NSW Law Reform Commission

REPORT 39 (1984) - COMMUNITY LAW REFORM PROGRAM: SOUND RECORDING OF PROCEEDINGS OF COURTS AND COMMISSIONS: THE MEDIA, AUTHORS AND PARTIES

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Terms of Reference and Participants

New South Wales Law Reform Commission

The Honourable D.P. Landa, LLB., M.L.C.,

Attorney General for New South Wales.

COMMUNITY LAW REFORM PROGRAM

Attached to this document is the report of this Commission pursuant to the reference dated 29 December 1983, a copy of which is fully set out on page 3 of the report

Ronald Sackville

Chairman

Russell Scott

Deputy Chairman

Deirdre O'Connor

Commissioner

Colin Phegan

Commissioner

March 1984.

Terms of Reference

"To inquire into and report on the following matters:

(1) whethertaperecordingorotherrecordingofcourtproceedingstheproceedings of Royal Commissions and the proceedings of Commissions of Inquiry under the Special Commissions of Inquiry Act, 1983 by -

representatives of publishers and broadcasters (including, representatives of the press and of radio and television broadcasters);

a person who is or intends to be the author of a book or article devoted entirely or in part to the proceedings;

the parties to legal proceedings, persons granted leave to appear before a Royal Commission or a Commission of Inquiry, and their legal representatives or anyone or more of them;

any other person.

should be permitted in New South Wales and if so on what conditions.

(2) Any related matter.

D.P. Landa,

Attorney *General and Minister of Justice.*

29 December 1983.

New South Wales Law Reform Commission

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967.

The Commissioners are:

Chairman

Professor Ronald Sackville

Deputy Chairman

Mr. Russell Scott

Full-time Commissioners

Miss Deirdre O'Connor

Associate Professor Colin Phegan

Part-time Commissioners

Mr. I.McC. Barker, Q.C.

Mrs. Bettina Cass

Mr. J.H.P. Disney

The Hon Mr. Justice Adrian Roden

The Hon Mr. Justice Andrew Rogers

Ms. P. Smith

Mr. H.D. Sperling, Q.C.

Research Director

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Mr. Ian Ramsay

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Ms. Fiona Tito

Ms. Judith Walker

Ms. Meredith Wilkie

The Secretary of the Commission is Ms. Mariella Lizier and its offices are at 16th Level Goodsell Building, 8-12 Chifley Square, Sydney, N.S.W. (telephone: (02) 238 7213).

|||[Click here for current contact details]||||

This is the Fourth Report of the Commission under its Community Law Reform Program.

Its short citation is LR.C.39.

Participants

Commission Members

For the purpose of the reference the Chairman in accordance with section 12A of the Law Reform Commission Act, 1967, created a Division comprising the following members of the Commission:

Professor Ronald Sackville (Chairman)

Mr. Russell Scott (Deputy Chairman - in charge of this reference)

Mr. Denis Gressier (until 19 November 1983)

Miss Deirdre O'Connor

Associate Professor Colin Phegan

Mr. J.R.T. Wood, Q.C. (until 31 January 1984)

Secretary

Ms. Mariella Lizier

Research and Writing

Mr. Ian Ramsay

Typing

Ms. Pamela Boettcher

Word Processing

Ms. Zoya Howes

Consultation

For the purpose of this report, the Commission consulted the following persons and organisations. While they should not necessarily be taken as endorsing the contents of the report (except where specifically indicated in the text) they have given freely of their time to read and comment upon a draft report prepared by the Commission. Their contributions have been of great value and the Commission expresses it appreciation to them.

Mr. I. R Angus, Solicitor.

Mr. A. M. Deamer, Solicitor.

Mr. G. Duncan, Director of Current Affairs, Radio Station 2GB.

Mr. D.D. Levine, Barrister.

Mr. S.M. Littlemore, Barrister.

Mr. T. Molomby, Australian Broadcasting Corporation

Professor R.G. Nettheim, Professor of Law, University of New South Wales.

Mr. W.H. Nicholas, Q.C., Barrister.

Mr. S. O'Doherty, Radio Station 2GB.

Mr. J. Slee, John Fairfax and Sons Ltd.

Mr. M.A.G. Tedeschi, Crown Prosecutor (Mr. Tedeschi also provided the Commission with two papers related to the terms of reference in their original form).

The Law Society of New South Wales.

The New South Wales Bar Association.

REPORT 39 (1984) - COMMUNITY LAW REFORM PROGRAM: SOUND RECORDING OF PROCEEDINGS OF COURTS AND COMMISSIONS: THE MEDIA, AUTHORS AND PARTIES

Summary of Recommendations

The recommendations in this report are summarised in the following paragraphs. Cross-references are given to the appropriate paragraphs of the report and to the draft legislation.

1. The following persons should have a statutory right to use a sound recorder to record the proceedings of courts, Royal Commissions and Special Commissions of Inquiry without having to obtain the leave of the court or Commission.

    representatives of the news media;

    authors of books and articles on a subject in respect of which those proceedings are relevant;

    parties to court proceedings and their legal representatives;

    persons authorised to appear before a Royal Commission or a Special Commission of Inquiry and their legal representatives; and

    persons appointed by the Crown to assist a Royal Commission or a special Commission of Inquiry.

    (Paragraphs 5.16, 5.22, 5.27; Bill cl.7(1))

2. The right should be subordinate to the power of a court or Commission to prohibit or order the cessation of the use of a sound recorder where the court or Commission reasonably believes that such use constitutes or would constitute a substantial interference with the administration of justice or the functions of the court or Commission (Paragraphs 5.16, 5.22, 5.27; Bill cl.7(3)).

3. A person shall not publicly broadcast the whole or any part of a sound recording of proceedings of a court or Commission except with permission of the court or Commission (Paragraphs 5.17, 5.22, 5.27; Bill cl.8)

4. No copy of the whole or any part of a sound recording of the proceedings of a court or Commission shall be made by any person No person shall have in his or her possession a copy of such a sound recording. (Paragraphs 5.17, 5.22, 5.27; Bill cl.9)

5. A recording of the proceedings of a court or Commission made by a representative of the news media shall be used only for the purpose of reporting those proceedings in a newspaper, journal magazine or other publication or on a radio or television station controlled by the Australian Broadcasting Corporation or the Special Broadcasting Service, or a radio or television station licensed in accordance with the provisions of the Broadcasting and Television Act 1942 (Cth). Use of a recording for any other purpose may be made only with the leave of the court or Commission (Paragraph 5.17; Bill cl.11)

6. A recording of the proceedings of a court or Commission made by an author shall be used only for the purposes of a book or article by the author on a subject in respect of which those proceedings are relevant. Use of a recording for any other purpose may be made only with the leave of the court or Commission (Paragraph 5.22; Bill cl.12)

7. A recording of the proceedings of a court or Commission made by:

    a party to court proceedings or his or her legal representative;

a person authorised to appear before a Royal Commission or a Special Commission of Inquiry or his or her legal representatives; and

a person appointed by the Crown to assist a Royal Commission or a Special Commission of Inquiry.

shall be used only for the purposes of the proceedings. Use of a recording for any other purpose may be made only with the leave of the court or Commission. (Paragraph 5.27; Bill cl.10.)

8. A sound recording of the proceedings of a court or Commission made by any person described in paragraph 1 above shall not, except with the leave of the court or commission be used to correct or call in question an official transcript of those proceedings. (Paragraphs 5.17, 5.22, 5.27: Bill cl.16)

9. Any legislation implementing the recommendations in this report should apply to Royal Commissions and Special Commissions of Inquiry established after the legislation takes effect Such legislation should also apply to the following courts of law:

the Supreme Court of New South Wales;

the Land and Environment Court of New South Wales;

the Industrial Commission of New South Wales;

the District Court of New South Wales;

the Workers' Compensation Commission of New South Wales;

Courts of Petty Sessions; and

Coroners Courts.

Any legislation implementing our recommendations should allow for regulations to be made prescribing as courts bodies other than those listed above, should this be considered desirable at a future date. (Paragraphs 5.28, 5.29, 5.32; Bill cl.3(1), 5)

10. Each court and Commission should decide whether notification procedures for those persons wishing to use a sound recorder are necessary and, if so, the most efficient way to establish such procedures. (Paragraph 6.3)

11. Existingremediesappeartohavethecapacitytopermiteffectivereviewoftherefusalofa court or Royal Commission to allow the use of a sound recorder as envisaged by this report. Should this prove not to be the case, it would be feasible for the Attorney General to reassess the circumstances with a view to the creation of specific remedies. (Paragraph 6.23)

12. In the interpretation of any Act based on the draft legislation appended to this report, it should be permissible to have regard to the report and to that draft legislation (Bill cl.4)

REPORT 39 (1984) - COMMUNITY LAW REFORM PROGRAM: SOUND RECORDING OF PROCEEDINGS OF COURTS AND COMMISSIONS: THE MEDIA, AUTHORS AND PARTIES

1. Community Law Reform Program and This Reference

THE TERMS OF REFERENCE

1.1 This is the fourth report in the Community Law Reform Program. The Program was established by the Attorney General by letter dated 24 May 1982, addressed to the chairman of the Commission. The letter included the following statement:

> "This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s.10 of the Law Reform Commission Act 1967."

The background of the Community Law Reform Program is described in greater detail in the Commission's Annual Reports for 1982 and 1983.

1.2 InAugustandSeptemberl982theCommissiongavepreliminaryconsiderationtothe subject matter of this report at the request of the then Attorney General the Honourable F.J. Walker, Q.C., M.P., following his receipt of a submission from a newspaper publisher John Fairfax and Sons Limited to the effect that reporters should be permitted to tape-record court proceedings. The submission suggested that the New South Wales Government enact legislation in similar terms to section 9 of the contempt of Court Act 1981 (Eng.). The English legislation is discussed in Chapter 4.

1.3 As part of its preliminary work the Commission wrote to a number of representatives of broadcasters and publishers in New South Wales seeking their views,[1] and after due consideration sought a reference by letter of 17 September 1982. By letter dated 16 October 1982 the Attorney General made the following reference to the Commission:

> "To inquire into and report on whether tape- recording or other recording of court proceedings by representatives of publishers and broadcasters (including representatives of the press and of radio and television broadcasters) should be permitted in New South Wales and, if so, on what conditions."

