judge (Speech presented at Society of Editors Annual Conference, Stansted, 16 November 2009) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-society-editors-nov-2009.pdf>>.

watchdog status and would undoubtedly fiercely resist being cast in the role of a ‘broadsheet’ for the courts, and rightly so.

Whether the media’s proper role is that of independent educator or news disseminator is a more difficult question, the resolution of which has several consequences.⁶³ One consequence pertains to selection. If the media’s function is to educate the public about the courts, one would expect that cases would be selected for coverage based on their significance to the public rather than their news value. Thus a tax decision that has important implications for the public would be reported over a decision concerning a trivial assault committed by a celebrity that has no real ramifications other than that it panders to public curiosity. Conversely, if the media are just after news, they will report those cases that possess ‘news values’.⁶⁴ Research in the United Kingdom and the United States suggests that, more often than not, the media report extraordinary, newsworthy proceedings and tend to ignore ordinary, routine cases that may have educative value.⁶⁵

Discerning the role of the media also has implications for the *manner* in which cases are reported. As an educator, the media would be expected to provide detailed coverage of a case and to explain the process by which the decision was reached, not merely the outcome. They would also act as a forum for illuminating debate about the courts.⁶⁶ On the other hand, media organisations that perceive themselves as entitled to treat the courts as a source of news fodder would not see themselves as educators, and may not assume an obligation to report a case in terms that convey the reasoning that underlies the decision or to explain its likely impact on the public. In fact, they might regard education and news as being at odds with each other. They might consider that a court that does not perform well or that delivers unpopular decisions creates more news than a court that hands down unobjectionable ones.⁶⁷ Given that public confidence in the courts — one of the aims of open justice — is boosted by accounts that reflect well on the courts, it does not bode well for the courts if media organisations focus to an

⁶³ Many of these consequences are elucidated in the panel discussion ‘Should We Dance? The Courts, the Community and the News Media’ (1996) 80(1) *Judicature* 30.

⁶⁴ For a discussion of what are generally considered to be news values see Jane Johnston and Rhonda Breit, ‘Towards a Narratology of Court Reporting’ (2010) 137 *Media International Australia* 47; Leslie J Moran, ‘Mass-Mediated ‘Open Justice’: Court and Judicial Reports in the Press in England and Wales’ (2013) 33(2) *Legal Studies* 1.

⁶⁵ Moran, above n 64, 10 citing research by William Haltom, *Reporting on the Courts: How the Mass Media Cover Judicial Actions* (1998) 168 and Keith Soothill and Sylvia Walby, *Sex Crime in the News* (Routledge, 1991) ch 4.

⁶⁶ New Zealand Law Commission, above n 44 [4.27]–[4.28].

⁶⁷ It has been noted that if things are proceeding smoothly, the likely reaction from the media is a lack of interest: Zdenkowski, above n 18, 390.

unjustified extent on cases that expose the failures of the judicial system rather than those that showcase its successes.⁶⁸

It is difficult to gauge the courts' opinion on the proper role of the media, since judges rarely express considered views on the matter. In truth, they probably harbour a range of private views. The media's opinion on this issue is likely to vary according to the context in which the issue arises. This is due to the dual nature of media organisations which are generally privately owned and operated enterprises that, nevertheless, perform a public service.⁶⁹ The tension between performing a public service and running a business for profit is considered in greater detail below. Suffice it to say that, when they are in court championing the public's right to know, media organisations are quick to claim the role of educator, but when it comes to profit margins, they are likely to regard themselves as news disseminators.⁷⁰ To the extent that the media eschew an educative role, the educative function of open justice is not adequately achieved.

Thus far it has been assumed that the media are *capable* of operating as the primary vehicle through which the public is educated about the courts. Is this in fact the case? When one compares the *modus operandi* of the courts with that of the media, one might conclude that the latter are ill suited to act as purveyors of information about the former. Indeed, many judges are justifiably sceptical about the extent to which media coverage is capable of advancing the administration of justice and enhancing public appreciation of the work of the courts.⁷¹ The processes and rules of evidence are complex, often counterintuitive, and may be incomprehensible to an inexperienced journalist with no legal training.⁷² Judgments are the product of slow and

⁶⁸ There is undoubtedly an educative function in exposing abuses and incompetencies within the judicial system. However, if media organisations focus solely or primarily on such cases — which are likely to be the exception rather than the rule — then the public confidence in the courts will be unnecessarily and unjustifiably shaken.

⁶⁹ Public broadcasters are funded by the government, but they are usually established as independent statutory authorities and operate at arms' length from the government of the day.

⁷⁰ This statement assumes that there is a consensus within media organisations as to the proper role of the media. However, the reality is that reporters are more likely to perceive themselves as performing a public service, whereas editors and proprietors are more likely to prioritise the need for financial success.

⁷¹ See *R v Williams* [2007] VSC 139; Kenny, above n 21, 222.

⁷² The situation may not be as dire for media organisations that can afford dedicated court reporters. Over time, these reporters would acquire a familiarity with court processes and become adept at understanding the rules of evidence and reading and digesting judgments. However, the decline in profits, particularly in the print media, is being matched by a decline in dedicated court reporters: see, eg, Adam Wagner, 'A Corrective to Bad Journalism' (Paper presented at Justice Wide Open, Centre of Law, Justice and Journalism, City University London, 29 February 2012).

careful thought and reflection and are not easily understood or summarised. By contrast, the media's *modus operandi* involves 'an inbred preference for heat over light and simplicity over nuance',⁷³ tight deadlines, communication in sound bites and a penchant for advocating quick solutions to the most complex problems. Moreover, media reports 'tend to cluster around particular moments in the court process', such as verdicts and sentences, as these are 'moments of ultimate disposition',⁷⁴ that satisfy news values such as immediacy, dramatisation and simplification.⁷⁵

Many have acknowledged that 'the ways in which stories are told in court and retold by the media make a difference in how the law is understood'.⁷⁶ For example, Johnston and Breit have observed that courts and media use different language — formal in the courts and vernacular in the media — a fact which is due to their professional routines but which can result in a re-interpretation of the story by the media.⁷⁷ Nobles and Schiff argue that the media and the law are two separate and closed systems of communication which simply cannot duplicate the meaning of each other's communications.⁷⁸ Courts and media construct communications about an event on different bases: the media encodes social life as information or non-information,⁷⁹ whereas the law encodes it as legal or illegal activity.⁸⁰ Because the media's basis for selection is information, legal communications are simply events to be reported for their news or information value; they are 'not reported by

⁷³ T Mauro, 'Five Ways Appellate Court Can Help the News Media' (2007) 9 *Journal of Appellate Practice and Process* 311, 312 as cited in: the Right Hon Beverley McLachlin, PC, Chief Justice of Canada, 'The Relationship Between the Courts and the Media' (Speech delivered at Carleton University, Ottawa, Ontario, 31 January 2012) <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>>.

⁷⁴ Moran, above n 64, 20.

⁷⁵ *Ibid*, citing news values identified by Steve Chibnall, *Law and Other News: An Analysis of Crime Reporting in the British Press* (Tavistock Publications, 1977). It should be noted that if reporters are permitted to tweet from inside the courtroom, the cases they cover are likely to be reported on a more ongoing basis. While the limit of 140 characters in a tweet presents its own problems, which are identified below, the advent of live text communication from the courtroom is likely to generate reports that are less clustered around these 'moments of ultimate disposition'.

⁷⁶ Johnston and Breit, above n 64, 49. The authors argue that, in light of this, the law and the media should pay more attention to narratives, narrative analysis and narrative theory.

⁷⁷ *Ibid*, 51–2.

⁷⁸ Richard Nobles and David Schiff, 'A Story of Miscarriage: Law in the Media' (2004) 31(2) *Journal of Law and Society* 221.

⁷⁹ More suitable terms might be 'newsworthiness' versus 'non-newsworthiness'.

