Is Sub Judice Passé?

Tobias Roberts

Traditional justifications for restrictions on media coverage look dubious in light of recent changes to the law of evidence.

The *sub judice* rule is traditionally justified as a necessary restriction on the media — one which ensures the right to a fair trial. Changes to the law of evidence under the *Evidence Act 1995* have rendered this justification tenuous. Aspects of news coverage which are regularly cited as prejudicial (and thus are prohibited) — such as revelations concerning prior criminal records, reputation or confessions — are all forms of evidence that are being ever more readily admitted formally in court under the new regime of evidence law. This fact coupled with some conceptual confusion surrounding the exceptions to the *sub judice* rule (such as coverage of committal hearings), all lead inexorably to the conclusion that the *sub judice* rule is in serious need of reform.

The sub judice rule and its justification

Before embarking on the intended critique, it is necessary to offer a brief explanation of the substance of the rule in question. Fair and accurate reporting of legal proceedings is a complete defence[1] as is the publication of information intended to warn the public of danger.[2] The prohibitions under the rule relate chiefly to reports and comments concerning things said or done outside the court which concern the matter at trial.

The principal justification for the *sub judice* rule is the belief the media would otherwise expose a jury to certain kinds of prejudicial information that would never pass legal standards of fairness. Some judicial pronouncements affirming this stance include:

- 'our system of justice, as Hinch knew, would not have allowed them [prior convictions] to be led in evidence and a jury which heard them would be discharged';[3]
- 'acquisition by a jury of knowledge of a prior conviction of the accused is usually regarded as causing such prejudice that the trial is invalidated thereafter';[4]
- Kirby J lists confessions as another type of material that should never be published during a criminal trial.[5]

Studies do indeed suggest that the kinds of information most likely to instil presumptions of guilt are reports of confessions and prior convictions,[6] yet it is precisely these kinds of prejudicial accounts that are now being formally adduced in court. If we accept Chesterman's cogent observation 'a major preoccupation of the *sub judice* rule is to act in aid of rules of evidence and criminal procedure which have been devised in support of the presumption of innocence', then clearly the *sub judice* rule needs to be altered to the extent that these rules of evidence have changed.

Changes to the law of evidence

In 1995 a series of significant alterations to the rules of evidence were introduced at the Commonwealth level by the *Evidence Act 1995* which has also provided a model for State legislatures to adopt. At the time of writing only NSW has enacted mirror legislation with its *Evidence Act*

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1995. From the Second Reading Speeches in the House of Representatives it is clear one of the purposes of the Act was to 'make it simpler to prove many facts'. In order to do this, the Act was intended to remove 'unnecessary restrictions on the admission of evidence'.[7]

Under the Act, a defendant's admissions form an exception to the hearsay rule, and are admissible under s.81 of the *Evidence Act 1995 (Cth)* provided it is first hand oral or documentary hearsay. The safeguards attached to the admissibility of this kind of highly damaging evidence — relating to the reliability of the admission (ss.84, 85 and 86) and the warning contained in s.165 — may well be inadequate given they are discretionary and fall within an Act with an overriding 'law and order' tenor. Similarly, the prosecution seems to be enjoying greater latitude in the tendering of evidence about prior convictions. Evidence of the conduct which led to prior convictions — tendency and coincidence evidence — will be admissible provided the probative value of the evidence substantially outweighs its prejudicial effect (s.101). This balancing act will be unlikely to afford a defendant much protection if *Pfennig v The Queen* (1995) 127 ALR 99 is any indication, for in this case evidence of other 'wrongful' acts was admitted despite the High Court's espousal of an extremely restrictive test, according to Mason CJ, Deane and Dawson JJ, namely:

> ... the evidence if accepted must bear no reasonable explanation other than the inculpation of the accused in the offence charged. [at 113]

One may well ask what protection the looser test in s.101(2) will afford if evidence of this kind, which was far from conclusive in *Pfennig* still passed the High Court's formulation.

Not only is there a glaring contradiction between the judiciary's justifications for the maintenance of the *sub judice* rule and the now permissive rules of evidence, but it may also be argued the law's treatment of these hitherto prohibited kinds of evidence is far more damaging than the media's treatment of this same information. This is because the impact of evidence about prior convictions or admissions will be all the more devastating in the court's *'forensic'* environment. At least with information of this kind provided by the media, recipients will often be on guard against bias, for Kirby J quotes a study which found 71% of audiences were aware of the media's pro-prosecution bias.[8] In the *apolitical* and *scientific* legal environment, on the other hand, jurors may be less inclined to doubt the work of officials such as policemen.

