Remarks of the Hon. Marilyn Warren AC
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on the occasion of the
2013 Redmond Barry Lecture
Open Justice in the Technological Age
21 October 2013

New Media

The concept that justice must be done and must be seen to be done is a fundamental tenet of Australian democracy. Historically, this meant that most court rooms, most of the time, were open to the public. In reality, for most of the last half century, relatively few members of the public have used that open door and court reporters have acted as the intermediary between the justice system and the wider community. With the rise of new media technologies the traditional methods of guaranteeing open justice for the community are rapidly changing. Open justice now increasingly means the ability of the community to access information about the courts is through the internet and social media. There are implications from this development for the traditional relationship between the courts and the media. There are challenges driving the courts towards direct community engagement in order to preserve the operation of open justice.

It is stating the obvious to say that we are in the midst of a communications revolution. Internet accessibility has increased to an average of 30 per cent of the world population, globally,

representing more than a 400 percent increase in the last ten years. Not only are computers commonplace but we can tweet, blog, text, participate in online forums, and receive alerts and emails on our iPhones and tablets. Nationally, the number of people now using smart phones to access social media increased to almost 70 per cent while the use of tablets to access social networks almost doubled nationally to 35 per cent this year.

The decentralisation of the press into a variety of new media forums is starting to have a noticeable effect on the circulation and revenues of traditional print and television media. Newspapers in particular have a declining and ageing readership as younger viewers seek online content through Twitter and online news sites.

In 2011, *The Age* had nearly 200,000 weekday newspaper subscriptions. Today *the Age* weekday newspaper circulation stands at just over 142,000. But, *the Age* Twitter account has over 150,000 followers. The weekday *Herald Sun* has circulation figures of just over 416,000. The *Herald Sun* Twitter account has just over 62,000 followers. Reduced circulation figures have led to redundancies and restructures at newspaper outlets.

What constitutes open justice is now moving away from the ability of a citizen to sit in a court or read a newspaper or view

the television news. The courts must look to new media forums if they are to reach a wider cross section of the community and effectively inform them about the justice system.

What will be the consequences of this shift towards new media for the traditional relationship between the courts and the media?

The Citizen Journalist

It seems likely that the courts will lose some if not eventually all of the expertise of dedicated newspaper court reporters. At the beginning of 2012, the ABC halved its court coverage commitment to one reporter. Also in 2012, very senior and experienced legal affairs reporters at *the Age* and *Herald Sun* retired. There are now very limited numbers of specialist legal affairs reporters.

In times gone by, the legal reporters would sit in court for much of a trial. Many were extremely talented at reducing hours of evidence to a pithy, focused piece of erudite writing that told the public the story. These reporters would race to the public telephone box, near Court One, or dash to the single telephone in the press room. Their copy about the verdict or sentence was dictated over the telephone to the news desk.

These days, accredited journalists are permitted to email, tweet and text from the courtroom. All this goes on line almost immediately. The public, on checking the news, updates on line read the bare facts – often with little analysis – and embark on their own generation of opinion and commentary.

Now there are number of common characteristics of the new media that distinguish its product from traditional journalism.

Characteristics of social media

One of the key differences between the traditional court reporter and the citizen journalist is that the citizen journalist is unlikely to be subject to any form of editorial control or commercial pressures and is most probably not bound by any ethical code. Typically, the citizen journalist will publish their work immediately without deference to an editorial opinion regarding the newsworthiness or accuracy of the content.

Some commentators have suggested that the internet has created an 'anonymity problem'. Not only is the language used sometimes offensive, but there seems to be a belief among participants in online forums that any kind of information should be distributed without restraint and that the customs and etiquette of society do not apply to the digital world. Some blogs and tweets are written as if the author is having a personal chat

with a friend over coffee. However, the potential audience for online content is in the millions. Moreso, once uploaded on to the internet the reach of the material is seemingly infinite.