1.4 In May 1983 the Department of the Attorney General and of justice invited the Commission by letter to consider the feasibility of widening the terms of reference to include the recording of proceedings of Royal Commissions. The Commission subsequently requested the Attorney General the Honourable D.P. Landa, LLB, MLC, to widen the terms of reference accordingly, and the Attorney General acceded to this request by letter of 26 July 1983.

1.5 The Commission completed a draft report in September 1983. The report recommended that representatives of the news media should have a statutory right to record the proceedings of courts and Royal Commissions where the proceedings are taking place in public. The report was circulated to 11 consultants, the Bar Association of New South Wales, the New South Wales Law Society, and to several Judges. The consultants included practising barristers and solicitors, journalists, executives in public radio and a professor of law. The names of the consultants are listed on page 9.

1.6 Some consultants suggested that the terms of reference should be widened to allow the Commission to consider whether persons other than representatives of the news media should be permitted to use a sound recorder to record the proceedings of courts

and Royal Commissions. It was argued that such persons may have a legitimate interest in the proceedings which justifies their use of a sound recorder. It was said, for example, that during a court hearing, practical assistance to parties and their legal representatives could result from a sound recording of the proceedings, particularly where a transcript of the proceedings is not readily available.[2]

1.7 The point was also made that attempts to draw a distinction between representatives of the news media and authors of books and articles by giving a statutory right to use a sound recorder only to the former could lead to problems. in particular, it could be unreasonable to deny to an author who intends to deal with the subject matter of particular court proceedings in a book or article, the right to make a sound recording of those proceedings if the same right were to be given to representatives of the news media. As one of our consultants stated:

> "People who write books about court cases are not usually representatives or employees of anyone. Such activity, while not frequent, has an honourable tradition and such works are likely to be a far more thoughtful and enduring record of what occurs than the output of the mass media."[3]

1.8 In the light of the consultants' comments it was decided that the Commission should seek an extension to the terms of reference to authorise it to consider whether the right to use sound recorders to record the proceedings of courts and Royal Commissions should be granted to persons other than representatives of the news media.

1.9 Shortly after the draft report was circulated to the consultants, the New South Wales Parliament enacted the Special Commissions of Inquiry Act, 1983. The provisions of this Act are similar to the Royal Commissions Act, 1923, the main difference being that a Special Commission of Inquiry, in the course of a hearing in public can only receive as evidence matter that in the opinion of the Commissioner, would be likely to be admitted into evidence in relevant criminal proceedings.[4] Given the similarities between Royal Commissions and Special Commissions of Inquiry, the Commission formed the opinion that it would be desirable to consider whether recording of the proceedings of Special Commissions of Inquiry should also be permitted.

1.10 On 30 November 1983 the Commission formally requested the Attorney General to widen the terms of reference so as to enable consideration to be given to whether other persons, as well as representatives of the news media, should be permitted to record the proceedings of courts, Royal Commissions and Special Commissions of Inquiry. By letter of reply dated 29 December 1983 the Attorney General acceded to this request The terms of reference are set out fully on page 3.

ISSUES FOR REFORM

1.11 The terms of reference raise a number of major issues for reform. These include the following:

> Whether the use of tape-recorders or other sound recorders for the purpose of recording the proceedings of a court, Royal Commission or Special Commission of Inquiry should be permitted by any or all of the following persons:
>
> (i) representatives of the news media;
>
> (ii) authors of books and articles which will deal with the subject matter of the proceedings;
>
> (iii) parties to court proceedings and their legal representatives;

(iv) persons authorised to appear before a Royal Commission or a Special Commission of Inquiry and their legal representatives,

(v) persons appointed by the Crown to assist a Royal Commission, or a Special Commission of Inquiry; and

(vi) members of the public.

The recording would be in substitution for, or in addition to, handwritten notes. Two alternatives immediately arise. The first is that the use of sound recorders be allowed as of right where the proceedings are already open to the public and the news media. The second alternative is that such use would be lawful only with prior permission of the court or Commission. In either case, broadcasting to the public of all or part of the recording would not be permitted.

Whether the broadcasting of all or part of a sound recording over public radio or television should be permitted (as opposed to restricting the use of the recording so that it is to be a substitute for, or an addition to, handwritten notes).

Whether television filming and public broadcasting (that is, broadcasting of visual images as well as sound) of all or part of the proceedings of courts, Royal Commissions and Special Commissions of Inquiry should be permitted.

1.12 In Chapter 5 we recommend that the following persons be permitted to use sound recorders to record the proceedings of courts and Commissions in substitution for, or in addition to, handwritten notes:

representatives of the news media;

authors of certain books and articles;

parties to court proceedings and their legal representatives;

persons authorised to appear before a Royal Commission or a Special Commission of Inquiry and their legal representatives, and

persons appointed by the Crown to assist a Royal Commission or a Special Commission of Inquiry.

Our recommendations envisage a right to use a sound recorder only where the person concerned is entitled to be present at the proceedings. Moreover, the right would be subject to the power of the court or Commission to prohibit the use of a sound recorder where it is reasonably believed that substantial interference with the administration of justice or the exercise of functions of the court or Commission would occur if the sound recorder were to be used in addition our recommendations envisage general restrictions upon the use of sound recordings of court and Commission proceedings. These include a prohibition on using the recording for the purpose of public broadcasting, except with the leave of the court or Commission.

1.13 We believe that the question whether members of the public generally should have the right to record the proceedings of courts and Commissions should be the subject of Wider public debate and discussion before recommendations are made by this Commission. We take the same view in relation to the questions raised by the second and third issues in paragraph 1.11, namely, the public broadcast of all or part of a sound recording of the proceedings of a court or Commission and the television filming and broadcast of all or part of those proceedings. We intend to publish an Issues Paper in which we discuss these broader questions. The Issues Paper will also canvass the question whether the law should be reformed in relation to sketches and photographs

which constitute a “record’ of the proceedings of courts and Commissions. The Issues Paper will set out arguments concerning each issue and call for submissions from interested organisations and members of the public. The submissions will be significant in our determination of procedures for future work on this reference.

DEFINITIONS

1.14 We now discuss two phrases which form part of our terms of reference: “tape-recording or other recording” and “representatives of publishers and broadcasters”. We also discuss the terms “media” and “news media” which are used extensively throughout this report.

Tape - Recording or Other Recording

1.15 The Oxford English Dictionary defines “record” as interalia, “an account of some factor event preserved in writing or other permanent form ...”[5] A record of the proceedings of a court or Commission could be a visual record or a sound record. A visual record can be made by means of film videotape, photograph or sketch or it can be in printed form. Tape-recording is a normal method of making a sound record although there are other means. In this report we use the expressions “tape or other sound recording” and “ sound recording” in relation to the sound recording of the proceedings of a court or Commission.

Representatives of Publishers and Broadcasters

1.16 Our terms of reference specifically include in the category “representatives of publishers and broadcasters”, representatives of the press and of radio and television broadcasters. “Publisher” obviously includes the publisher of a book as well as the publisher of any newspaper, journal magazine or other publication that is published daily or at periodic intervals. The activities of “broadcasters” in our opinion include broadcasting via television (which of course includes sound as well as visual images, and which may be done, for example, by the Australian Broadcasting Corporation the Special Broadcasting Service or a commercial television station), and broadcasting via radio (which may be done by the Australian Broadcasting Corporation the Special Broadcasting Service, commercial radio stations or public broadcasting stations). It is therefore plain that the words “publishers and broadcasters’ refer to persons concerned with disseminating more information than is comprehended by “news” and current affairs”. However, when in this report we refer to representatives of publishers and broadcasters, we largely confine our attention to persons concerned with information of the last mentioned kinds, and use expressions such as “news media”, “media” and “representatives of the news media”. When we use the term “representative” we mean an agent, servant or employee. In this sense, a person who intends to publish a book or article may not necessarily be a representative of a publisher. However, our amended terms of reference allow us to consider whether such persons should be permitted to use sound recorders to record the proceedings of courts and Commissions.

“Media” and “News Media”

1.17 We do not intend to attempt an exhaustive definition of expressions such as “news”, “news media”, “information media” and “current affairs”. However, it may be useful to give an indication of our understanding of the broad reach of such expressions. Our references to “the news media” and “the media” are intended to include persons and organisations who publicly disseminate information concerning current events and matters of current public interest. These activities can be carried out by the printed word in newspapers, magazines and the like (the print medium), by radio broadcasting, by cinematograph film projection or by television broadcasting. Radio and television broadcasting often are referred to as “the electronic media”. It is generally accepted that these means (media) of publishing facts, reports, and discussing matters of the kind mentioned above, including judicial proceedings, are important organs of communication whether done on a

commercial basis or otherwise. For example, in 1974 the Lord Chief justice of England, Lord Widgery, in discussing the principle that justice must be administered in public, said that the great majority of the public "get their news of how justice is administered through the press or other mass media..."[6] The important role of the media in disseminating information concerning matters of current public interest is discussed further in Chapter 5.[7]

ACKNOWLEDGMENTS

1.18 We record our thanks to Mr. D.R. Murphy, Q.C., Parliamentary Counsel and to Mr. C.M. Orpwood, Deputy Parliamentary Counsel for the preparation of the draft legislation attached to this report and for their advice and assistance.

1.19 TheCommissionhasdecidedtotaketheunusualstepofexpressingitsappreciationto one of its research staff for his valuable contribution to the production of this report The staff member is Mr. I. M. Ramsay, Legal Officer, who has devoted a substantial amount of his own time to this reference. Mr. Ramsay's research and written material have been of a particularly high order.

FOOTNOTES

1. Letters were forwarded to the Federation of Australian Commercial Television Stations, the Federation of Australian Radio Broadcasters, the Australian Broadcasting Commission (now the Australian Broadcasting Corporation) and News Limited.