Weak theory for the sub judice rule

Other features of the *sub judice* rule which demonstrate the need for reform include the absurdity in allowing the media to disseminate highly prejudicial information at the committal stage, but not at the trial stage, and the prohibition of the publication of photographs but not sketches.

The fact that fair and accurate reports of committal proceedings do not amount to contempt raises some perplexing problems. The judiciary concedes evidence submitted in such proceedings may be highly prejudicial and may later be ruled inadmissible, but the public policy in dispelling inaccurate rumour and inducing citizens to give evidence is thought to prevail. The kinds of evidence adduced by the crown in such proceedings will be extremely prejudicial precisely because it will contain assertions of fact that may be deemed too tenuous, speculative and unfair to appear at trial. Surely such evidence will create more rumour than it will dispel.

It has also been argued the delay between committal proceedings and trial will negate any prejudicial effect. A lapse of some two years in the Hinch case was held to be insufficient to ameliorate the prejudicial effect of the broadcast, whilst few committal proceedings will predate a trial by such a length of time. Starke J suggests the effect of delay cannot be calculated mathematically, rather it is the durability of the prejudice which is determinative.[9] It is difficult to see how this provides the distinction at issue given that information about prior convictions is often raised at the committal stage — giving rise to the same form of 'durable' prejudice supposedly created by Hinch when he revealed the accused's prior convictions.

An examination of the kinds of publicity which violate the *sub judice* rule tends to suggest the law has some difficulty reconciling open justice with the mass media. *Time's* arguments in defence of the *Who Weekly* publication of a photo of Ivan Milat are thought provoking. *Time* said there was insufficient difference between photographs and detailed sketches for the former, but not the latter, to constitute contempt.[10] A comprehensive description of the accused and sketches done in court had been published on television programs and in newspaper articles and yet these were not thought to contaminate the evidence of witnesses. A further anomaly concerning open justice was also raised. *Time* noted the apparent absurdity in prohibiting the publication of images of the accused when he had appeared in open court which had been attended by numerous members of the public. The media's role as the 'eyes and ears' of the general public — allowing the benefits of open justice to be extended to those who could not physically attend — was being frustrated. This is a relatively unsophisticated argument, for clearly there is a distinction to be drawn between a court open to everyone and one open to the public but not certain witnesses or the jury. Publication of sensitive material may reach those special individuals who may not attend open court. Surely the effect of seeing the accused sitting in the dock, when the time comes for such individuals to attend court, has far greater potential than published images to contaminate the minds of the jurors or the evidence of an identification witness. Thus it may be argued that unfettered open justice will create little unfairness in comparison to that arising from the physical presence of the accused.

Conclusion

It seems fair to say a disjunct has opened up between the *sub judice* rule and the actual law of evidence this rule is supposed to support. This state of affairs, in conjunction with the theoretically dubious nature of the exceptions to the *sub judice* rule, has led to the current farcical situation where:

- the law is prepared to allow media coverage of prejudicial material in committal hearings but not in other situations which may be less prejudicial;
- confessions and often prior convictions are admitted in court but not out of it;
- publication of sketches is allowed but not the publication of photos; and
- witnesses are allowed to see an accused but not their photo.

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TECHNOLOGICAL ASSAULT on visitors to prisons

James Godfrey

With touches of sci-fi technology the application of biometric identification to visitors to NSW prisons raises issues of cost, effectiveness and privacy.

At present, there are three conventional forms of identification: something you have, like a card; something you know, like a password or PIN; and finally something which you are, like your fingerprints, voice, image, or any other identity trait.[1] One of the problems of taking fingerprints and photographs is that these acts are associated with criminality — indeed any intrusive identification system will be seen as such.

'Biometrics are technologies which automatically verify one's identity based on physiological characteristics;'[2] biometric identification includes retina scans, voice recognition and hand geometry. It has been used at such diverse places as a Los Angeles sperm bank, San Francisco International Airport and a childcare centre at the Lotus Corporation in the USA.[3] One company (Biometric Tracking LLC) even requires people to enrol their fingerprints in a database in order to gain access to its web site.