⁸⁰ Nobles and Schiff, above n 78, 226. See also Lieve Gies, 'The Empire Strikes Back: Press Judges and Communication Advisers in Dutch Courts' (2005) 32(3) *Journal of Law and Society* 450, 456–7.

reference to their meaning within law'.⁸¹ Nobles and Schiff maintain that this simply reflects the fact that there is no single reality of meaning: inevitably, legal events are assigned a different meaning in the law from that which they are given in the media.⁸²

These views were echoed by Justice Nicholson of the Family Court when he perceptively observed that the root cause of the state of unresolved tension that exists between the courts and the media

lies in the fundamental difference of method employed by each. The methodology of the law is offended by the methodology of the media, yet each considers the search for justice is best served by the method which it employs.⁸³

B The Changing Tone of Media Coverage of the Courts

There is widespread acknowledgement that recent years have witnessed a change in the way the media cover the courts. One reason is that we live in an age when the community demands greater accountability from its institutions, including the courts,⁸⁴ particularly in liberal democracies where courts have a central role to play in protecting human rights.⁸⁵ There has been a rapid decline in the respect accorded to judges and a greater readiness on the part of the media to engage in a critical examination of the courts, the judges and their decisions.⁸⁶ This phenomenon is not peculiar to the Australian media. In 1998, Justice Kirby observed that attacks on judges had become a 'universal phenomenon'.⁸⁷ The lack of restraint typically exhibited by users of social media has resulted in even more intemperate criticism of judges.⁸⁸ Schulz has conducted a number of studies into coverage of the courts by sections of the

⁸¹ Nobles and Schiff, above n 78, 228.

⁸² Ibid.

⁸³ R D Nicholson, 'The Courts, the Media and the Community' (1995) 5 *Journal of Judicial Administration* 5, 5.

⁸⁴ Williams, above n 62, 13.

⁸⁵ Mason, above n 9, 10.

⁸⁶ Justice Sackville maintains that there is nothing novel or recent about vehement criticism of the courts; it is just that the impact of criticism is more severe as a result of modern communications technologies: Ronald Sackville, 'The Judiciary and the Media: A Clash of Cultures' [2005] *Federal Judicial Scholarship* 6.

⁸⁷ M Kirby, 'Attacks on Judges — A Universal Phenomenon' (1998) 81 *Judicature* 238. See also Sir Anthony Mason, 'No Place in a Modern Democratic Society for a Supine Judiciary: Former Chief Justice Attacks Attempts to Muzzle Judges' (1997) 35(11) *Law Society Journal of New South Wales* 51.

⁸⁸ Gibson, above n 30.

Australian media and has detected a discourse of disapproval and disrespect and ‘a consistent pattern of reporting which inexorably demands that the justice system be modified’.⁸⁹ The media’s tendency to delegitimise the courts led her to conclude that:

It is no longer sufficient, or safe, to rely on traditional media to translate or deliver the information to the public, because they no longer just deliver an accurate record of events. Rather, court reports are now infotainment which is simplified by the use of the discourse of time to create a discourse of disrespect and control over the judicial process.⁹⁰

Open justice is not inimical to criticism of the judiciary and the courts; indeed, open justice facilitates critique — even encourages it — as a means of improving judicial performance where it is seen to be sub-standard. However, it was always taken for granted that the objective of the criticism was the pursuit of truth.⁹¹ Today, this is not necessarily the case. Indeed, Handsley has stated that ‘journalists do not typically see it as their role to provide a balanced, accurate picture of the judiciary and their activities’.⁹² If criticism is unfounded, ignorant and engaged in primarily for the sake of entertainment or a good story, this suggests that the principle of open justice is being exploited by the media to facilitate outcomes for the courts that gainsay what it is intended to produce. There are a number of such outcomes. First, inaccurate, uninformed, strident or even reckless criticism of the judicial system has a corrosive effect on public confidence in the courts and in the laws they administer.⁹³ A tendency towards distortion by the media is particularly evident in the recurrent clamour over light sentences, where the media frequently fail to communicate to the public that punishment of an offender is not the sole purpose of a sentence and that judges are obliged by sentencing

⁸⁹ Pamela D Schulz, ‘Rougher Than Usual Media Treatment: A Discourse Analysis of Media Reporting and Justice on Trial’ (2008) 17 *Journal of Judicial Administration* 223, 223.

⁹⁰ Pamela Schulz and Andrew Cannon, ‘Public Opinion, Media, Judges and the Discourse of Time’ (2011) 21 *Journal of Judicial Administration* 8, 18. It has also been noted that any delegitimation of the courts by the media makes it easier for the other arms of government to encroach on the judicial role, because they believe they will have public backing in doing so: Chris Merritt, ‘The Courts and the Media: What Reforms Are Needed and Why?’ (1999) 1 *UTS Law Review* 42. That such a tendency exists is evident in federal and state government reactions to the High Court’s decision in *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁹¹ Kirby, above n 87, 241.

⁹² Elizabeth Handsley, ‘The Media and Public Misconceptions about the Judiciary’ (2001) 6 *Media and Arts Law Review* 97, 103.

⁹³ In fairness to the media, it is necessary to distinguish between ‘reportage of alarmist or extremist opinions by the media and expression of alarmist or extremist opinions by the media’. The media are entitled to do the former but should not do the latter: Keyzer, above n 62, 151.

legislation to attempt to achieve other purposes, including the rehabilitation of the offender.⁹⁴

Second, as explained above, the most important and longstanding rationale for the principle of open justice is that openness exerts pressure on judges to discharge their judicial duties in a proper manner because they know that they are liable to be exposed if they do not. However, proper behaviour on the part of a judge entails the judge acting in an unbiased way, capably, courteously, and attentively, not inappropriately questioning witnesses, properly explaining the law to the jury, properly applying the law to the facts, promptly handing down judgments and so forth. It does not demand the delivery of outcomes that draw accolades from the media. This does not mean that community reaction should be ignored — the principle of open justice endorses community sentiment as a disciplining force — but there is a critical distinction between being accountable for the proper performance of one's duties and being popular or uncontroversial. To the extent that media reports castigate judges for decisions or sentences that fail to attract community approval, and to the extent that judges succumb to this pressure, open justice is not yielding the benefits that it is designed to produce.

Third, a lack of public confidence in the courts brought about by media criticism makes it

less difficult for the government of the day, or the legislature ... to introduce legislation which gradually restricts the discretion available to be exercised by a judge and eventually, in effect, instructs him on how his responsibilities should be exercised.⁹⁵

If this occurs, 'how ... will the citizen be sure that when he takes on the government of the day, or the large institutions of the state, that [sic] the judge before whom the litigation is being conducted is truly independent of the government or the large institution'?'⁹⁶

C *The Judicial Response to Media Reporting*

Irrespective of the role of the media in reporting court proceedings and the extent to which their *modus operandi* affects their ability to do so, the fact is

⁹⁴ See Karen Gelb, 'Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing' (Research Paper, Sentencing Advisory Council, 2006) [15]–[16]; Karen Gelb, 'More Myths and Misconceptions' (Research Paper, Sentencing Advisory Council, 2008); *WCB v The Queen* [2010] VSCA 230 [15]–[29].

⁹⁵ Lord Judge, above n 58.

⁹⁶ *Ibid.*

that the media remain, at present, the most significant bridge between the public and the courts.⁹⁷ Accordingly, judges have had to decide how they will respond to this reality, both in their judicial capacity and in terms of the assistance they are willing to give the media.⁹⁸

1 *How Judges React to Media Coverage in their Judicial Capacity*

Courts have developed exemptions from the law which are designed to enable the media to report court proceedings.⁹⁹ These exemptions include a ‘fair reports’ defence to a defamation action¹⁰⁰ and a ground of exoneration for sub judge contempt of court for fair and accurate reports of judicial proceedings.¹⁰¹ Special provision may also be made in legislation or rules of court for media representatives to inspect documents on the court record.¹⁰²

Judges can react to sub-standard media coverage of courts and cases in their judicial capacity only if legal boundaries are crossed. This will generally be the case only where a media organisation has breached a suppression order or committed a sub judge or scandalising contempt.¹⁰³ A sub judge contempt is committed where a media organisation publishes something about a case that has a real tendency to prejudice the administration of justice in that case. A scandalising contempt is committed where a media organisation publishes scurrilous abuse of a judge or a court or makes unfounded allegations of bias and impropriety that have a tendency to imperil public confidence in the

⁹⁷ Although many members of the public use the internet as their source of news, they are still most likely to visit sites that are operated by traditional media. However, this reliance on the traditional media may change over time.