In addition to their informal nature, new media outputs are permanent, and therefore remain searchable in the internet long after they are published. They are also often interactive and additive, so that an initial publication may be changed and added to. This means the author immediately loses control as soon as a comment or tweet is posted.

So how have these changes affected the traditional relationship between the courts and the media and in turn the courts' efforts to protect fundamental aspects of the justice system: namely, openness, public confidence in the judiciary and the right to a fair trial?

A reduction in dedicated coverage of the courts

First the challenges for the court's traditional mode of relating with the media. With the decline in the number of court reporter roles, the courts are losing the main source of dedicated and coherent media coverage of court proceedings and justice sector matters. Court reporters have traditionally developed strong relationships with court media liaison officers in order to gain access to information, interviews and assistance. Due to their

high professionalism, experience and interest in an ongoing relationship with the courts, court reporters exercise care with the accuracy of information they publish. Court reporters are also typically assigned to particular courts for long periods of time and so build up a body of research and knowledge about the legal system. The quality of reporting produced is often very high. The court reporters are also acutely aware of the risk of contempt and compliance with suppression orders. They are familiar with the courts' register of suppression orders.

The internet and social media attract large numbers of publishers on a global scale. It has become more difficult for courts to identify who they should engage with and how they should engage in order to deliver a targeted and coherent message to the public.

So how does this process, when combined with the informal and interactive modes of expression of the new media, impact on levels of public confidence in the judiciary?

Public confidence: sensationalism and increased scrutiny

The court reporters and traditional media that remain are taking up new media tools and using them to complement traditional electronic and print modes of communication. There is now a

fast-paced, active and responsive 24 hour news cycle on high profile cases and justice sector matters.

The courts are facing more scrutiny than they ever have before. Court decisions are now constantly reviewed, questioned and critiqued.

The social media platform Twitter limits its contributors to 140 characters a post. It is extremely difficult for journalists, whether they are professional or untrained, whether or not they are subject to editorial and ethical constraints, to reduce complex legal issues into a fair and accurate report of 140 characters. The space constraints also mean that Twitter contributors tend to focus selectively on the most sensational aspects of the story without providing any context to the sensational and sometimes inflammatory tweet. Sensationalism and selectivity in reporting of the courts is nothing new and was occurring long before the rise of social media. But Twitter does present a new challenge for the courts. It may prompt traditional media to focus more explicitly on the sensational elements of stories in an attempt to arrest the decline of the print and television medium.

Recently the Court of Appeal heard the appeal of Adrian Bayley against his publicised sentence for the rape and murder of the victim Jill Meagher. Upon the Court of Appeal announcing its

decision Twitter posts stated that the Court had dismissed the appeal after only ten minutes of deliberation. These posts were misleading and misrepresented the thorough, considered and objective nature of the judicial process.

On publishing its judgment, the Court said:

> After the hearing of the application the court adjourned at the end of argument for a short period. We then announced our decision, namely refusal of the application and that we would publish our reasons at a later time. This was not an unusual course in criminal appeals ..... The court was in a position to dispose of the application expeditiously because of the materials filed and the prior preparation and discussion of the court members during the days beforehand. After hearing argument from counsel on both sides over some time – one and a half hours - the court was in a position to determine the matter ..... We were assisted by submissions from counsel on both sides. We refused leave to appeal**.**

The Twitter posts about Bayley and the commentary on line (and also in the traditional media) took no account of the time that went into the hearing. The application was not dismissed after only ten minutes. But Twitter and others disregarded what actually occurred in the courtroom.

Blogs and comments online regarding high profile cases provide evidence of the 'anonymity problem'. The *Malaysia Solution* case demonstrates the point. There the High Court held that the federal government's legislative solution to the asylum seeker issue was invalid. The routine ABC online report on the case attracted about 170 comments, some of which quickly descended into criticism of other commentators and the judiciary. One comment said:

> Sorry but we have the courts basically saying that anyone who rocks up to Australia can waste our courts time and get legal aid...we have people smugglers using legal aid thanks to the courts...our courts are making a mockery of policy....and its [sic] time to get the courts out of the process.