2. Letter from Mr. D. Levine, Barrister, 7 November 198 3; and letter from the Law Society of New South Wales, 5 December 1983.

3. Letter from Mr. T. Molomby, Australian Broadcasting Corporation, 19 October 1983.

4. Special Commissions of Inquiry Act 1983, s.9(3).

5. *Oxford English Dictionary* (1961), vol. viii, p.266.

6. R. *v. Denbigh Justices, ex parte Williams* (1974) 2 All E.R. 1052, at p.1056. See also para.2.13.

7. Paras.5.3-5.11.

2. Recording the Proceedings of Courts: The Present Law and General Principles

INTRODUCTION

2.1 In this chapter we examine the law in New South Wales applicable to the recording and reporting of the proceedings of courts by representatives of the news media and other persons, including authors of books and articles and members of the public. We examine first the current practice regulating the reporting of judicial proceedings, and then the right of representatives of the news media and the public to be present in court and report and comment upon the proceedings. This right is based on the historic principle that justice is to be administered in open court. The remainder of the chapter is concerned with an analysis of the power of courts to control the means of recording court proceedings, for example, the use of sound recorders. In the absence of statutory provision control over the methods used to record the proceedings must proceed from the inherent jurisdiction or power of a court to control its own proceedings. Our conclusions are preceded by analysis of the principles underlying the exercise of this inherent power.

RECORDING OF COURT PROCEEDINGS: THE PRESENT PRACTICE

2.2 Representatives of the news media are, generally speaking, restricted to the use of handwritten notes for the purpose of recording court proceedings in New South Wales. In our Issues Paper to be published shortly we document several occasions when the proceedings of courts in New South Wales have been broadcast over public television. However, these occasions represent rare exceptions to the general practice that prevails in New South Wales, namely, that electronic recording of court proceedings, other than for official purposes associated with the preparation of transcripts, is not permitted There is no statute which prohibits or regulates the use of electronic recording equipment such as cameras and sound recorders in New South Wales courts. Later in this chapter we examine the power of a court to make rules regulating its own practice and proceedings, with specific reference to the means used to record court proceedings. We also examine the power of a court to punish persons who disobey an order of the court regulating its proceedings.

2.3 In New South Wales, the only sound recording of court proceedings presently allowed on a permanent basis is that undertaken for the purpose of making an official transcript of the proceedings. However, the use of sound recorders for making an official transcript is by no means universal in New South Wales courts, and both the Supreme Court and the Industrial Commission still rely heavily on court stenographers or reporters. The Land and Environment Court relies wholly on sound recording, while a combination of sound recording and court stenographers is found in the District Court, the Workers' Compensation Commission and Magistrates Courts. Where sound recording is used, in no case is the tape made available to journalists. The tape is kept indefinitely by the Court Reporting Branch of the Department of the Attorney General and of Justice.[1]

2.4 We have made inquiries in other States and Territories of Australia and in New Zealand in relation to the practice of reporting court proceedings in those jurisdictions. We are able to conclude that the practice in New South Wales is similar to that followed elsewhere in Australia and in New Zealand. Although we were referred to an occasion in Tasmania and one in the Northern Territory when the proceedings of a court were filmed for subsequent televising, in no jurisdiction was the use of sound recorders or other electronic recording equipment allowed other than for the purpose of the preparation of

the official court transcript.[2] We were informed that as is the case in New South Wales, there is no statutory bar to the use of electronic recording devices but the general rule is that representatives of the news media are restricted to taking handwritten notes. Recent legislation in England regulates the use of sound recorders in courts[3] and we examine its provisions in detail in Chapter 4.

2.5 Although representatives of the news media are not in practice, permitted to use sound recorders while in court, we are aware of one example of standing arrangements whereby the news media can make a sound recording of court proceedings while outside the courtroom. In the High Court of Australia in Canberra, the proceedings in two of the three courts are transmitted via closed circuit television to a "media room" where representatives of the media may view and hear the proceedings. We are informed that some representatives of the news media follow the practice of using sound recorders in the "media room" to record the proceedings, rather than take handwritten notes. This occurs particularly when a reporter is absent from the "media room". Although such recording is not made by representatives of the news media while personally present in court the same result is obtained.

THE RIGHT OF REPRESENTATIVES OF THE NEWS MEDIA AND THE PUBLIC TO BE PRESENT IN COURT AND REPORT THE PROCEEDINGS

Open Justice

2.6 The right of the news media to be present in court and report the proceedings is based on the principle that justice is to be administered in open court. In the words of one commentator

> "There is a basic principle that courts must administer justice in public. In practical terms, this means allowing the Press to attend and report the proceedings as representatives of the public."[4]

In a recent case, *Home Office v. Harman,*[5] Lord Diplock said:

> "... justice in the courts of England is administered in open court to which the public and press reporters as representatives of the public have free access and can listen and communicate to others all that was said there by counsel or witnesses."[6]

In an earlier case, Lord Diplock stated that the application of the principle of open justice has two aspects:

> "... as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."[7]

2.7 A leading case on the principle that justice must be administered in open court is *Scott v. Scott*.[8] The case involved matrimonial proceedings and, on appeal the House of Lords considered the power of a judge to make an order which excludes the public from a hearing. The principle enunciated by all five judges was that subject to certain narrowly defined exceptions, the administration of justice must be conducted in open court in the words of the Earl of Halsbury, "every Court of Justice is open to every subject of the King".[9] The reason for allowing the public to have access to the courts was stated by Lord Atkinson:

> "The hearing of a case in public may be, and often is, no doubt, painful humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trials is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect."[10]

2.8 The House of Lords considered that there were exceptional cases where it was justifiable to exclude the public from the court:

> "while the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions... But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done... it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield."[11]

2.9 The test stated by Viscount Haldane LC. was that to justify an order for a hearing *in camera* (that is, in the absence of the public) it must be shown "that the paramount objective of securing that justice is done would really be rendered doubtful of attainment if the order were not made".[12] However, the Earl of Halsbury expressed concern at the width of this exception to the general rule of open courts, stating that the test was of such wide application that an individual judge may apply it in circumstances that the law does not warrant.[13]

2.10 The Australian cases concerning the access of members of the public to courts have treated the decision of the House of Lords in *Scott v. Scott* as authoritative. Thus, in 1913, an application to the High Court by motion that an appeal in a matrimonial matter be heard in closed court was refused on the authority of Scott v. Scott. The Acting Chief justice, Sir Edmund Barton with whom the other four judges comprising the court concurred, said:

> "... there is no inherent power in a Court of justice to exclude the public, in as much as one of the normal attributes of a Court is publicity, that is, the admission of the public to attend the proceedings."[14]

2.11 Similarly, a decision to deny the public access to a criminal trial on the basis that unsavoury evidence was to be presented led to the quashing of the conviction by the Supreme Court of New South Wales.[15] Following Scott *v. Scott,* the Chief justice stated that "the only consideration to which the rule as to publicity yields is the paramount duty of the Court to secure that justice should be done".[16] The fact that publicity is an essential element of the principle that justice is to be administered in open court has been emphasised by the present Chief justice of New South Wales, Sir Laurence Street:

> "it is a deeply rooted principle that justice must not be administered behind closed doors - court proceedings must be exposed in their entirety to the cathartic glare of publicity. There are limited exeptions to the observance of this principle but these are well defined and sparingly allowed. Statutes are made by public processes. They are judicially administered in public proceedings. it is only thus that the right of representation and of due hearing of all legitimate submissions can be seen to have been accorded to parties subjected to the judicial process. Moreover publicity of proceedings is one of the great bastions against the exercise of arbitrary power as well as a re-assurance that justice is administered fairly and impartially."[17]

2.12 Recently, the Federal Court of Australia had cause to consider the basis upon which a court may be closed to the public and the media.[18] A judge of the Northern Territory

Supreme Court granted an application for the defence that the court be closed so that certain confidential matters could be discussed. The Federal Court held the decision to be in error and stated that" to deny the public knowledge of any part of the proceedings of a court is a matter of gravity, especially where the court is exercising criminal jurisdiction."[19] The Federal Court outlined the circumstances in which a court may be closed in the following terms:

> "In order that a court may accede to an application that it sit in *camera,* it must appear either that there is a statutory provision which enables it to do so, or that the case falls within one of the 'strictly defined exceptions' ... to the rule that the proceedings of courts of justice should be conducted publicly and in open court (*Scott v. Scott*) ... Apart from statute, a court has no discretion as to whether it sits in public or in private. That rule is as clearly established as it is essential to the preservation of confidence in the judicial system."[20]

2.13 Given the importance of the principle of administering justice in open court, it is clear that the news media occupy an important role in this process.[21] In 1974 the Lord Chief justice of England said:

> "Today, as everybody knows, the great body of the British public get their news of how justice is administered through the press or other mass media ... the presence or absence of the press is a vital factor in deciding whether a particular hearing was or was not in open court I find it difficult to imagine a case which can be said to be held publicly if the press have been actively excluded."[22]

The United States Supreme Court has also emphasised the important role of the news media:

> "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."[23]

2.14 Although the news media and the public share the same right to be present in court the news media do not have any special rights in relation to court reporting.[24] As one commentator has said:

> "Press reporters merely share the right of the public to be in a court and to take notes of the proceedings."[25]

Representatives of the news media often have special facilities provided for them in courtrooms which usually consist of separate seating and table facilities. However, even where these facilities are provided the presiding judge can still order journalists not to sit at the reporter's desk and can order that they only take notes in the public gallery.[26]

2.15 It is also to be observed that members of the public (who for our purposes may include intending authors of books and articles), as well as representatives of the news media, have the right to take written notes in court. Thus, the English Court of Appeal, when considering whether privilege attached to a transcript of shorthand notes taken of proceedings in a county court stated:

> "... the proceedings in the county court were public. Any one present could listen and take a note of what the witnesses said."[27]

More recently, Lord Diplock, in a decision handed down by the House of Lords, stated that justice is to be administered in open court where anyone present may listen to and report what he said".[28] He emphasized that one aspect of this principle:

> "is that any document or portion of a document that is read out orally in open court can be taken down in shorthand by anyone competent to do so and can be published as part of a report of the proceedings in the court, even though after it has been read aloud it turns out that it ought not to have been because it is later ruled to be inadmissible in evidence."[29]

2.16 It would seem that this right is not always recognised in practice and members of the public have been asked, or directed, both by judges and court officers to desist from taking notes in court without any reason being given Yet in the recent case *New South Wales Bar Association v. Livesey*[30] both Hope J.A., and Reynolds J.A., of the New South Wales Court of Appeal stated during the proceedings that they could not understand why some judges have objected to members of the public taking notes in court.[31] Obviously a Judge may prevent a person in court taking notes if he or she has reason to believe that they will be used improperly, for example, to influence future witnesses in the proceedings. However, the authorities clearly state that members of the public (and this includes interested observers, law students and persons who intend to write books or articles) are entitled to take written notes during court proceedings that are open to the public. This is an essential element of the principle that justice must be administered in open court where:

> "members of the public, including, of course, journalists and reporters, have access to the trial and to the transcript of proceedings, and may, subject to the law of defamation and copyright publicly report, discuss, and comment on what has, through the trial entered the public domain."[32]

Exceptions to Open Justice

2.17 In our discussion of open justice we saw that courts may conduct proceedings in the absence of the public but that any departure from the principle that justice is to be administered in open court "must depend not on judicial discretion but the demands of justice itself."[33] In *Scott v. Scott,*[34] the House of Lords stated:

> "it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must of necessity be superseded by this paramount consideration The question is by no means one which consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."[35]

2.19 Apart from the power in all courts to hold proceedings in camera, some statutes confer a discretion on courts to hold proceedings in *camera* in specified circumstances. This following are examples of judicial proceedings which may be closed to the public and the media.

> Justices of the High Court of Australia have power to hear applications in chambers concerning, *inter alia,* the conduct of a matter or the custody, management or sale of property. Either party may, however, apply for an order that the application be heard in open court.[36]

The jurisdiction of the Federal Court of Australia may be exercised by a judge in chambers in certain limited circumstances.[37] The Federal Court Act 1976 (Cth.) also provides that:

> "The Court may order the exclusion of the public or of persons specified by the Court from a sitting of the Court where the Court is satisfied that the presence of the public or of those persons, as the case may be would be contrary to the interests of justice."[38]

As a general rule, the jurisdiction of the New South Wales Supreme Court cannot be exercised by a judge in chambers.[39] However, section 80 of the Supreme Court Act, 1970 specifically provides that the business of the court may be conducted in the absence of the public in certain circumstances. These include cases where the proceedings are not before a jury and are formal or non-contentious; where the presence of the public will defeat the ends of justice; where the business concerns the guardianship, custody and maintenance of an infant; and where the business does not involve the appearance before the court of any person.[40]

Certain powers of the New South Wales District Court may be exercised by a judge in chambers:

> "A judge in chambers may, in respect of any proceedings, give any judgment or decision or make any order, which he could lawfully give or make in court and which he considers may be properly given or made in chambers..."[41]

In New South Wales it is specifically provided that at any hearing or trial in a children's court:

> "any persons not directly interested in the case shall be excluded from the courtroom or place of hearing of the trial unless the court otherwise directs".[42]

Committal proceedings before a magistrate in New South Wales may be closed to the press and the public pursuant to section 32 of the Justices Act, 1902 which declares that the place in which committal proceedings occur is not deemed to be an open court and:

> "the Justice or Justices may, if it appears to him or them that the ends of justice will be best answered by so doing, order that no person shall have access to, or be, or remain in such room or building without his or their permission."[43]

Until November 1983, proceedings in the Family Court were held in closed court. Section 97(1) of the Family Law Act 1975 (Cth) now provides:

> "Subject to sub-section (2) and to the regulations, all proceedings in the Family Court, or in a court of a Territory (other than the Northern Territory) when exercising jurisdiction under this Act shall be heard in open court."

As an exception to this rule, the court has power to make an order, *inter alia*, that only the parties to the proceedings, their legal representatives and such other persons (if any) specified by the court may be present in court during the proceedings or during a specified part of the proceedings.[44] The provision that proceedings under the Family Law Act 1975 (Cth) be held in open court was enacted following the recommendation of both the Family Law Council[45] and the Joint Select Committee on the Family Law Act.[46]

Restrictions on Reporting

2.19 A court has two sources of authority to justify imposing restrictions on the reporting of its proceedings, the common law and statutes. A court may properly make orders under the common law that effectively blind people within the court, for example, an order that the name of the victim or a witness in a trial for blackmail not be disclosed.[47] However, there is some doubt whether a court has any power, other than that which maybe conferred by statute or the law of contempt, to make orders directed against the news media restricting their right to publish reports of the proceedings.

2.20 In *Taylor v.Attorney-General*,[48] the New Zealand Court of Appeal considered a ruling made by a trial Judge "prohibiting the publication of anything that may lead to the identification of officers of the New Zealand Security Services." It was held that it was within the Judge's inherent jurisdiction to make the ruling in question The House of Lords later referred to the New Zealand case in terms that cast doubt on its authority.

> "It is not necessary to express an opinion on whether that case was rightly decided. It suffices for me to say that in my opinion the courts of this country have no such power, except when expressly given by statute."[49]

Of course, the fact that a court may not have inherent power to make an order forbidding the publication of certain evidence, including the name of a witness outside the courtroom, does not prevent any such publication being punished as a contempt of court should the publication constitute an interference with the administration of justice.[50]

2.21 Apart from common law, courts may be given a statutory discretion to impose restrictions on the reporting of their proceedings. Courts in New South Wales have no such general statutory power, but do have specific powers which can be exercised in particular circumstances, for example, in cases concerning the adoption of children These powers will be examined shortly. In contrast, section 69 of the South Australian Evidence Act 1929 provides:

> "Where a court considers it desirable to exercise powers conferred by this section -
>
> (a) in the interests of the administration of justice; or
>
> (b) in order to prevent undue prejudice or undue hardship to any person,
>
> it may by order -
>
> (c)...

(d) forbid the publication of specified evidence, or of any account or report of specified evidence either absolutely, or subject to conditions determined by the court, or

(e) forbid the publication of the name of

(i) any party or witness; or

(ii) any person alluded to in the course of proceedings before the court;

and of any other material tending to identify any such person."[51]

2.22 Some New South Wales statutes confer a discretion on courts to impose restrictions on the reporting of proceedings, while others impose mandatory restrictions. The following are examples of New South Wales statutes which confer a discretion on courts to impose such restrictions.

As we have seem section 80 of the Supreme Court Act, 1970 specifies the circumstances when "the business of the court may be conducted in the absence of the public". it has been held that the power conferred by section 80 may be used to make an order preventing publication of the names of the parties in a Supreme Court action,[52] although this is not specifically stated in the section.

Section 44 of the Coroners Act, 1980 provides that a coroner holding an inquest or inquiry may order "that any evidence given at the inquest or inquiry being held by him be not published". Where there is a finding or verdict in an inquest to the effect that the death of a person was self-inflicted, no report of the proceedings shall be published after the finding or verdict unless the coroner holding the inquest is of the opinion that it is desirable in the public interest to permit a report of the proceedings to be published.[53]

Section 578 of the Crimes Act, 1900 provides that any judge presiding at the trial of any person for a specified offence may, at any stage of the trial make an order forbidding publication of any or all of the evidence. The specified offences include:

(i) sexual assault;

(ii) acts of indecency; and

(iii) abduction.

2.23 The following are examples of New South Wales statutes which impose a mandatory restriction on the reporting of court proceedings.

Section 16(4) of the Child Welfare Act 1939 provides, *inter alia,* that the name of any child involved in a hearing or trial by a court or to whom a hearing or trial by a court relates, shall not in any case be published or broadcast.

Section 53 of the Adoption of Children Act, 1963 provides that any person who publishes or broadcasts the name of an applicant for adoption or the name of the child, the father, mother or guardian of the child, or any matter reasonably likely to enable any of those persons to be identified, is guilty of an offence. An offence will not be committed if the court to which the application for adoption is made authorises the publication.

THE POWER OF A COURT TO PREVENT OR ALLOW THE USE OF RECORDING EQUIPMENT IN COURT

2.24 We have seen that representatives of the news media have the right to be present in court when the proceedings are open to the public, and share with the public the right to take notes of the proceedings. Apart from handwritten notes, it is technically possible to record the proceedings of a court by means of sound recorders and cameras. In this section we examine the power of a court to regulate the use of such recording equipment in the absence of statutory provision As we observe in Chapter 4, in England the use of a sound recorder in court without permission has been an offence since the enactment of the Contempt of Court Act 1981 (Eng.).[54]

2.25 In New South Wales there is no statute which regulates' the use of cameras and sound recorders in courtrooms. Control over the methods used to record the proceedings of a court can therefore only be effected pursuant to the inherent jurisdiction or power of a court to control its own proceedings. We now outline the principles underlying inherent jurisdiction and examine the manner in which they may be applied.