⁹⁸ It is not being suggested that, when acting in a judicial capacity, judges have an unbridled discretion as to whether they will permit the media to have access to the courtroom or disseminate reports about cases. Rather, the focus of this section is on the provision of active judicial assistance that does not stem from the legal requirements of open justice.

⁹⁹ These exemptions are of general application, but have primary relevance to the media.

¹⁰⁰ This defence is now enshrined in the uniform defamation legislation, but it was originally a creature of the common law: *Wason v Walter* (1968) LR 4 QB 73. See *Civil Laws (Wrongs) Act 2002* (ACT) s 139; *Defamation Act 2005* (NSW) s 29; *Defamation Act* (NT) s 26; *Defamation Act 2005* (Qld) s 29; *Defamation Act 2005* (SA) s 27; *Defamation Act 2005* (Tas) s 29; *Defamation Act 2005* (Vic) s 29; *Defamation Act 2005* (WA) s 29.

¹⁰¹ See *Ex parte Terrill; Re Consolidated Press Ltd* [1937] SR (NSW) 255; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15; *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281; *R v Herald & Weekly Times Ltd* [2007] VSC 482.

¹⁰² See, eg, *Criminal Procedure Act 1986* (NSW) s 314.

¹⁰³ It is also open to an individual judge to institute a civil defamation action against the media. However, this is a decision for the individual judge and is not made on behalf of the judiciary as an institution.

courts. In *Civil Aviation Authority v Australian Broadcasting Corporation*,¹⁰⁴ Kirby J warned that the laws of contempt must not be employed as a means of eliminating poor or offensive journalism. In circumstances where there is no detriment to the administration of justice, the courts must resist the temptation to impose quality controls on the media and must permit the media to choose how they will report on cases or on the courts in general. In a similar vein, albeit in a different context, in *Guardian News and Media Ltd in Her Majesty's Treasury v Ahmed*, the United Kingdom Supreme Court affirmed that judges recognise that

editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.¹⁰⁵

2 *Extra Judicial Action to Assist the Media*

Traditionally, the courts have remained distant and aloof from the media, and have been reluctant to assist them to act as an intermediary between themselves and the public. Judges have traditionally not made themselves available for media interviews nor responded to media criticism,¹⁰⁶ choosing to speak only through their judgments,¹⁰⁷ and courts have customarily not conducted their operations with the needs of the media in mind. This detachment was regarded by courts as necessary to preserve judicial impartiality. It traditionally fell to the Attorney-General as Chief Legal Officer of the Crown to defend the judiciary against unwarranted attack by the

¹⁰⁴ (1995) 39 NSWLR 540, 556–7.

¹⁰⁵ [2010] UKSC 1 [63].

¹⁰⁶ This practice was given formal status in a letter written by the Lord Chancellor, Lord Kilmuir, in 1955. The Lord Chancellor's edict became known as the Kilmuir rules. The letter was understood to apply to all media, even though it was addressed only to the Director-General of the BBC. The rules are reproduced, with comment, in A W Bradley, 'Judges and the Media — The Kilmuir Rules' [1986] *Public Law* 383. See also Sir Daryl Dawson, 'Judges and the Media' (1987) 10 *University of New South Wales Law Journal* 17; John Harber Phillips, 'The Judiciary and the Media' (1994) 20 *Monash University Law Review* 12, 12–13. The Kilmuir Rules were abandoned in 1987 during the Lord Chancellorship of Lord MacKay and are no longer followed in Australia: Nicholson, above n 83, 8.

¹⁰⁷ Of course judgments only address the legal issues that fall to be resolved in the case; they do not canvass wider issues concerning the role of the courts, court processes, the state of the law and so forth.

media or other branches of government. However, this role appears to be in decline.¹⁰⁸

In the 1990s, the nature of the courts' interaction with the media began to undergo considerable change. Judges are now more likely to agree to be interviewed about the work of the courts¹⁰⁹ and to respond to criticism,¹¹⁰ although opinions differ over the precise circumstances in which it is appropriate for judges to do so.¹¹¹ Courts are becoming progressively more pro-active in their relationship with the media and most have accorded the media a number of privileges and entitlements that exceed those enjoyed by the general public.

¹⁰⁸ Former Attorney-General Daryl Williams did not regard defence of the judiciary as a legitimate role of the Attorney-General, largely because of the political nature of the Attorney-General's office: Daryl Williams, 'Opening Ceremony Address' (Speech Delivered at Judicial Conference of Australia Colloquium 2001, Ayers Rock Resort, Uluru, 7 April 2001) <<http://www.jca.asn.au/attachments/williams.pdf>>. *Contra* Gerard Carney, 'Comment — The Role of the Attorney-General' (1997) 9(1) *Bond Law Review* 8; Sir Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33, 41; Alana McCarthy, 'The Evolution of the Role of the Attorney-General' (2004) 11(4) *Murdoch University Electronic Journal of Law* 1; Ben Heraghty, 'Defender of the Faith? The Role of the Attorney-General in Defending the High Court' (2002) 28 *Monash University Law Review* 206; John Hatzistergos, 'The Evolving Office of the New South Wales Attorney General' (2012) 86 *Australian Law Journal* 192. Defending the judiciary is regarded by some as a role that should be assumed by the Judicial Conference of Australia or the Australian Institute of Judicial Administration. Others have expressed doubts about the capacity of these bodies to discharge such a role: Nicholson, above n 83, 17; Kenny, above n 21, 222. There is also disagreement over the circumstances in which the judiciary should be defended. The issues are canvassed at length in James Plunkett, 'The Role of the Attorney-General in Defending the Judiciary' (2010) 19 *Journal of Judicial Administration* 160.

¹⁰⁹ Of course judges still do not comment on cases they have adjudicated.

¹¹⁰ A notable example is Chief Justice Nicholson, who assumed responsibility to defend the Family Court from unwarranted public attack: Alastair Nicholson, 'Family Law in the Looking Glass' (Speech delivered at the Annual Family Law One-Day Seminar, NSW Young Lawyers, Sydney, 10 March 2001) 8 <<http://www.familycourt.gov.au/wps/wcm/resources/file/ebb86f0486b6b71/younglawyers.pdf>>. More recently, Justice Whelan, former head of the Adult Parole Board, gave a radio interview in which he defended the Board following the release of a scathing report by Justice Callinan: Adrian Lowe, 'Parole Board Hits Back over Ian Callinan's Scathing Report', *The Age* (Melbourne), 22 August 2013 <<http://www.theage.com.au/victoria/parole-board-hits-back-over-ian-callinans-scathing-report-20130822-2sclg.html>>. It may also be appropriate for a Chief Justice or a court's public liaison officer to contact the media to point out an instance of inaccurate reporting and to request a correction.

¹¹¹ See, eg, Harber Phillips, above n 106; B Teague, 'The Courts, the Media and the Community — a Victorian Perspective' (1995) 5 *Journal of Judicial Administration* 22; Kenneth Hayne, 'Let Justice Be Done without the Heavens Falling' (2001) 27 *Monash University Law Review* 12; Sackville, above n 86.

A multiplicity of motives may underlie the courts' heightened preparedness to assist the media. It may emanate from a belief that the media are a 'public of the court in their own right with legitimate needs to be satisfied'¹¹² or that the media have a positive educative role to play and that the courts have an obligation to assist them to discharge it.¹¹³ It may emanate from a view that public confidence can be won and maintained only if the judges make more effort to communicate via the media. As Justice McGarvie stated:

There is a great paradox in the Australian judicial scene today. While opinion is unanimous that the judicial system must have the confidence of the community and that its real, as distinct from its formal, authority comes from that confidence, practically nothing is done to provide the public with the information from which that confidence would grow.¹¹⁴

Alternatively, it may stem from a conviction that 'the courts must do this because Australians have a democratic right to be told what the courts are doing'.¹¹⁵ On a less lofty note, it may simply represent a judicial capitulation to the age of consumerism or a collective judicial resignation to the reality that the media is the primary interface between the courts and the public and that assistance should be provided to reporters in the hope that this will reduce the incidence of inaccurate, sensational, unfair or unduly critical reporting.