Other comments sent via Twitter referred to the courts as being 'out of touch', arrogant or unaware of the needs of the community. Some of the commentary demonstrated a lack of understanding of the role of the courts in our democracy and the independence of the judiciary from government policy making.

But the story is not all bad. There are a number of benefits associated with new media reporting of the courts and in

particular the use of new media technologies by the courts themselves.

Firstly, new media forums enable a wider range of views to reach the public domain. Through the internet and websites, academics and community groups are able to publish resources and information about court decisions. For example, in the Malaysia Solution case, refugee activists and an academic published a detailed and considered commentary on the issues via a website which was viewed over 500,000 times.

Secondly, new media has increased opportunities for the courts to engage with the community directly and deliver information in an unmediated form to the public through the internet, Twitter or blogs. The opportunity for the public to see what the courts do unmediated by journalists and editors may go a long way towards educating the public about the role of the judiciary. It is also a way of reaching younger generations.

Thirdly, there are arguments that instantaneous reporting from the court room will increase accuracy of reporting and public interest in court proceedings. If journalists tweet, file or blog from the court room, they can inform the public of what occurs at court more quickly than traditional media forums. This could increase the openness of and access to the courts.

However, openness is but one aspect of maintaining public confidence. Another purpose of public confidence is to protect the right to a fair trial. Pre-trial publicity about events before or during a trial may unfairly influence jurors in favour of or against an accused.

A Fair Trial

The courts can limit publication of information through suppression orders. Sometimes court information is suppressed to protect the identity of a protected witness or an undercover police officer or the disclosure of national security information. There can be many other reasons such as protecting the identity of victims, often in sex cases. The history of an accused will be suppressed. If the media publish information about the prior criminal history or other criminal charges of the accused it will be prejudicial. The community might see suppression of this information as unsatisfactory. However, it is the law.

The general position is that suppression orders can never be a routine matter. The court will ask the question: is there nothing else that can be done except a suppression order?

Where information is already in the public domain, generally speaking, the courts will not grant a suppression order.

Yet even then, judges are divided as to when an accused person should not be put to trial because of the prejudice of publicity.

Glennon was a former priest convicted of numbers of sex offences against children in multiple trials. A radio commentator, *Derryn Hinch,* breached suppression orders made by courts to protect *Glennon's* right to a fair trial. The Victorian appellate court split 2-1 saying *Glennon* was prejudiced by the publicity. On appeal to the High Court of Australia the judges split 4-3 saying *Glennon* was <u>not</u> prejudiced and his next trial could proceed.

Dupas was a serial killer who was convicted of murdering a number of women. On his last conviction he appealed asserting he had been subjected to unfair publicity covering his earlier trials for murder and rape and the circumstances of the death of the victim. There were other aspects of his appeal. He wanted his prosecution stayed or stopped forever. However, again the Court of Appeal split 2-1 on the point saying *Dupas'* trial should not be stayed. One of the judges had confidence in jurors to distinguish 'between evidence on the one hand, and rumour, gossip, and whatever else the media may have reported, on the other'. The judge made the point that juries could manage. Otherwise, the judge suggested, individuals such as Jack the Ripper, Charles

Manson, Ronald Biggs, even Osama Bin Laden would not face trial.

Yet these cases of Glennon and Dupas were concerned with traditional media: newspapers and television. Are things different with the internet and social media? In a short time the courts have become more robust when it comes to digital media. In 2008 a judge prohibited the broadcasting of the television programme 'Underbelly' until a trial, about to commence, was finished. Underbelly was dramatic, colourful entertainment about the crimes, loves and lives of notorious individuals said to be participants in the Melbourne gangland wars of the 1990's and 2000's. The judge also ordered that 'Underbelly' not be broadcast on the internet. The next night after the orders a television station showed the programme across Australia but not in Victoria. Once broadcast, Underbelly was available on the internet and so it was available to the world, despite the Court order. The Court of Appeal essentially continued the restriction. However, it became notorious that Underbelly could be purchased interstate or downloaded. The Court was criticised and probably regarded as naïve in trying to protect fair trials relating to individuals portrayed or implicated in Underbelly.