The exponential growth in biometrics identification system (BIS) is under way; indeed the 'global market for biometric technologies is estimated to be in excess of $50 billion'.[4] In order to expand its business, the biometrics industry has begun to target the 'captive markets' (the armed forces and prisons). Such involvement opens up the path for operation in the 'closed systems' (immigration control, access control, voter registration and state benefits registration). Once this has taken place, the way will be cleared for biometrics to intrude into the 'open markets' (employment, banking, health etc.).[5]

Biometric identification in NSW prisons

This article focuses on the imposition of fingerprint scanning of visitors to maximum security prisons in New South Wales. On 8 August 1996, the Department of Corrective Services (DCS) implemented a BIS at Maitland prison. By the end of 1996, it had been introduced to prisons at Goulburn and Lithgow, as well as the Remand Centre, the Special Purpose Centre and the Reception and Induction Centre at Long Bay. On 4 July 1997, the largest application of the system to date in NSW began at the new $85 million Metropolitan Reception and Remand Centre (MRRC) at Silverwater — the largest prison in Oceania, currently holding nearly 900 prisoners. Although the BIS was originally intended only to be used for those visiting maximum security prisons, there is a major problem in relation to remand centres. The MRRC is deemed maximum security and yet many of the people detained there are merely awaiting trial for minor offences.

The procedure

The BIS currently operating consists of two actions of registration. First, a video image is taken of the visitor's face. This image is then linked to a key code, which identifies the person's fingerprints. For the fingerprinting exercise, DCS utilises equipment that takes a photo of two thumbs, or a thumb and a forefinger, then identifies the eight best features by two-dimensional topography. It then converts these fea-

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Queer theory attempts to deconstruct the categories of identity and render them problematic. This is because it is not grounded in any positive truth. It acquires its meaning from its oppositional relation to the norm. This shows that queer is more of a relation than a category. In this way queer adopts a Foucauldian analysis of power. Power, according to Foucault, is not a linear relationship flowing in one direction. He argues that power is an all embracing concept. Nothing is outside power, and no single institution or person owns power. This organic model is perpetrated through a myriad of power relationships. Power from one institution over an individual is more precisely described as dominion, which is one type of power. This is a negative form of power. Power is also positive. As it is all embracing it can come from below in the form of resistance. As such there is nothing in particular to which it *necessarily* refers. Queer is thus fluid — its boundaries are flexible.

Queer can also be seen as a strategic manoeuvre, a resistance to the attempt of categorisation inherent within the dominant culture. As such it challenges the binary opposition of hetero/homo.

Within the legal discourse queer challenges the categorical thinking which, as already outlined, is the foundation of legal analysis. It challenges the idea of a marked category in which the individual is known.

The notion of any type of binary is based on categorical thinking. Any binary is categorical in that it requires two terms with identifiable features and strong distinctions between the two so that they are easily separable.

The classification taking place in the hetero/homo binary is definite and assured. A distinction is firmly drawn with the identity of the defendant who has killed the victim. This then is translated into the hetero/homo binary by a concerted effort to model a heterosexual defendant and homosexual victim who, through the act of killing, are put at odds with each other. Once this device is in place the court maintains the binary through various methods such as assimilation of peripheral sexualities into homosexuality and the use of stereotypes. There is no common ground between the two; even those otherwise heterosexual victims who have made a sexual advance to the male defendant are believed to be homosexual.

This categorical thinking is the antipathy of queer since queer transcends barriers. The queering of the hetero/homo binary can begin in any of the methods outlined to maintain the binary. It can reinvent the assimilation process by relating sexualities via their marking as the other and rejecting the idea that they can be known because they fall within the category. In repudiating this idea, queer sets the whole objectification process on its head and restores the object to the subject.

However, queer is an attempt to transcend barriers, so it can be used to confuse the boundaries between the hetero and the other. Its pluralist framework denies the notion that there is one type of heterosexuality and one type of homosexuality and in place asserts the multiplicity of sexualities. In doing so it disrupts the opposition set in place between heterosexuality and homosexuality which is vital to shifting blame from the defendant to the victim.

Conclusion

This analysis shows there is an explicit discursive maintenance of the hetero/homo by the courts of law. The deconstruction or refusal to recognise other peripheral sexualities, the use of stereotypes to preserve the binary, and assertion of heterosexuality evidences this type of essentialist approach by the defendants.

Queer represents an important tool to resist this dominant classification system as it transcends the boundaries that have been erected. This allows it to resist the objectification process and reinstate the victim to a subjective status, and it fractures the hetero/homo opposition.

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