Whatever the motive, many Australian courts have adopted measures that are designed to assist the media to report the work of the courts. Most Australian courts have appointed public information officers (PIOs).¹¹⁶ This has generated debate as to the precise role of PIOs: do they primarily exist to benefit the court or to assist the media? If the former, then PIOs are open to the criticism that they are 'spin doctors' for the courts.¹¹⁷ If they are facilitators for the media, this creates a potential for the media to become unduly reliant on their assistance, to the point where the media loses control

¹¹² Parker, above n 21, 19.

¹¹³ See McLachlin, above n 73. See also John Doyle, 'The Well-Tuned Cymbal' in H Cunningham (ed), *Fragile Bastion* (Judicial Commission of New South Wales, 1997) <<http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbdoyle.htm>>.

¹¹⁴ McGarvie, above n 22, 267.

¹¹⁵ Doyle, above n 15, 26.

¹¹⁶ Superior courts in most jurisdictions employ a PIO, although they are sometimes given a different title. See R D Nicholson, 'Judicial Independence and the Conduct of Media Relations by Courts' (1993) 2 *Journal of Judicial Administration* 207; M E J Black, 'Letting the Public Know — the Educative Role of the Courts' (1994) 1(2) *Canberra Law Review* 165, 170–2; Jane Johnston, 'The Court–Media Interface: Bridging the Divide' (2008) 30(1) *Australian Journalism Review* 27.

¹¹⁷ Brennan, above n 108, 40.

of the news agenda.¹¹⁸ Other forms of curial assistance include: publishing guidelines for reporting for the benefit of the media;¹¹⁹ providing reporters with special seating in courtrooms;¹²⁰ permitting representatives of the news media to be present at hearings held in camera;¹²¹ providing online access to listings of cases; and adopting a generous attitude to the media's standing to challenge orders that, if made, would derogate from open justice.¹²²

Many superior courts provide the media with judgment summaries to aid accurate reporting of significant or high-profile cases, and some courts, such as the Supreme Court of Victoria, publish regular sentencing summaries. Courts in overseas jurisdictions have gone even further. The Supreme Court of Canada has a procedure in place whereby the President of the Canadian Parliamentary Press Gallery can request a lock up in advance of a Supreme Court judgment.¹²³ The Netherlands has dedicated press judges who are responsible for speaking about cases and judgments on behalf of the court.¹²⁴ To the extent that there is a high degree of dependency by the media on the extra judicial information that courts release, there is a danger that court reporting will become susceptible to influence by official sources, to the detriment of independent investigatory journalism.¹²⁵ Lest it be thought that these forms of assistance have given journalists trouble-free access to the courts, it should be noted that many journalists still claim that they experience great difficulty in gaining access to information, particularly documents on the court record.¹²⁶

¹¹⁸ These issues are explored at length in Johnston, above n 116.

¹¹⁹ These guidelines assist the media to comply with the law by drawing their attention to the legal restrictions on covering the courts, such as suppression orders and contempt of court.

¹²⁰ Some courts provide the media with their own room, which has audio and video feed from the courtroom.

¹²¹ See, eg, *R v Waterfield* [1975] 2 All ER 40.

¹²² See, eg, *Re Bromfield, Stipendiary Magistrate; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153.

¹²³ See Supreme Court of Canada, *Resources for Media Procedure for Lock-Ups* <<http://www.scc-csc.gc.ca/media/decisions/lu-hc-eng.asp>>. This procedure was adopted by the Australian High Court on one occasion: Dawson, above n 106, 25.

¹²⁴ De Rechtspraak, *Press Guidelines* (2013) <<http://www.rechtspraak.nl/English/Publications/Documents/pressguideline.pdf>>. Press judges do not speak about cases or judgments in which they themselves have been involved. See Gies, above n 80. Gies notes the conflict over who is best placed to act as the guardian of the courts: a judge with legal expertise or a communications professional with media expertise: at 468.

¹²⁵ Gies, above n 80, 472. Gies notes that this source dependency is well documented in journalist/police relations: at 457.

¹²⁶ Anecdotal accounts of such difficulties have been published by the Australia's Right to Know Coalition: Prue Innes (Chair) and Australia's Right to Know Coalition, *Report of the Review of Suppression Orders and The Media's Access to Court Documents and Information*

Recently, courts have come under increasing pressure to allow journalists to tweet or live blog from within the courtroom, thereby enabling them to report on court cases in real time. Journalists argue that this ensures their right to report, which is a critical application of the principle of open justice. Whether journalists should be permitted to tweet or blog was initially a matter for the presiding judge in the case in which the request was made, in the exercise of his or her inherent or implied powers. Judicial responses were varied and inconsistent. While Cowdroy J allowed journalists to tweet from the Federal Court in *Roadshow Films Pty Ltd v iiNet Ltd*,¹²⁷ they were not permitted to tweet from the High Court during the hearing of the appeal in that case. Journalists were also warned by the Magistrate not to tweet in the Melbourne Magistrates' Court during Simon Artz's committal hearing in late 2011,¹²⁸ as the Magistrate was concerned that statements made during the hearing might subsequently be suppressed or objected to and was anxious to ensure that they would not already have been tweeted.

Today, most courts have either developed policies on the use of live, text-based communications from within the courtroom or are in the process of doing so. For example, the United Kingdom Supreme Court generally permits tweeting from the courtroom provided it is unobtrusive and does not disrupt proceedings.¹²⁹ Other courts in England and Wales are governed by the Practice Guidance issued by the Lord Justice in December 2011,¹³⁰ paragraph 10 of which states:

It is presumed that a representative of the media or a legal commentator using live, text-based communications from court does not pose a danger of interference to the proper administration of justice in the individual case. This is because the most obvious purpose of permitting the use of live, text-

(13 November 2008). For similar comments in respect of United Kingdom courts see Mike Dodd, 'Open and Shut Justice' (Paper presented at Justice Wide Open, Centre of Law, Justice and Journalism, City University London, 29 February 2012) <<http://www.scribd.com/doc/97591726/Justice-Wide-Open-Mike-Dodd-Open-and-Shut-Justice>>; Heather Brooke, 'Secret Justice' (Paper presented at Justice Wide Open, Centre of Law, Justice and Journalism, City University London, 29 February 2012) <<http://www.scribd.com/doc/97590479/Justice-Wide-Open-Heather-Brooke-Secret-Justice>>.

¹²⁷ [2010] FCA 24 [4].

¹²⁸ Simon Artz was a policeman who stood accused of leaking details of a counter terror raid to *The Australian* newspaper in 2009.

¹²⁹ Supreme Court of the United Kingdom, *Policy on the Use of Live Text-Based Communications From Court* <<http://www.supremecourt.gov.uk/docs/live-text-based-comms.pdf>>.

¹³⁰ Lord Judge, the Lord Chief Justice of England and Wales, *Practice Guidance: The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting* (December 2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/lbcb-guidance-dec-2011.pdf>>.

based communications would be to enable the media to produce fair and accurate reports of the proceedings. As such, a representative of the media or a legal commentator who wishes to use live, text-based communications from court may do so without making an application to the court.¹³¹

New South Wales also takes a permissive approach.¹³² Other jurisdictions are less generous.¹³³

While use of social media within the courtroom allows journalists to impart a sense of immediacy to their reporting of a case, it also has a number of potential hazards. Some of these hazards are peculiar to social media, while others simply add to the risks that exist with all forms of reporting. These hazards arise from the fact that:

- The brevity of tweets makes it difficult to convey evidence and arguments accurately;¹³⁴
- Evidence that is challenged and subsequently ruled inadmissible or corrected may have already been tweeted/ posted;
- The making of a suppression order will be rendered futile if the information sought to be suppressed has already been tweeted;
- A witness who is sitting outside a courtroom awaiting their turn to testify might become acquainted with evidence as it is being given by another witness and adjust their own testimony accordingly;
- In the heat of the moment, reporters might breach statutory prohibitions on the naming of parties, or tweet information that has been disclosed to the court during a *voir dire* in the absence of the jury.¹³⁵

¹³¹ It should be noted that the Guidance only permits text-based forms of communication. Photographs and audio recordings are not permitted in the courtroom.

¹³² *Court Security Act 2005* (NSW) s 9A; *Court Security Regulations 2011* (NSW) reg 6B.

¹³³ The Canadian Press, 'Quebec Courtrooms to Become Twitter-Free Zones', 14 April 2013 <<http://www2.macleans.ca/2013/04/14/quebec-courtrooms-to-become-twitter-free-zones/>>.