In 2009 a judge ordered that major media organisations take down from their websites any articles relating to the criminal

Tony Mokbel until after his trial for a murder. The media groups appealed. The Court split 2-1 and lifted the order. Essentially the Court said it was impractical if not impossible to take the material off the internet. The view adopted was that the internet order went far beyond what was needed to protect the right of *Mokbel* to a fair trial.

Thus we see a sign that the courts recognise the problem in controlling the internet.

These cases demonstrate the changes in approaches by the courts, but also how difficult a problem the courts face in balancing open justice and the right to a fair trial in the digital age.

For completion it should be noted that Victoria has the highest number of suppression orders in the country for at least two reasons. First, Victoria is the only place in Australia where an electronic register of suppression orders is kept (to assist the media and prevent contempts). Other places do not retain a full record. Secondly, the complexity and security sensitivity of the Melbourne gangland cases necessarily increased the numbers of Victorian orders. The State Government recently introduced the *Open Courts Bill*. We will need to see how it works in practice. The courts retain their inherent jurisdiction to suppress matters

and will continue to act in accordance with the legislation and established legal principle.

The internet and social media create other problems. There is the risk of jurors conducting their own investigation or even contacting witnesses and accused. This occurred in England. A juror exchanged messages on Facebook with an accused in a drug trial. The juror was convicted of contempt and sentenced to eight months jail. Judges warn jurors not to look at the internet.

There has not been much of a problem in Victoria with this to date. However, as younger generations join the jury pool, reliance upon the internet for information gathering can only increase. Therefore judges can anticipate increased temptation for jurors to use these tools. Education and clear directions to juries will be the key.

The Courts' Response

The internet and social media are here to stay. The courts must develop constructive strategies to engage with the new technologies. Open justice in the technological age means the ability of the community to view or access information about court proceedings through the internet or social media as well as through traditional print and electronic mediums. So what are the

courts doing to adapt their communications strategies to meet the demands of the digital age?

Historically, the judiciary does not engage with and speak to the public on controversial legal issues. This is because of the role of the judiciary as independent and impartial enforcers of the rule of law. A judge cannot engage in public discussion of a case which he or she is hearing or public issues generally. They risk, if they do, being accused of pre-judging a case, of being biased.

Because of the highly interactive nature of new media, the public have access to and can contribute to the public debate in ways that were previously impossible. The traditional reticence of the judiciary to speak out in the face of criticism may be leading to an increased devaluation of the courts in the mind of the community. Community concerns aimed at the judiciary might be seen by the general public to be gaining no answer.

At the community ceremony to open the 2013 Legal Year the judiciary heard from two high school students as voices of the future. They urged the judiciary to take up new media technologies and speak directly to the public about issues.

They said:

> As respected members of the justice system, we hope that you can start hearing the opinions of many Australians, young and old. You all have a role in standing up for the community and setting what is right, and now you have an opportunity to hear the voices of the people that you are protecting. If we start using the technology available, hopefully the people who make our laws will become more aware of the opinions of the people they are seeking to protect.

Earlier this year, community discussion raised concerns about the operation of the Victorian parole system, and the Adult Parole Board in particular. The Board is chaired by a Supreme Court judge (as an extra, non-judicial function).

Regrettably, the full picture of the Adult Parole Board and its decisions were not being made available to the community. In the end, the former Chairman Justice Whelan was interviewed, live to air, on the ABC (Jon Faine) and Fairfax (Neil Mitchell). This was very unusual but necessary to explain the facts. Importantly, after Justice Whelan's public comments, the public had a better understanding of the full facts not just the media's portrayal of the facts. The experience demonstrates that there will be times for the judiciary to speak publicly.