The Inherent Jurisdiction of Courts

2.26 It is stated in *Halsbury's Laws of England* that

> "A court exercising judicial functions has an inherent power to regulate its own procedure, save insofar as its procedure has been laid down by the enacted law..."[55]

It is necessary to examine the extent of this jurisdiction and to ascertain whether it can be employed by a judge or magistrate to refuse a reporter or any other person the use of a sound recorder or camera to record the proceedings of a court Little has been written on the inherent jurisdiction of courts, and it has been said that:

> "Its ubiquitous nature precludes any exhaustive enumeration of the powers which are thus exercised by the courts."[56]

Writing in 1970, Master I.H. Jacob of the English Supreme Court stated that:

> "the source of the inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition".[57]

2.27 According to Jacob, superior courts of common law have exercised inherent jurisdiction from the "earliest time" and the exercise of this power has developed along two paths:

> regulating the practice of the court and preventing the abuse of its process, and
>
> punishment for contempt of court and of its process.[58]

Jacob defines the inherent jurisdiction of a court as:

> "being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary wherever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression to do justice between the parties and to secure a fair trial between them".[59]

The juridical basis of inherent jurisdiction is:

> "the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."[60]

Regulating Process and Proceedings

2.28 As stated above, the exercise of inherent jurisdiction has developed along two paths, the first leading to regulation of the practice of the court and the second to punishment for contempt of court. A court exercises the power to regulate its own process and proceedings in a wide variety of circumstances. It has been said that

> "it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice."[61]

One example of the power of a court to control and regulate its process and proceedings is the power to make rules of court However, the creation of procedural rules of court does not exhaust the inherent jurisdiction of a court to control its own proceedings, but merely regulates this power.[62]

2.29 Any rule or order made by a court which prohibits or places conditions upon the use of sound recorders or cameras must proceed from the court s inherent power to regulate its own proceedings. The question is, however, what limits, if any, circumscribe the power of a court to make such a ruling. The New South Wales Court of Appeal has stated that "the inherent jurisdiction could not exceed what is necessary for the administration of justice" and that inherent powers "are recognized and exercised because they are necessary for the administration of justice".[63] Yet this leaves unanswered the question whether a ruling of a court prohibiting, for example, the use of sound recorders can only be made on the basis that the use of sound recorders will constitute an interference with the administration of justice.

2.30 The question can be illustrated by an example: a journalist enters a courtroom and proceeds to use an unobtrusive hand-held sound recorder with the intention of using the recording for compiling a fair and accurate report of the proceedings for later publication The use of the recorder will not interfere with the proceedings. If the judge rules that the sound recorder not be used, is the ruling a valid exercise of the courts inherent power?

2.31 Jacob states that the courts power to control its own practice and proceedings can be used "to prevent any obstruction or interference with the administration of justice".[64] He does not make it clear whether this power can only be exercised to prevent any obstruction or interference with the administration of justice. If this was the case, then the judge in the illustration would have no power to order the journalist to stop Using sound recorder. In the United States, for example, the courts have limited the exercise of inherent powers by providing that

> "inherent powers may be used only when reasonably necessary for the court to be able to function... Courts may not exercise inherent powers merely because their use would be convenient or desirable".[65]

On this approach there would be no legitimate basis for a court disallowing the use of a sound recorder where that use does not interfere with the proceedings. On the other hand the Privy Council in *O'Toole v. Scott*[66] has stated that the discretionary power of a magistrate to permit a person other than the informant or his counsel-to conduct the case for the informant:

> "is an element or consequence of the inherent right of a judge or magistrate to regulate the proceedings in his court ... Its exercise should not be confined to cases where there is a strict necessity, it should be regarded as proper for a magistrate to exercise the discretion in order to secure or promote convenience and expedition in the administration of justice".[67]

2.32 This statement may appear to provide support for the view that a judge can make a ruling prohibiting the use of sound recorders in the court, not because it is necessary for the administration of justice but merely because the judge may consider it to be convenient. Such an interpretation arguably takes too broad a view of the inherent jurisdiction As we have seem there is language in a New South Wales case which suggests that a ruling made pursuant to the court s inherent jurisdiction should not exceed what is necessary for the administration of justice.[68] Moreover, the statement of the Privy Council in *O'Toole v. Scott* referred to in paragraph 2.31, was made in a particular context Indeed, their Lordships' statement that the exercise of the discretionary power of a magistrate to permit a person other than the informant or his or her counsel to conduct the case for the informant might be "convenient for the dispatch of the court's business"[69] suggests that the ruling was designed to promote the administration of justice.

2.33 Although there appear to be no Australian cases which have considered the validity of a ruling prohibiting or regulating the use of sound recorders in courts, the issue arose in lower courts in England before the enactment of the Contempt of Court Act 1981 (Eng.). The Phillimore Committee, whose report led to the 1981 Act considered the question of the use of sound recorders in court (otherwise than for official purposes), and observed "that difficulties about this do occasionally arise".[70] The following are occasions whem according to the periodic literature, English courts have had cause to consider the use of sound recorders in court

> In August 1964, a stipendiary magistrate, Mr. A.P. Babbing to be permitted a spectator to proceedings at the Bow Street court to record the proceedings. He decided that there was nothing to prevent the recording of the proceedings, and is quoted as saying, "You can sit and play it to your hearts content but you must stop it squeaking."[71]

> In January, 1967, a tape recorder was brought into Banbury Magistrates' Court by a man charged with receiving stolen property. After consulting the rest of the Bench the Chairman, Ald. J. Friswell, ordered the tape recorder to be turned off "because there was a possibility that it would only pick up snatches of the proceedings and so not give a true picture".[72]

> In May, 1971, at the Essex quarter sessions, a man in the public gallery was seen by the Deputy Chairman, Mr. Peter Greenwood, with at a tape recorder on his lap. The man in question said that he was a neighbour of the accused. A High Court judge sitting at the Essex Assizes in the same building was consulted and Mr. Greenwood then announced:
>
> > "As far as he knows and as far as I know, there is no statutory provision preventing people from having a tape recorder in court. But if it were a case of a person taking a tape of the evidence with the intention of letting it be heard by someone waiting outside the court to give evidence then the matter could be dealt with by way of contempt.[73]

> In January, 1973, Judge King-Hamilton, Q.C., presiding at the Central Criminal Court (Old Bailey) ordered a spectator in the public gallery using a tape recorder to erase

> the tape and banned any further recording. He had taken this action he stated, because in the past improper use had been made of unauthorised tape recordings.

2.34 Other opinions have been expressed with respect to the power of a court to prevent the use of a tape recorder in court. The English Justice Clerk Society Conference of 1969 stated that there could be no objection to a party to proceedings in a Magistrates' Court, or a member of the public, recording the proceedings by means of a portable tape recorder provided that the recorder was not run from the court s electricity supplies and that its use did not interfere with the conduct of the proceedings.

2.35 In an editorial in 1974, *Justice of the Peace* stated that the Crown Court might have inherent jurisdiction to prevent the use of tape recorders in court It was further stated:

> "We are of the opinion that it is a power that the Crown Court should exercise with considerable caution. In the first place we can see no real objection to the use of a tape recorder as against any other form of speech recording be it manual or mechanical providing no disturbance is caused to the proceedings. In the second place the only sanction available to the judge to enforce his order would be that of contempt of court and ... it seems unlikely that the Court of Appeal would applaud any summary action in a case of this sort except on clear evidence of misuse of the recording. In any case to prejudge the issue and order the removal of the recorder and clearing of the tapes on the ground that they might be misused would surely be wrong."[76]

Finally, one commentator writing in relation to the use of tape recorders in court s(prior to the enactment of the Contempt of Court Act 1981 (Eng.)) expressed the opinion "that the court has an underlying discretion to prohibit such recordings if they interfere with the administration of justice".[77]

2.36 It is evident that the law is not clear on the question whether a judge or magistrate may make a valid order prohibiting the use of a sound recorder where there is no evidence that its use would interfere with the administration of justice. We believe that the preferable view is that such a ruling should only be made if the use of a sound recorder in a particular case has actually interfered with the administration of justice or if there is good reason to believe that use of a recorder, if allowed, will constitute an interference with the administration of justice. On this basis, sound recorders could reasonably be prohibited or restrictions placed on their use if, for example, the noise of their operation made it difficult to hear witnesses or if there were reason to believe that the recording would be used to brief future witnesses in a proceeding. If there were no interference or threatened interference with the administration of justice, there would be no basis for prohibiting the use of sound recorders.

Contempt of Court

2.37 It will be recalled that according to Jacob, the power to punish contempt of court is one aspect of the courts inherent jurisdiction.[78] Our discussion of contempt is in two parts. First, we examine whether the use of a sound recorder in court without any prior ruling of a judge prohibiting its use, constitutes an act of contempt Secondly, we examine the principles of contempt as a means of enforcing an order of a court prohibiting the use of sound recorders.

2.38 Contempt of court is usually divided into two categories: criminal contempt which includes the publication of words and the commission of acts which would tend to prejudice or interfere with the course of justice, and civil contempt, which consists of disobedience to certain court orders and judgments.[79] Lord Diplock has described civil

contempt as “the mere disobedience by a party to a civil action of a specific order of the court made on him in that action”.[80] We are not here concerned with civil contempt or criminal contempt as it relates to publications. We are concerned with criminal contempt to the extent that it is relevant to controlling court proceedings. This category of the law of criminal contempt is usually referred to as “contempt in the face of the court”.

2.39 Contempt in the face of the court is conduct which interferes with the administration of justice in the court itself.[81] Borrie and Lowe submit that:

> “the best definition that can be given to the term is that the words or acts must interfere or tend to interfere with the course of justice, and that all the circumstances must be within the personal knowledge of the court”.[82]

The clearest example of contempt in the face of the court is threatening (or actual assault of judges or any other person within the confines of the court.[83] Insulting or disrespectful behaviour in court may also constitute contempt.[84]

2.40 The expression “interference with the course or administration of justice” plainly includes deliberate physical disturbance of a particular court proceeding. However, as pointed out by the New South Wales Court of Appeal it is not confined to actual physical disturbance:

> “... it comprehends as well an interference with the authority of the courts in the sense that there may be a detraction from the influence of judicial decisions and an impairment of confidence and respect in the courts and their judgments.”[85]

In this case, the six defendants had attended a Court of Petty Sessions to answer charges of trespass brought against them and, as they entered the courtroom had all made a gesture by raising the left arm with the hand or fist clenched. This was held to be contempt in the face of the court According to the Court of Appeal:

> “Acts, words or other forms of behaviour which give the appearance of defying the authority of a Court of law or which by intimidation ridicule or otherwise tend to lessen the authority of the courts to administer the law and to seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as contempt of Court.”[86]

2.41 Even if a broad interpretation is given to the expression “interference with the course or administration of justice”, it is evident that where there has been no prior prohibitory order, the use of an unobtrusive sound recorder that does not interfere with the proceedings and the administration of justice will not constitute contempt in the face of the court. This is not to say that contempt can only be committed if a prior order has been made, but rather that where there has been no prior order, the use of a sound recorder must amount to an interference with the administration of justice in order for the offence of contempt to be established.