¹³⁴ Judith Townend, 'Opinion: Legal and Ethical Issues for Televising and Tweeting Court' on *Inform* (24 April 2012) <<http://inform.wordpress.com/2012/04/24/opinion-legal-and-ethical-issues-for-televising-and-tweeting-court-judith-townend/>>.

¹³⁵ An experienced journalist will know not to do this, but untrained or inexperienced court reporters may not be aware of the danger and will not have the benefit of having their social media reports checked before publication.

Some of these pitfalls may affect the fairness, accuracy or legality of a report and therefore endanger the media organisation's protection from defamation and contempt liability. In a worst case scenario, they may jeopardise the trial.

It is interesting to note that while Justice Kirby supported the rendering of judicial assistance to the media, he warned that 'there are dangers in playing the media's game', because its mission 'will never be the same as that of the judges'.¹³⁶ While many have lauded the courts for implementing the abovementioned forms of judicial assistance, Schulz's research results indicate that the assistance has not improved the standard of reporting, leading her to suggest that the judiciary should 'avoid reliance on the media as a major conduit for communication with the public or to facilitate community understanding'.¹³⁷

D An Evolving Intermediary between the Media and the Courts: Litigants' 'Litigation PR'

When it comes to reporting on court proceedings, the garnering of information by journalists has traditionally been direct and first hand. Reporters sit in court, listen and take notes as a case unfolds, search documents on the court record at the court registry, then write or broadcast their reports. However, it is becoming increasingly common for litigants to use the media as part of their litigation strategy.¹³⁸ The formal practice by or on behalf of litigants of 'litigation PR' has been described as

managing the communications process during the course of any legal dispute or adjudicatory proceeding so as to affect the outcome or its impact on the client's overall reputation.¹³⁹

Litigation PR has been a feature of the litigation process in the United States for some time and is gaining popularity in the United Kingdom, New Zealand and Australia.¹⁴⁰ It is generally used in high profile civil litigation involving commercial litigants. To the extent that a reporter gleans his or her

¹³⁶ Kirby, above n 87, 242.

¹³⁷ Schulz, above n 89, 223. *Contra* Schulz citing Jane Johnston, *Communicating Courts: An Analysis of the Changing Interface between Court and the Media* (PhD thesis, Griffith University, 2004); Jane Johnston, 'Public Relations in the Courts: A New Frontier' (2001) 28(1) *Australian Journal of Communication* 109.

¹³⁸ See Simon Mount, 'The Interface between the Media and the Law' [2006] *New Zealand Law Review* 413, 418–9 for some New Zealand examples.

¹³⁹ James F Haggerty, *In the Court of Public Opinion: Winning Your Case with Public Relations* (Wiley, 2003) 2.

¹⁴⁰ See, eg, Mount, above n 138, 432–6.

information about a proceeding from a litigant's PR team, litigation PR interposes an intermediary between the courts and the media. One reason why reporters might be tempted to garner their information in this way is that newspapers can no longer afford to allow their journalists to spend days in court; it is simply too expensive in this era of declining newspaper circulation. Therefore, in long and complex cases, the media need to rely on someone to supply them with information. In cases where litigation PR is employed, this role is assumed by the parties' PR teams.¹⁴¹

A problem faced by reporters and parties is that, even if reporters do attend court, they may not see witnesses undergoing an examination in chief. This is because witnesses often give their evidence in chief by affidavit. If this is the case, reporters will only see witnesses being cross examined. This casts the witnesses in the worst possible light.¹⁴² While it is usually possible for a reporter to obtain a copy of the examination in chief — at least once it has been deployed in the proceedings — in a complex case this document may be very lengthy. A litigation PR person representing the party for whom the witness gave evidence can take a reporter through it quickly.¹⁴³

Litigation PR has a potentially damaging effect on the quality of reporting, since it means that information about the courts is being mediated by persons whose task it is to put their client's case to the media in the most favourable light, in the hope that the ensuing coverage will preserve their client's reputation in the court of public opinion.¹⁴⁴ This, in turn, affects the extent to which the aims of open justice can be achieved. It bolsters the argument for judicial assistance to be given to the media so that reliance on a litigant is less enticing to the media in this era of diminishing editorial budgets.¹⁴⁵ Even more fundamentally, if, as a result of pre-trial publicity, the case never goes to trial, it implies that the case was more appropriately decided by the court of public opinion.¹⁴⁶ This arguably usurps the role of the court.

¹⁴¹ A similar role might be assumed by a party's legal representatives: *ibid* 432–6.

¹⁴² Richard Elsen, 'The PRs Invade the Courtroom' (2001) 12 *British Journalism Review* 39, 40.

¹⁴³ *Ibid*.

¹⁴⁴ Chris Sheedy, 'Courting Public Opinion' (2006) *Management Today (Australian Institute of Management)* 25 <<http://svc031.wic011v.server-web.com/DisplayStory.asp?ID=592>>.

¹⁴⁵ Although it has already been suggested that an overreliance on judicial assistance can itself jeopardise independent journalism.

¹⁴⁶ Haggerty, above n 139, 12.

V THE RELATIONSHIP BETWEEN THE MEDIA AND THE PUBLIC

The relationship between the media and the public is complex and subject to differing interpretations. It has implications for open justice, as decisions concerning which cases are reported, how they are reported and the commentary that accompanies a report shape public perceptions of the work of the courts and therefore impact on the educative effect of the principle.

A *The Dual Role of the Media*

As observed above, when appearing in court to seek leave to inspect documents on the court record or to resist an application for an order that would diminish open justice, media organisations inevitably take the high moral ground and hold themselves out as performing a public service by arguing that they should be free to convey to the public that which the public has a right to know. In formal judicial proceedings, judges generally accept this argument at face value.

However, the position is more obscure than the media's arguments would suggest. The complexity arises from the two-sided nature of the media. In the words of C P Scott, former editor of the *Manchester Guardian*, written in 1921:

A newspaper has two sides to it. It is a business, like any other, and has to pay in the material sense in order to live. But it is much more than a business; it is an institution; it reflects and it influences the life of the community ... it has, therefore, a moral as well as a material existence, and its character and influence are in the main determined by the balance of these two forces.¹⁴⁷

This two-sided nature of the media pervades court reporting. It means that while media organisations undoubtedly endeavour to report cases of significance to the public, it is also true that they are driven by less lofty considerations, namely the need to make a profit in order to survive.¹⁴⁸ The need of media organisations to allocate their limited resources efficiently and to sell copy or attract audiences means that they must be selective about which cases they report and must report them in an abridged form in a manner most likely to capture and sustain the public's attention. This renders it

¹⁴⁷ This quote is reproduced in R Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (2012) [2.52]. The speech of C P Scott can be read in its entirety at <<http://www.guardian.co.uk/commentisfree/2002/nov/29/1>>.

¹⁴⁸ See Mount, above n 138, 415–6.

inevitable that the media will have a preference for cases that involve celebrities or high profile sportspeople, natural disasters, unusual occurrences and gruesome crimes against the person, over complex and dry decisions in fields such as constitutional law, taxation or trusts, notwithstanding that the latter decisions may have a more direct impact on the lives of members of the public. It is often perceived as a choice between being ‘worthy and dull’ and going out of business, or offering ‘a mix of news in all its forms and entertainment’.¹⁴⁹ The media are also selective about the way in which they report cases. As noted earlier, commercial imperatives impel the media to focus on outcomes, rather than the process by which a decision was reached, notwithstanding that it is the ratio decidendi that forms the law and therefore has the greatest implications for the public.¹⁵⁰

Although judges are cognisant of the harsh commercial realities that confront the media, their reactions to it vary. For example, Lord Hoffmann stated that the media’s ‘motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage’.¹⁵¹ Chief Justice Spigelman was less sympathetic, stating that the public interest arguments advanced by the media should be taken with a grain of salt:

When the media come before the Court invoking high-minded principles of freedom of speech, freedom of the press or the principle of open justice, it is always salutary to bear in mind the commercial interest the media has in maximising its access to private information about individuals.¹⁵²

B *The Extent to which Media Coverage of the Courts Shapes Public Opinion*

The media, the courts and the public have divergent views regarding the extent to which media coverage of court cases shapes the public’s opinion of the work of the courts. In keeping with their insistence that they serve the public, the media are likely to claim that they select and cover court cases in which they believe the public has an independent interest.¹⁵³ However, it has

¹⁴⁹ *Solicitor-General for New Zealand v Fairfax New Zealand Ltd* HC WN CIV 2008-485-000705 (10 October 2008).