Speaking to the community on legal issues and topics by judges occurs constantly through the year. In the Supreme Court judges attend and participate in hundreds of events. In addition, each year over 8000 school students visit the courts. Judges try to speak to them. The Supreme Court has open days where thousands flock to tour the buildings and hear judges and staff talk about court processes. Recently, the Supreme Court facilitated the performance of the play '12 Angry Men' in a real courtroom. Over 800 theatre patrons were entertained at night in a working courtroom where a murder trial proceeded through the day. These efforts are well and good but are they as effective as the social media?

There is momentum within the Supreme Court of Victoria towards using the internet to speak directly to the public. Live web-streaming of trials is viewed as a way to fill the void left by the decline in traditional court reporters. When web-streaming is used the community can check for themselves what transpires in the Supreme Court and see and what the judiciary actually do when they administer the law.

The Supreme Court is now web-streaming sentencing remarks in criminal trials. It is hoped that live streaming of sentencing remarks will increase public understanding of the sentencing

process and decrease the influence of the more sensational reporting of criminal trials.

The effectiveness of web-streaming sentences is substantial. In the Freeman case where a father was sentenced for murdering his little daughter by throwing her from the West Gate Bridge there were thousands of hits on the court website.

The courts are not ready to broadcast visual feed of criminal trials. It has occurred in New Zealand and, of course, the US such as the O J Simpson trial. At this stage the Supreme Court is web-streaming selected civil cases, mostly for the benefit of the parties. In Great Southern there is a class action involving 22,000 shareholders. They have been able to see the trial. In the Kilmore East bushfire trial the parties but particularly the plaintiff group of over 10,000 people can view the trial through the internet. Web-streaming will continue as fast as we are able to secure funding.

Notably, the High Court has commenced streaming of appeal hearings.

The Supreme Court is also developing an interactive website to be the centrepiece of the court's communication with the public. The community would be able to watch Video on Demand,

download judgment summaries and judgments, leave comments on the Supreme Court News website or participate in an Internet Forum.

Shortly, the Supreme Court communications judges will convene a meeting to tackle the present website which is clumsy, difficult and sometimes impossible to navigate. It is contemplated that other than the judges, no-one over 30 will be allowed to participate in the meeting.

Most importantly, the website features will enable the Court to provide context for its judgments and sentences. To avoid compromising the impartiality of a sitting judge, we plan that a retired judge might write a regular blog for the court website to create greater community understanding around controversial issues. Bloggers could also be drawn from the ranks of the media and academia. This will represent a historic shift away from traditional judicial reluctance to explain or defend judicial decisions that are made in accordance with the rule of law. Of course this will require resources but we will do our best to promote the concept.

This week the Supreme Court will move onto Facebook. The Court is already on Twitter. We have nearly 2500 followers. Soon the Court will look at other opportunities such as Linked In. In the

Kilmore East bushfire trial the court used Facebook as a way of centralising court communications between the parties. We are now moving towards full desk-top access for every Victorian lawyer and judge through the new Law Library of Victoria. Meanwhile we have free Wifi across the Court. By 1 January 2016 we expect to be a paper-free court. So, no more folders and trolleys. Photocopiers and printers will be banished. We expect to be an 'e-court' in every sense.

Conclusion

The shift in the communications practices of judges is symptomatic of the challenges but importantly the opportunities that new media poses for democratic institutions in the technological age. The traditions of the judiciary, including the set up of the court room and even the robes that judges wear, have changed very little over centuries. However, the means by which courts communicate and, therefore, the provision of open justice has changed dramatically. There is now an expectation that open justice involves the judiciary adopting new media technologies and engaging in a direct dialogue with the community. The judiciary must find a way to meet these expectations whilst at the same time preserve the fundamental aspects of the rule of law – fairness and judicial impartiality.

Technology and social media provide an exhilarating opportunity for the Courts to tell the public we serve who we are, what we do, how we do it and why the rule of law matters.