2.42 The situation may be different where the judge has made a prior order prohibiting the use of sound recorders. We have already examined the law in relation to the validity of such an order. For an order regulating the proceedings of a court to be valid, it should be necessary for the administration of justice.[87] Therefore, a breach of a valid order is capable of amounting to contempt as the breach interferes with. the administration of justice.

> “At common law if the court makes an order regulating its own procedure and the purpose of the order is plainly to protect the administration of justice, then anyone who subverts that order will be guilty of contempt.”[88]

If the order is not made for the administration of justice, then the order is invalid and no contempt for breach of the purported order can be committed. The conclusion that a breach of a valid order regulating court proceedings constitutes contempt was stated by Lord Widgery C.J. in delivering the judgment of the Divisional Court in *Attorney-General v. Leveller Magazine Ltd:*

> "Every court has the power to control its own proceedings subject to the rules of evidence and general practice. An instance is the power to order witnesses out of court ... All such rulings are given (and only purported to be given) to those in court and not outside it A flouting in court of the court s ruling will be a contempt."[89]

SUMMARY

2.43 This chapter has examined the general principle (and its limited exceptions) that justice is to be administered in open court. The application of this principle has the result that members of the public and representatives of the news media have the right to be present in court and to report and comment upon the proceedings. The second part of the chapter examined the power of a court to regulate its own proceedings, including the power to control the use of recording equipment in court. We observed that in the absence of statutory provision control over the methods used to record the proceedings of a court can only be effected pursuant to the inherent jurisdiction or power of a court to control its own proceedings.

2.44 Although little has been written on the inherent jurisdiction of courts and, in particular, the limits that can be placed on its exercise, we suggest that a ruling prohibiting the use of sound recorders in court can be valid only if the use of a sound recorder in a particular case has actually interfered with the administration of justice or if there is reason to believe that such use would, if allowed, constitute an interference with the administration of justice. Finally, we discussed the power of a court to enforce a ruling prohibiting the use of sound recorders in court by punishing a breach of the ruling as a contempt of court.

2.45 In the next chapter we examine in general terms the functions and powers of Royal Commissions and Special Commissions of inquiry and, more specifically, how those powers can be used to control the means of recording the proceedings of such inquiries.

FOOTNOTES

1. Information supplied by the Court Reporting Branch of the Department of the Attorney General and of Justice.

2. In response to our request for information concerning the practice of recording court proceedings, letters were received from the Crown Solicitor, Tasmania, 14 July 1983: Department of Law, Northern Territory of Australia, 25 July 1983; Law Department, Victoria, 16 August 1983: Department of Justice, New Zealand, 23 August 1983; Crown Law Department of Western Australia, 6 September 1983; Attorney-Generals Department South Australia, 28 September 1983; Department of Justice, Queensland, 17 November 1983; and Attorney-Generals Department, Australian Capital Territory, 2 December 1983.

3. Contempt of Court Act 1981 (Eng), s.9.

4. P.C. Smith *Press Law* (1978), p.211.

5. [1982] 1 All E.R. 532.

6. *Id.,* at p.536.

7. *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440, at p.450.

8. [1913] A.C. 417.

9. *Id.,* at p.440. See also *Daubney* v. Cooper (1829) 10 B.& C. 237; 109 E.R. 438, at p.440:

> "... it is one of the essential qualities of a Court of justice that its proceedings should be public, and that all parties who maybe desirous of hearing what is going on if there be room in the place for that purpose, - provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed,- have a right to be present for the purpose of hearing what is going on."

10. *Id*., at p.463.

11. *Id*., at pp.437-438; also Earl Loreburn at p.445.

12. *Id*., at p.439.

13. *Id*., at p.442.

14. *Dickason v. Dickason* (1913) 17 C.L.R. 50, at p.51.

15. R. *v. Hamilton* (1930) 47 W.N. (N.S.W.) 84.

16. *Id.,* at p.84.

17. *R. v. Brady*, 29 July 1977, Supreme Court of New South Wales, Court of Criminal Appeal Street C.J., Transcript of judgment, pp.3-4.

18. *R. v. Tait and Bartley* (1979) 24 A.LP, 473.

19. *Id.,* at p.487.

20. *Ibid*. See also *Russell v. Russell* (1976) 134 C.L R, 495, where a provision in the Family Law Act 1975 (Cth.), which would have required the Supreme Courts of the States to exercise their matrimonial jurisdiction in closed court was held invalid. In this case, Gibbs J. stated:

> "It is the ordinary rule of the Supreme Court as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (*Scott v. Scott*). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character To require a court invariably to sit in closed court is to alter the nature of the court."(p.520)

The principle that justice must subject to certain limited exceptions, be administered in open court has recently been considered in New Zealand (see *Broadcasting Corporation of New Zealand v. Attorney-General* [1982] 1 N.Z.L.R. 120) and the United States *(see Richmond Newspaper Inc v. Commonwealth of Virginia* (1980) 448 U.S. 555; and G.M. Fenner and J.L Koley, "Access to judicial Proceedings: To Richmond Newspapers and Beyond" (1981) 16 *Harvard Civil Rights - Civil Liberties Law Review* 415).

21. See paras.5.3-5.11.

22. R. v. *Denbigh justices, ex parte Williams* [1974] 2 All E.P, 1052, per Lord Widgery C.J., at p.1056.

23. *Richmond Newspapers Inc. v. Commonwealth of Virginia* (1980) 448 U.S.555, per Burger C.J., at pp.572-573.

24. In *re Andrew Dunn and The Morning Bulletin Ltd.* [1932] St.R.Qd. 1.

25. G. Sawer," Privilege" in The Australian Press Council To Name or Not to Name (1980), p.10. In *Arnold v. The King Emperor* (1914) 30 T.L.R. 462, at p.468, Lord Shaw stated:

> "Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute-law, his privilege is no other and no higher."

26. Note 24 above.

27. *Lambert v.* Home [1914] 3 K.B. 86, at p.90. See also the statement by Lord Tenterden C.J. in *Collier v. Hicks* (1831) 2 B. & A.D. 663; 109 E.R. 1290, at p.1292:

> "Any person whether he be a professional man or not, may attend [court] as a friend of either party, may take notes, may quietly make suggestions, and give advice."

28. *Home Office v. Harman* [1982] 1 All E.R. 532, at p.537.

29. *Ibid.*

30. [1982] 2 N.S.W.L.R. 231.

31. Transcript Record of Proceedings, p.195.

32. Note 28 above, per Lord Scarman, at p.546.

33. *Broadcasting Corporation of New Zealand v. Attorney-General* [1982] 1 N.Z.L.R. 120, per Woodhouse P., at p.123.

34. [1913] A.C.417.

35. *Id*., per Viscount Haldane L.C., at pp.437-438..

36. Judiciary Act 1903 (Cth.), s.16. See also High Court Rules, Order 52. Proceedings in chambers are held in private and members of the public are not admitted. *See Halsbury's Laws of England* (4th ed., 1982), vol.37, para.345 and The Law Commission, *Report on the Powers of Appeal Courts to Sit in Private and The Restrictions Upon Publicity in Domestic Proceedings* (Cmnd.3149, 1966), para.3.

37. Federal Court of Australia Act 1976 (Cth), s.17.

38. *Id*., s.17(4). This section was considered by the Federal Court in *Australian Broadcasting Commission v. Parish* (1980) 29 A.LR. 228.

39. Supreme Court Act 1970, s.11. It has been held that a Master, although not a member of the Supreme Court constitutes the court for the purpose of the exercise of powers

conferred by the Supreme Court Act: *The Commonwealth v. Hospital Contribution Fund of Australia* (1982) 56 A.L.J.R. 588.

40. *Id.,* s.80. See also Supreme Court Rules, Part 73 rule 11 and part 78 rules 9 and 41.

41. District Court Act, 1973, s.37(1).

42. Child Welfare Act 1939, s.16(1). This Act is to be wholly repealed on a day to be appointed, by the Miscellaneous Acts (Community Welfare) Repeal and Amendment Act, 1982. The Community Welfare Act, 1982, which has yet to be proclaimed, provides that any person not directly interested in the proceedings shall be excluded from the Children's Court but that "any persons bona fide engaged in reporting or commenting upon the proceedings of the court for dissemination through a public news medium shall not be excluded' unless the court otherwise directs: s.186(1).

43. Cf. Evidence Act 1929 (S.A.), s.69(1); Magistrates' Courts Act 1980 (U.K.), s.8: R. *v. Leeds justices, ex parte Sykes* [1983] 1 All E. R. 460. See also" Publicity of Committal Proceedings"(1958) *3 I Australian Law Journal* 629.

44. Family Law Act 1975 (Cth.), s.97(2).

45. Family Law Council, First *Annual Report 1977* (1977), paras.106-1 11.

46. Joint Select Committee on the Family Law Act *Family Law in Australia* (1980), Chapter 9. In *Russell v. Russell* (1976) 134 C.LR. 495, the High Court held that the requirement of a closed court in s.97 prior to it being amended was invalid insofar as it purported to apply to State Supreme Courts exercising federal jurisdiction under the Family Law Act 1975 (Cth.).

47. R. *v. Socialist Worker Printers and Publishers Ltd; ex parte Attorney-General* [1975] 1 All E.P, 142.

48. [1975] 2 N.Z.L.R. 675.

49. *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440, at p.456.

50. *Ibid.*

51. The original section 69, which was more limited in scope, was repealed in 1979 and replaced by the present section. It has been said that section 69:

> "was intended by parliament to set out exhaustively the extent of the powers of courts in the State to prohibit publication of legal proceedings. The section is a statutory code as to those powers and would operate to supersede and abrogate any pre-existing inherent jurisdiction to prohibit publication of proceedings."

Attorney-General v. Kernahan [1981] 28 S.A.S.R. 31 3, per King C.J., at p.314.

52. *G. v. Day* [1982] 1 N.S.W.L.R. 24, at p.41.

53. Coroners Act, 1980, s.44(3), (4).

54. Paras.4.5-4.6.

55. *Halsbury's Laws of England* (4th ed., 1975), vol 10, para.703.