¹⁵⁰ As Sir Gerard Brennan stated: ‘It is in the reasons for judgment rather than in the formal judgment or order of the court that one must search to find what the court is doing’: Sir Gerard Brennan, ‘The Third Branch and the Fourth Estate’ (Lecture delivered at the Faculty of Law, University College, Dublin, 22 April 1997) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_irish.htm>.

¹⁵¹ *R v Central Independent Television plc* [1994] Fam 192; [1994] 3 WLR 20.

¹⁵² *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 [76].

¹⁵³ Of course it is well understood that the media have a propensity to confuse the ‘public interest’ with what the public is interested in.

been argued that the media actually construct and generate public opinion, rather than reacting to opinions and preferences that have been independently formed by members of the community. In this way, the media actually dictate public perceptions of the courts.¹⁵⁴ Schulz describes the result as media constructed community concern.¹⁵⁵ In a similar vein, Gies doubts whether media portrayal of judges and their work can be assumed to be a 'reliable barometer of public opinion'.¹⁵⁶ In any event, public opinion is not homogeneous, but complex and diverse.¹⁵⁷

For their part, courts clearly proceed on the assumption that jurors are susceptible to believing what they read and hear in the media and have applied this assumption in cases of sub judice and scandalising contempt. Since jurors are drawn from the general populace, one might suppose that courts would ascribe the same degree of susceptibility to all members of the public.¹⁵⁸ This may account for the courts' increased willingness to assist the media to report cases accurately. However, studies suggest that jurors may not be as influenced by media coverage of a case as the courts have supposed,¹⁵⁹ and many have found that the public has a significant level of distrust of the media.¹⁶⁰ If this is the case, it may be that many members of the public do not passively accept the media's verdict on the shortcomings of the judicial system, thus suggesting that the media is not necessarily a surrogate for public opinion.

¹⁵⁴ Justice John Basten, 'Court and Media Relationships' (Speech delivered at the National Judicial College, Beijing, 30 October – 4 November 2005) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_basten301005>. See also New South Wales Law Reform Commission, 'Sentencing and Juries' (Issues Paper No 27, June 2006) [3.20].

¹⁵⁵ Schultz, above n 89, 227.

¹⁵⁶ Gies, above n 80, 456.

¹⁵⁷ New South Wales Law Reform Commission, above n 154 [3.11].

¹⁵⁸ The general public, however, is in a different position from jurors. Jurors sit in court and hear the case first hand; indeed, that is what they are required to do and is precisely what the law of contempt seeks to ensure is done. Open justice, in its modern form, is an exemplar of the opposite scenario, namely, that the public obtains its information about judicial proceedings from the media.

¹⁵⁹ Warren Young, Neil Cameron and Yvette Tinsley, *Juries in Criminal Trials*, New Zealand Law Commission Preliminary Paper No 37 (1999); M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of New South Wales, 2001).

¹⁶⁰ See, eg, the Edelman Trust Barometer 2012 *Annual Global Study*, which revealed that public trust in the media is low compared with other sectors (although it had risen slightly in the last year) and that the Australian public trusts the media to a significantly lesser extent than citizens in most other countries. Recent and reputable surveys of public opinion of media performance were summarised in Finkelstein, above n 147 [4.9]–[4.81]. This report confirmed that the Australian media has poor public standing, with the exception of the ABC, which is held in high esteem.

However, the fact that public confidence in the media is low does not necessarily negate the argument that the public is susceptible to media influence regarding the work of the courts. Unless members of the public have attended a judicial proceeding in person¹⁶¹ or had information relayed to them by someone who has, or have made independent inquiries about a case (such as reading the judgment or sentencing remarks that have been uploaded onto the internet by the court or by the Australasian Legal Information Institute ('Austlii')) they have no other basis upon which to form their opinions about the courts and their work. At most, they can suspend their judgment. To the extent that media reporting is inaccurate, superficial, sensational or biased, this does not augur well for the educative aim of open justice.

VI THE RELATIONSHIP BETWEEN THE COURTS AND THE PUBLIC

To this point this article has focused on the role of the media in giving practical substance to the principle of open justice. This section grapples with the role of the courts vis-à-vis the public. To what extent, if any, do courts have a responsibility to make their work directly known to the public?¹⁶²

It is possible that, when pressed, some judges might maintain that their sole responsibility is to do justice in the cases over which they preside rather than to educate the public. That is, they might regard open justice as a passive concept which obliges them to be exposed to public view and public reports, but which does not require them to take positive steps to explain themselves or to make their work known.¹⁶³ However, the initiatives adopted by courts in recent years indicate that most judges believe that they should accept some responsibility for educating the public about their work.¹⁶⁴ Some judges may think that the news media are most suited to undertake this role and that their own collective judicial energy is best expended in assisting the media to discharge it. Others may have a conviction that courts are best placed to do so

¹⁶¹ See Sharyn Roach Anleu and Kathy Mack, 'The Work of the Australian Judiciary: Public and Judicial Attitudes' (2010) 20 *Journal of Judicial Administration* 3. This article draws on the 2007 Australian Survey of Social Attitudes, which found, inter alia, that very few Australians have any firsthand experience of the courts, thus suggesting that most Australians derive their information about the courts from the media or from relayed accounts of others' experiences.

¹⁶² The 'public' that the judiciary serves is not confined to the media-viewing/reading/listening public, but encompasses all members of the community, not all of whom may be represented by the media: Kenny, above n 21, 209.

¹⁶³ Justice Doyle notes the existence of this view, although he does not agree with it: Doyle, above n 15, 27.

¹⁶⁴ Parker, above n 21, 146.

and that courts should therefore develop communications strategies that are aimed at building a direct relationship with the public.¹⁶⁵ This conviction may also betray a belief that speaking to the media is not necessarily the same as speaking to the community.¹⁶⁶

Whichever view a judge holds, the reality is that dwindling newspaper circulation and the consequent fall in profits has led to a significant decline in the number of specialised, experienced court reporters.¹⁶⁷ As a result, the courts are ‘losing the main source of dedicated and coherent media coverage of court proceedings and justice sector matters’.¹⁶⁸ Citizen journalists are inadequate replacements, as courts cannot assume that they possess the same level of training, expertise, professionalism and knowledge of contempt law and suppression orders as that possessed by dedicated court reporters. Moreover, they are not subject to layers of editorial control. Thus it seems inevitable that it will increasingly fall to the courts to directly inform the public about how they operate.

A *Recent Technological Developments*

The issue of whether the courts should endeavour to develop a more direct relationship with the public has not been a pressing one because, until recently, courts have not had the means of doing so, except in those circumstances where members of the public have made the effort to attend the courts. In that event, most courts offer an array of pamphlets, touch screen information and public tours, and frequently host school groups. They also participate in events such as Law Week by holding mock cases and conducting question and answer sessions with members of the public.

Three relatively recent technological developments have made it possible for the public to experience a more direct form of access to the courts that has not been feasible since the bygone era when people had the time and inclination

¹⁶⁵ For an example of the latter view see Mason, above n 9, 11; Black, above n 116, 168; Williams, above n 62, 15; Daniel Stepniak, ‘Court TV — Coming to an Internet Browser near You’ (2006) 15 *Journal of Judicial Administration* 218; Lord Neuberger, above n 19.

¹⁶⁶ Nicholson, above n 83, 18.

¹⁶⁷ Chief Justice Warren has noted that at the beginning of 2012, ‘the ABC halved its court coverage commitment to one reporter’ and that ‘very senior and experienced legal affairs reporters at the *Age* and *Herald Sun* retired’: Chief Justice Marilyn Warren, ‘Open Justice in the Technological Age’ (Speech delivered at the 2013 Redmond Barry Lecture, State Library of Victoria, 21 October 2013) <<http://www.supremecourt.vic.gov.au/find/publications/speech+-+open+justice+in+the+technological+age>>.

¹⁶⁸ *Ibid.*

to attend proceedings in person.¹⁶⁹ If the courts embrace these developments it will mean that they have come full circle, although the return will be to a virtual presence, rather than a face to face one.

1 *The Introduction of Television*

First, the introduction of television in the 1950s made it possible for judicial proceedings to be conveyed first hand and in full to the viewing public. While a media organisation that provided ‘gavel to gavel’ coverage would still be acting as an intermediary between the court and the public, its role would more closely approximate that of a conduit rather than a processor, interpreter or packager of information, although there would still be some selectivity in terms of camera angles among other things. By contrast, if the media were free to make their own decisions as to how they used footage of judicial proceedings, they would likely broadcast short excerpts, which would have the potential to be as selective, mediated and out of context as a summary of a case in the print media. This would not bring about the direct contact between the courts and the public that unedited coverage can deliver. These problems would be minimised if the media were required to abide by strict rules as to how footage of the courts could be used.¹⁷⁰

Unlike courts in the United States, Canada, New Zealand and the United Kingdom,¹⁷¹ Australian courts have persisted in their disinclination to allow their proceedings to be televised. The result is that judicial proceedings in Australia have been televised only spasmodically, on an ad hoc basis. This reluctance to allow cameras into the courtroom has meant that the electronic media have been relegated to conveying information about judicial proceedings to the public through the spoken word of court reporters (who usually deliver their reports from the street outside the court), in much the

¹⁶⁹ Although members of the public are now less likely to attend judicial proceedings in which they have no personal stake, it remains the case that high profile criminal cases attract the public to the courtroom. A recent example is the murder trial of Gerard Baden-Clay in the Supreme Court in Brisbane, where additional courtrooms had to be opened to house the public and a ticketing system introduced to prevent overcrowding: Daniel Winters, ‘Baden-Clay Murder Trial: Large Crowds in Court Evidence of a Healthy Legal System, Top Barrister Says’, *The ABC* (online) 11 July 2014 <<https://au.news.yahoo.com/a/24442435/baden-clay-murder-trial-large-crowds-in-court-evidence-of-a-healthy-legal-system-top-barrister-says/>>.

¹⁷⁰ The media are subject to stringent rules regarding their broadcasts of federal and state parliaments.

¹⁷¹ The United Kingdom has only recently reversed the ban on the recording and broadcasting of proceedings of a court or tribunal that was enshrined in s 41 of the *Criminal Justice Act 1925* (UK) (with the exception of the Supreme Court) and s 9 of the *Contempt of Court Act 1981* (UK). The *Crime and Courts Act 2013* (UK) confers power on the courts to lift the current restrictions on filming and broadcasting and allow filming under controlled circumstances: s 32.

same way as the press do through the printed word. This is notwithstanding the fact that the aural and visual nature of broadcasting would give the public a more direct sense of what has transpired than a verbal report in a highly summarised form.¹⁷²

Australian courts justify this stance on the basis that televised coverage entails greater risks. Concern has centred on the potential for cameras to disrupt proceedings and detrimentally affect the participants and the evidence, thereby altering both the nature and conduct of the proceedings. While some of these objections remain valid, others are becoming less convincing.

In light of the fact that members of the public acquire most of their news through electronic media, the electronic media regard it as somewhat ironic that they are not able to utilise the principle of open justice to their advantage to the same extent as the print media. Differences of opinion have been expressed as to whether open justice *requires* the court to permit the broadcast of court proceedings. As recently as 2009, the Court of Appeal of Western Australia opined that no such requirement existed:

The ordinary rule [that courts conduct their proceedings publicly and in open view] is satisfied if persons are free to attend court and report on the proceedings without restriction; it does not require the court to permit the broadcast (by television or otherwise) of court proceedings. Whether it justifies it is a different policy (not legal) question.¹⁷³

Others claim that the principle of open justice *does* require cameras to be permitted in the courtrooms, except where their presence would interfere with the proper administration of justice.¹⁷⁴

It is interesting to speculate on whether any liberalisation of the courts' restrictive stance would be matched by an interest on the part of the electronic media in providing extended broadcasts of judicial proceedings.¹⁷⁵ It is unlikely that media outlets would seek to broadcast cases in their entirety, even if this were permitted, since 'gavel to gavel' coverage is time consuming

¹⁷² Stepniak, above n 165, 222.

¹⁷³ *Re Hogan; Ex parte West Australian Newspapers Ltd* [2009] WASCA 221 [31].

¹⁷⁴ Edward Thomson, 'Does the Open Justice Principle Require Cameras to Be Permitted in the Courtroom and the Broadcasting of Legal Proceedings?' (2011) 3(2) *Journal of Media Law* 211.

¹⁷⁵ See Jane Johnston, 'Setting the Table Doesn't Mean the Guests Will Come to Dinner: Televised Courts in Australia' (Paper presented at the annual meeting of the International Communication Association, New York, May 2005) <http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=jane_johnston>.

and prosaic, and would not sustain the interest of audiences.¹⁷⁶ The media's main interest will likely lie in televising judgments and sentencing remarks in high-profile cases.

2 *The Advent of the Internet*

Second, the advent of the internet has made it possible for courts to bypass the mainstream media and to be publishers in their own right. Courts are now in a position to disseminate textual, audio and visual information about their history, personnel, structure and jurisdiction, webcast their proceedings and publish their judgments and sentencing remarks almost immediately and in their entirety directly to the public. Most courts have developed websites that provide a general introduction to the court, which often includes a brief history of the court, a description of its jurisdiction and place in the court hierarchy, a visual tour and biographical information about the judges. These websites help the public to glean general information about a court, as information of this nature has no news value and is therefore unlikely to find its way into the media.¹⁷⁷

To date, most courts have not exhibited a great deal of enthusiasm for webcasting their cases, using webcasting only on an ad hoc basis and generally only on ceremonial occasions, such as the admission of lawyers or the welcoming or farewelling of judges. However, there are indications that this is changing, at least in relation to the superior courts. For example, the Victorian Supreme Court has a sentencing and judgments portal on which certain sentences and judgments can be heard or viewed on demand. The opening addresses of certain class actions which involve large sections of the community — mainly trials arising out of the 2009 Black Saturday bushfires — are also available on the Court's website. In 2013, the High Court announced that it would begin to publish on its website audio-visual recordings of Full Court hearings heard in Canberra, other than applications for special leave. Recordings are made available within one business day after a hearing in order to 'allow for vetting of recordings to avoid the possibility of information which should not be published being published — such as a name which is the subject of a publication constraint'.¹⁷⁸ Other courts are disposed to use the opportunities afforded by the internet but have been impeded in doing so by budgetary constraints. For example, the Chief Justice of Western

¹⁷⁶ It is possible that this situation will change as digitisation technology spawns more television and radio channels, since in this emerging era of greater spectrum abundance, the demand for content will intensify and the need to attract a mass audience will abate.

¹⁷⁷ Williams, above n 62, 17.

¹⁷⁸ High Court of Australia, Press Release, October 2013 <<http://www.hcourt.gov.au/assets/news/MR-audio-visual-recordings-Oct13.pdf>>.

Australia recently expressed his deep concern at a decision of the Western Australian Attorney-General to ‘stop a project which would allow the Supreme Court to web stream cases live to the public’.¹⁷⁹

The Chief Justice of the Victorian Supreme Court recently announced a proposal to have a regular blog written for the court website by a retired judge, or perhaps someone from the ranks of the media or academia, ‘to create greater community understanding around controversial issues’.¹⁸⁰

Superior courts routinely upload the full text of their judgments and sentencing remarks onto court websites and/or supply them to Austlii.¹⁸¹ Courts have accommodated themselves to the internet by numbering the paragraphs in their judgments and assigning each case a media neutral citation. While the fact that judgments are available free of charge to the general public makes the courts more accessible to the community,¹⁸² the sheer number and complexity of cases that pass through the courts each day, coupled with the wealth of judgments that are uploaded, makes it likely that the public will continue to rely on the media to do the ‘hard yards’ of sifting through and reporting newsworthy cases.¹⁸³ However, it is open to the courts to use social media as a means of alerting followers to significant cases.