56. K Mason, "The Inherent jurisdiction of the Court" (1983) 57 *Australian Law Journal* 449, at p.449.

57. I.H. Jacob, “The Inherent jurisdiction of the Court” (1970) 23 *Current Legal Problems* 23, at p.24.

58. *Id*., p.25.

59. *Id.,* p.51.

60. *Id*., p.28.

61. *Id.,* p.33.

62. Id., p.34.

63. *Riley McKay Pty. Ltd. v. McKay* [1982] 1 N.S.W.L.R. 264, at p.270.

64. Note 57 above, p.32.

65. S.D. Baskin, “Protective Orders Against the Dress and the Inherent Powers of the Court” (1977) 87 *Yale Law Journal* 342, at pp.351-352.

66. [1965] A.C. 939, at p.959.

67. *Id*, at p.959.

68. Para.2.29.

69. Note 66 above, at p.954. By way of comparison it is pertinent to refer to the decision of the Supreme Court of Queensland in In *re Andrew Dunn and the Morning Bulletin Ltd*. [1932] St.R. Qd. 1. in that case, the court considered a ruling of a judge who, resenting certain criticisms of him that had been published in a local newspaper, made an order forbidding the reporters of the newspaper and of another newspaper owned by the same company to sit at the reporters desk or take notes of the proceedings in his court elsewhere than in the public gallery. This wag clearly a ruling made on the same basis as an order prohibiting the use of sound recorders in court, namely, an order made pursuant to the inherent power of a judge to regulate and control the court s proceedings. The court held that the ruling of the judge was not a judicial order, but an administrative order and was therefore not subject to appeal. It was therefore not necessary for the court to determine the validity of the ruling, having held that it was not subject to appeal. However, E.A. Douglas J., stated that the “order was not in excess of the Judge’s powers” (p.17). On the other hand, R.J. Douglas J., stated that the power of a judge to regulate the conduct of the court “should be exercised with a wise discretion and with the sole idea of promoting the interests of justice” (p.15). He further stated that the judge’s ruling was made:

> “not for the purpose of duly regulating his court, but for the purpose of punishing a person against whom he felt himself aggrieved in his judicial capacity. I can only say that I personally would not have made such an order, but that this court cannot interfere with it.” (p.16)

70. *Report of the Committee on Contempt of Court* (Cmnd.5794, 1974), para.42.

71. (1964) 128 *Justice of the Peace and Local Government Review* 597, at p.606.

72. (1967) 131 *Justice of the Peace and Local Government Review* 144, at p.145.,

73. (1971) 135 *Justice of the Peace and Local Government Review* 460, at p.460.

74. (1973) 137 *Justice of the Peace* 81, at p.81.

75. (1969) 133 *Justice of the Peace and Local Government Review* 434, at p.446.

76. (1974) 138 *justice of the Peace* 426, at p.427.

77. B. Harris. *The Courts, The Press and the Public* (1976), p.54.

78. Para.2.27. With respect to the jurisdiction to punish for contempt as a general rule, a "superior court of record" has jurisdiction to deal summarily with any contempt which affects its own proceedings. In New South Wales, the Supreme Court, the Land and Environment Court and the Industrial Commission are superior courts of record (Supreme Court Act 1970, s.22; Land and Environment Court Act 1979, s.5(1); Industrial Arbitration Act, 1940, s.14(1)). An "inferior court of record" has jurisdiction to deal only with contempt committed in the face of the court while "inferior courts not of record" do not have jurisdiction to deal with contempt unless jurisdiction is conferred pursuant to statute. Both the District Court and the Workers' Compensation Commission of New South Wales are inferior courts of record (District Court Act, 1973, s.8(2); Workers' Compensation Act 1926, s.31(1)). Although Courts of Petty Sessions are not statutory courts of record, these courts would normally be classed as courts of record as the question whether a court is a court of record depends in general upon whether it has power to fine or imprison *(Halsbury's Laws of England* (4th ed.,.1975), vol 10, para.709). In any event Courts of Petty Sessions have statutory power to deal with contempt (Justices Act 1902, s.152). The Coroners Court is a court of record *(Attorney-General v. Mirror Newpapers Ltd.* [1980] 1 N.S.W.L.R 374) and also has statutory power to punish acts of contempt (Coroners Act, 1980, s.43).

79. See generally, A. Arlidge and D. Eady, *The Law of Contempt* (1982): G. Borrie and N. Lowe, *The Law of Contempt* (1973); C.J. Miller, Contempt of Court (1976): G.A. Flick, *Civil Liberties in Australia* (1981), C115. In the recent case *Jendell Australia Pty.Ltd. v. Kesby* [1983] 1 N.S.W.L.R 127, McLelland J., referred to the different sanctions imposed for civil contempt and criminal contempt and stated:

> "The purpose of the imposition of sanctions for civil contempt is the enforcement of private rights as between the parties: in such a case the sanctions are of a coercive or remedial nature. The purpose of the imposition of sanctions for criminal contempt is the protection of the public interest in the due administration of justice, including vindication of the authority of the courts: in such a case the sanctions are of a punitive nature." (p.133).

80. *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273, at p.307.

81. Miller, note 79 above, p.48.

82. Borrie and Lowe, note 79 above, p.7. *See also Parashuram Detaram Shamdasani v. King-Emperor* [1945] A.C. 264, at p.268.

83. Borrie and Lowe, note 79 above, pp. 10-13.

84. Miller, note 79 above, pp.51-53.

85. *Ex parte Tuckerman; Re Nash* [1970] 3 N.S.W.R. 23, at p.27.

86. *Id.,* at p.28.

87. See paras.2.28-2.36; In *re Andrew Dunn and The Morning Bulletin Ltd.* [1932] St R. Qd. 1, per PJ. Douglas J. at p.15.

88. Arlidge and Eady, note 79 above, para.4-151.

89. [1978] 3 All E.R 731, at p.736.

3. Recording the Proceedings of Royal Commissions and Special Commissions of Inquiry: The Present Law and General Principles

ROYAL COMMISSIONS

Historical Background

3.1 Royal Conimissions are part of the executive arm of government. They are appointed by governments to conduct inquiries, obtain information and report thereon.[1] Royal Commissions are appointed by the Commonwealth Government and by State Governments. All the States and the Commonwealth have legislation which confers specific powers upon Royal Commissions;[2] however, Commissions may be appointed not only in conformity with statute but also by virtue of the prerogative power of the Crown.[3]

3.2 Royal Commissions were used as long ago as the 11th century when William the Conqueror established an inquiry which resulted in the Domesday Book of 1086.[4] Although there was a decline in the use of Royal Commissions in the 15th century, Royal Commissions became a regular feature of government under the Tudors and the Stuarts. Cartwright observes that the 17th and 18th centuries were a period of relative unpopularity for Royal Commissions because of their extra-legal status and procedures.[5]

3.3 However, by the early 19th century Royal Commissions were being appointed in Britain at the rate of about one each year. In 1859, 13 Royal Commissions were appointed.[6] According to Cartwright, there were several reasons for this revival With the continued passing of power from the Crown to the Parliament, much of the unpopularity surrounding Royal Commissions diminished. Moreover, the coming of the Industrial Revolution and its associated social and economic problems seemed suited to Royal Commissions and the type of investigation they could conduct.[7]

3.4 In Australia, research on the numbers of Royal Commissions appointed by the Commonwealth and State Governments has been undertaken by D.H. Borchardt.[8] During the period 1855-1960, there were 959 Royal Commissions, Select Committees of Parliament and Boards of Inquiry established in New South Wales.[9] For the period 1900-1960, 370 Royal Commissions, Select Committees and Boards of Inquiry were established by the Commonwealth Government.[10]

Powers of Royal Commissions

3.5 In Chapter 2 we discussed the principle that justice must, subject to limited exceptions, be administered in public. Royal Commissions exercise an investigatory or inquisitorial function.[11] They do not exercise a judicial function in the sense of determining rights between parties, and are therefore not governed by the same principle. The New South Wales Royal Commissions Act, 1923 is silent in relation to the power of a Commission to exclude members of the public and the news media from proceedings, although the Commonwealth Act states that a Royal Commission has general power to order that evidence may be taken in private.[12] Similarly, the New South Wales Act does not confer power on a Royal Commission to order that evidence be withheld from publication while the Commonwealth legislation provides that a Commission may direct that any evidence given before it “shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies.”[13]

3.6 Despite the lack of a statutory basis upon which to hold proceedings in *camera,* it is well established that a Royal Commission has a discretion whether or not to exclude the public. Thus, it was stated by the New South Wales Supreme Court in relation to the Royal Commissions Act:

> "... it is for the person conducting the inquiry to decide whether the inquiry should be open to the public or not In this State, Royal Commissions have usually been conducted as public inquiries, subject to there being some occasions when for reasons usually of public policy, part of the proceedings have been conducted in camera."[14]

Hallett states that the policy behind allowing the proceedings of Royal Commissions to be open is that

> "Publicity is regarded as of fundamental importance to the success of an inquiry as a means of restoring public confidence, and as a means of independent scrutiny, into those areas of government administration where a problem has arisen."[15]

3.7 Royal Commissions, like courts, have inherent power to regulate their own proceedings and to determine the manner in which the inquiry is to be conducted.[16] There is no statutory basis for this power in the New South Wales Act, although in some other States, the power of Royal Commissions to regulate their own proceedings is contained in legislation For example, in South Australia, section 7 of the Royal Commissions Act 1917 (S.A.) provides that Royal Commissioners:

> "... in the exercise of any of their functions or powers, shall not be bound by the rules or practice of any court or tribunal as to procedure or evidence, but may conduct their proceedings and inform their minds on any matter in such manner as they think proper."[17]

The High Court has stated with respect to Royal Commissions appointed by the Commonwealth Government that the manner of the conduct of their inquiries "is entirely unfettered, either by statute or by executive direction".[18]

3.8 Clearly, a body that has unfettered power to control its own proceedings, including a Royal Commission may make an order that a sound recorder not be used to record the proceedings. This issue was addressed by the Ontario High Court when considering a ruling of a School Board that prohibited the use of sound recorders during meetings.[19] The School Board had statutory power to regulate its own proceedings and the public had a statutory right to attend meetings of the Board, unlike Royal Commissions which as we have seem have (in the absence of specific provision to the contrary in their governing statutes) a discretion whether or not to exclude the public. The Board made a ruling:

> "That, at meetings of the Board or of its committees, the use of cameras, electric lighting equipment, flash bulbs, recording equipment, tape recorders, sound equipment, television cameras, and any other devices of a mechanical electronic, or similar nature used for transcribing or recording proceedings by auditory or visual means by members of the public, including accredited and other representatives of any news media whatsoever, be prohibited."