3 *The Advent of Social Media*

Courts around the world are currently wrestling with whether they should have an official presence on social media and, if so, how they will use this technology to communicate with the public.¹⁸⁴ Some of the questions that courts must resolve when deciding whether to use social media include: what types of content should be posted and how frequently; which social media platforms the court should use; and whether social media should be used for

¹⁷⁹ Supreme Court of Western Australia, Media Statement, 9 May 2013 <http://www.supremecourt.wa.gov.au/_files/Statement%20by%20the%20Hon%20Chief%20Justice%20Wayne%20Martin%20AC%209%20May%202013.pdf>.

¹⁸⁰ Chief Justice Marilyn Warren, above n 167.

¹⁸¹ The High Court also makes written submissions and transcripts of oral arguments available on its website.

¹⁸² For an account of how free accessibility was secured see Graham Greenleaf, Andrew Mowbray and Geoffrey King, ‘The Austlii Papers — New Directions in Law via the Internet’ (1997) 2 *The Journal of Information, Law and Technology* <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m67000113/bathurst211112.pdf>.

¹⁸³ Joe Mathewson, *The Supreme Court and the Press: The Indispensable Conflict* (Northwestern University Press, 2011) xv–xvi.

¹⁸⁴ Pamela D Schulz, ‘Trial by Tweet? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts’ (2012) 22 *Journal of Judicial Administration* 29. Whether journalists should be permitted to use social media to report on cases from within the courtroom is a separate question, albeit one which also has implications for open justice.

two-way communication.¹⁸⁵ The Supreme Court of Victoria has a Twitter feed and a presence on Facebook which are used to draw the attention of its followers to significant judgments, sentences, practice notes and webcasts, among other things.

Judges face the additional challenge of deciding whether it is appropriate for them to use social media in their professional or private capacity.¹⁸⁶ Extra-judicial comments on legal issues may result in allegations of apprehended bias being leveled against the judge, which may form the basis of an application to the judge to recuse himself or herself from a case or which may constitute the grounds for an appeal.¹⁸⁷

B Courts Should Take a Proactive Stance in Making Their Work Known to the Public

Given the nature of the media's *modus operandi*, discussed above, coupled with the decline in newspaper circulation and dedicated court reporters, courts should seize the opportunities afforded by these technological developments and attempt to instate a more direct relationship with the public. It is not suggested that courts should do this with a view to inviting the public to 'have a say' in how justice is administered. To invite such communication would suggest a two-way engagement with the community which hitherto has not characterised the work of the court. To conduct a two-way exchange with the public would be equally inappropriate today, despite the fact that modern technology can facilitate such a relationship. Clearly, the task of the courts is to apply the law to the cases that come before them, even if this produces a result that is favourable to an unpopular litigant or that appears to the layperson to be counterintuitive.¹⁸⁸

Rather, what is advocated is that courts take greater pains to make their work known to the public, provided this can be done without detriment to the administration of justice. This would expose the public to a wider variety of cases, give them a greater appreciation of the complexities of the issues that

¹⁸⁵ National Centre for State Courts <<http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/Social-Media/Home.aspx>>. This site is a repository of empirical information on how courts in the United States are currently using social media. It also provides information on the impact of social media on the courts, including the impact on juries and judicial ethics issues.

¹⁸⁶ Gibson, above n 30.

¹⁸⁷ See *ibid*, and the cases cited therein.

¹⁸⁸ It has, however, been suggested that there are cases where public opinion or changing social values 'can legitimately enter into a judicial officer's thinking', but generally courts must not be 'swayed by the mood of the moment': Parker, above n 21, 14.

arise for determination and assist them to understand that sentencing is not solely about punishment. Justice would be truly ‘seen to be done’.

There are, however, some drawbacks to the proactive stance that is being urged on the courts in the interests of open justice. First, information made available by the courts over the internet is going to come to the attention only of those who actively seek it. It is not thrust upon people in the same way as media reports of court cases that appear in newspapers or on television or radio news broadcasts are.¹⁸⁹ The media therefore remain in a stronger position vis-à-vis the public than the courts. By selecting the news that the public reads or views, they can impose unsolicited information on a passive audience. Thus it is likely that it will continue to be primarily through the media that the work of the courts will be made known to the wider public, at least for the foreseeable future.

Second, although it would be inappropriate for courts to use new media to engage in a two-way conversation with the public regarding the administration of justice, members of the public who use social media may not be content to be the passive recipients of information. It will be interesting to see over time whether courts that have chosen to relate to the public through social media are able to maintain an appropriate distance from public opinion.

Third, implicit in a proactive stance by the courts is an assumption that the ‘disconnect’ between the courts and the public is attributable to an information deficit among the public which can be corrected by the courts taking steps to directly inform the public about their work. However, the solution may not be that simple. It may be unrealistic to expect the public to be able to understand complex decisions that are the product of years of accumulated legal precedent, just as it would be unrealistic to expect the public to comprehend a surgeon’s detailed explanation of an operation or an accountant’s description of a complex tax minimisation scheme. The difference, however, is that the courts’ legitimacy rests on public confidence in a way that other vocations do not.¹⁹⁰ It has been suggested that judges should take steps to ensure that their judgments are ‘accessible through

¹⁸⁹ A court may offer members of the public the opportunity to subscribe to a system which alerts them to judgments, judgment summaries and other pertinent material uploaded by the court. The High Court’s alert system has 20 000 subscribers: High Court of Australia, *Annual Report 2012-2013* 17.

¹⁹⁰ The legitimacy of other branches of government also rests on gaining and maintaining public confidence, but the public has a direct opportunity to express or negate this confidence at the ballot box, with immediate effect. With the courts, however, confidence that is lost is hard to regain. The slate cannot be wiped clean the way it can with the executive and legislative branch of government, which are simply replaced with new personnel.

effective language' so as to secure an 'effective interaction between language and the law',¹⁹¹ but the extent to which this can be achieved is debatable. Nevertheless, the availability online of judgment summaries which are couched in less technical terms certainly assists the public to understand what the court has distilled as the essence of the decision. Moreover, webcasts of sentencing remarks — which are often the most reported and most controversial aspects of decisions — should be readily comprehensible to members of the public.

Fourth, Gies claims that court-driven initiatives rest on the supposition that there is 'a truthful way of portraying the work of judges'.¹⁹² However, she argues that there is controversy over 'what exactly counts as complete and legitimate understanding' and that people these days question the superiority of expert knowledge; indeed, they lack confidence in it. If so, this means that judges, not just journalists, 'are inevitably selective in their reality claims'.¹⁹³ Be that as it may, courts cannot be responsible for how people react to their work. They can only work to ensure that the picture presented to the public is, from their perspective, as accurate as possible.

VII CONCLUSION

This article has considered the nature of the relationships between the courts and the media, the media and the public, and the courts and the public. It has demonstrated that these relationships are complex and reveal an interweaving of cause and effect. While the principle of open justice has spawned these relationships, the way in which they operate is capable of either enhancing or diminishing the aims of open justice. To the extent that the media act as an intermediary between the courts and the public, the value of open justice, and its capacity to achieve its purposes, is only as good as the quality of the reporting.

While proactive behaviour on the part of courts is not a requirement of open justice, nor even one of its recognised manifestations, it is a strategy for maximising its benefits.¹⁹⁴ For that reason, the forging of a direct, unmediated

¹⁹¹ Marilyn Warren AC, 'The Obligation to Communicate: The Interaction between Language and the Law' (Richard Searby Oration, Deakin University, Victoria, 21 September 2010) <http://www.supremecourt.vic.gov.au/resources/7/e/7ed8f00044f76d9e9042f3067e306f2f/2010_richard_searby_oration_.pdf>.

¹⁹² Gies, above n 80, 456.

¹⁹³ Ibid.

¹⁹⁴ In light of the fact that open justice is a flexible principle which has the capacity to adapt to new circumstances, it may come to embrace public access to information about the courts through the internet and social media. Indeed, comments recently made by Chief Justice

engagement with the community merits serious consideration by the courts. The internet and social media have provided courts with the means of delivering a fuller and truer picture of their work to the public than the traditional media provide, and they should seize the opportunities to do so. The fact that they are reliant on an active, inquiring public to solicit this information should not dissuade them from pursuing this engagement. Indeed, the availability of this information may generate further interest.

Warren suggest that provision of such access by the courts has already become an application of the principle: Chief Justice Marilyn Warren, above n 167.