3.9 The applicant, a radio station contended that the resolution so far as it prohibited the use of tape recorders, was beyond the powers of the Board. in response, the court stated:

> "I consider it within the powers of the Board in the performance of its duty ... in the regulating of the mode of the conduct of its meetings to pass a resolution which deals with matters which may distract or interfere with the conduct of such meetings. It is not unreasonable that the Board should be of the opinion that recording or

> transcribing its meetings in the manner referred to might well interfere by distracting and impeding its members in their deliberations, to say nothing of members of the public who might come before the Board in the course of the Boards business. If it is reasonable that the Board should reach this decision, it is not for a Court to interfere."[20]

3.10 As an example of a ruling made by a Royal Commissioner (pursuant to the inherent, rather than statutory power of a Royal Commission to control its own proceedings) for the purpose of regulating media reporting of the proceedings of a Royal Commission it is pertinent to refer to a memorandum issued to the media by the Chief Justice of New South Wales, the Hon Sir Laurence Street, who received a Royal Commission in May 1983, for the purpose of inquiring into "certain committal proceedings against KE. Humphreys". The memorandum is as follows:

> "(1) Full and free access will be available to all media representatives throughout the Commission, subject to an occasion arising in which the Commission sits in camera. This access will permit the taking of notes or making of sketches (if done discreetly).
>
> (2) By arrangement with the Sheriff at the Supreme Court, still photographs or television photographs may be taken of the courtroom and the precincts, provided that no persons are shown therein. This will of course, preclude televising of the proceedings themselves.
>
> (3) Sound broadcasting and recording by tape-recorders will not be permitted."[21]

Contempt

3.11 If a ruling such as this were breached by representatives of the news media for example, if a sound recorder were to be used, the breach could be dealt with by way of contempt. The Privy Council has recently held that in the absence of statutory provision to the contrary, the law of contempt only applies to courts and not to Royal Commissions.[22] However, in New South Wales, the Royal Commissions Act 1923 provides that where a Royal Commissioner is a Judge of the Supreme Court the Royal Commissioner:

> "shall have all such powers, rights, and privileges as are vested in the Supreme Court or in any Judge thereof in relation to any actions on trial in respect of... punishing persons guilty of contempt".[23]

3.12 It is to be noted that this power only applies if the Chairman of the Commission or the sole Commissioner is a Judge of the Supreme Court. Consequently, where the sole Commissioner is not a judge of the Supreme Court, the Royal Commission has no power to punish any contempt that is committed. In Victoria, Royal Commissions do not have the power to punish acts of contempt, except where this is conferred by statute on a particular Commissio. Hallett describes the Victorian situation in the following terms:

> "As the law stands at present, Commissions and Boards are powerless to prevent disruption to their proceedings or interference with witnesses. Unless a person engages in conduct for which he could be arrested for a breach of the ordinary laws of the land, it appears police officers are also powerless. The person who wishes to be a nuisance is apparently free to do so."[24]

3.13 In New South Wales section 18(1) of the Royal Commissions Act, 1923 clearly allows a Royal Commissioner who is a Judge of the Supreme Court to punish any act of contempt However, our discussion in Chapter 2 concerning contempt centred around the definition of contempt of court which as we have seem consists of acts or words which interfere or tend to interfere with the administration of justice. Given that Royal Commissions are not concerned with the administration of justice, it remains to be

considered whether contempt takes on a different meaning when applied to the proceedings of Royal Commissions.

> "The problem is, how to apply to a Royal Commission which is not concerned in the administration of justice at all doctrines designed solely to prevent interference with the administration of justice. Ex *hypothesis* there is nothing to be interfered with The very touchstone whereby the question of contempt or no contempt is to be judged has been withdrawn and some new criterion must be found. The solution must be that Parliament intended that the proceedings of the Commission are to be treated as themselves part of the general administration of justice, and that all acts which would be contempt in the case of a judicial proceeding shall if committed in relation to the Commission be contempt. Difficulties will arise in forcing the old doctrines to new uses, which I am not called upon to solve, but it is plain that there is an additional reason for great caution in applying the summary procedure for contempt to this new use."[25]

3.14 In other words, any act that would, if the Royal Commission had been a court, have constituted contempt of court, is punishable as contempt of the Royal Commissio. This is the approach adopted in England to contempt of certain tribunals. Section 1(2) (c) of the Tribunals of Inquiry (Evidence) Act l921 (Eng.) provides:

> "If any person... does any other thing which would, if the tribunal had been a court of law having power to commit for contempt have been contempt of that court: the chairman of the tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court."

Therefore, matters which will constitute contempt of a tribunal include publications likely to jeopardise the tribunals impartiality, publications likely to impede the tribunals ability to determine the truth scandalising the tribunal and acts which constitute contempt in the face of the tribunal.[26]

3.15 Although the New South Wales legislation contains only a general reference to the power of a Royal Commission to punish for contempt the Commonwealth legislation is much more specific in its application Section 60(1) of the Royal Commissions Act 1902 (Cth) provides a penalty of $200 or imprisonment for three months for:

> "Any person who wilfully insults or disturbs a Royal Commission or interrupts the proceedings of a Royal Commission or uses any insulting language towards a Royal Commission, or by writing or speech uses words false and defamatory of a Royal Commission, or is in any manner guilty of any wilful contempt of a Royal Commission..."

3.16 Where the President Chairman or sole Commissioner of a Royal Commission established under Commonwealth legislation is a judge or justice of a specified court, it is provided by section 60(2) that:

> "he shall in relation to any offence against sub-section (1) of this section committed in the face of the Commission, have all the powers of a justice of the High Court sitting in open Court in relation to a contempt committed in the face of the Court except that any punishment inflicted shall not exceed the punishment provided by sub-section (1) of this section".

Where the Royal Commissioner is not a judge, or where the offence is not committed in the face of the Commission, prosecution for the offence may be undertaken by the Attorney-General in the Federal Court.[27] it has been suggested that section 60(2) should have been drafted so as to render a contempt committed in the face of a Royal Commissioner who is a judge, also an offence to be prosecuted by the Attorney-General.

> "It is possible that originally it was thought that because a Royal Commissioner is a judge, he is exercising judicial power, but *quaere* whether such a circumstance can alter the inquisitorial character of the Royal Commission concerned ... or render penalisation by such a Commission of a person committing a contempt in the face of the Commission a constitutional exercise of judicial power, not contravening the paramount provisions of s.71 of the Constitution. The validity of sub-s.(2) is, to say the least, open to grave doubt."[28]

3.17 The Australian Press Council has recently called for the repeal of the reference to contempt in section 60, arguing that it is necessary to draw a clear distinction between a Royal Commission and a Court.[29] The Council stated that the power of a court to punish for contempt is based on the dual belief that a court s own processes "should not be exposed to the possible influence of rival investigation or external criticism" and that courts should be protected " from criticism or statements tending to lower public confidence in the judicial system as a whole". The Council continued:

> "However, Royal Commissions have no claim to either of these types of protection The appointment of a Commission is not and should not operate as a gag on discussion of the topic investigated. There is no trial to influence, and there is no reason why a Royal Commissioner should not be influenced by whatever comment the public or the Press may provide, if he finds it relevant to his task. There is no requirement that the sort of public confidence placed in the judiciary be automatically transferable to Royal Commissions."[30]

Duration of Contempt Powers

3.18 Given that Royal Commissions in New South Wales possess the power to punish acts of contempt where the Chairman of the Commission or the sole Commissioner is a judge of the Supreme Court it needs to be considered whether this power extends beyond the life of the Commission. For example, a journalist may use a sound recorder to record the proceedings of a Royal Commission with the permission of the Commission subject to the condition that the recording not be broadcast. The Royal Commission then completes its work and is dissolved. if the journalist then broadcasts an excerpt from the sound recording does this constitute contempt?

3.19 It is clear that a statement made in reference to a court after it has given judgment and the proceedings are concluded can still constitute contempt of court.[31] The law is not so clear with respect to Royal Commissions. It may be thought that once a Royal Commission is dissolved and is *functus officio,* there is consequently no body to be the object of contempt Yet in the Victorian case *R. v. Arrowsmith*,[32] it was held that contempt had been committed by the publication of certain statements, even though the Royal Commission, which was the subject of the statements, was of limited duration.[33] But the special legislation that was applicable to the Royal Commission in question provided that:

> "the inquiry of the Commissioner shall be deemed to be a proceeding in the Supreme Court of the State of Victoria and the Commissioner shall be deemed to be acting as a Judge of the said Supreme Court."[34]

Consequently, it was held that:

> "The Supreme Court is then given as full and ample jurisdiction as it had with respect to any proceeding in the Court. it thus follows that any judge of the Court may deal with contempt of the Royal Commission."[35]

3.20 It is to be noted that although the New South Wales legislation provides that a Royal Commissioner who is a Judge of the Supreme Court "shall have all such powers, rights and privileges as are vested in the Supreme Court or in any Judge thereof", it does not provide that the Commission is an actual proceeding in the Supreme Court. The High Court considered the contempt power contained in the New South Wales Royal Commissions Act, 1923 in *Ferraro v. Woodward.*[36] The court observed that an important point of distinction between a Royal Commission and the Supreme Court is that the term of a Commission is limited and stated that:

> "a Commissioner who commits a person to prison must commit the contemnor for a fixed term or, if the term is not fixed, for a period which would not extend beyond the determination of the Commission."[37]

3.21 The court noted that if a Royal Commissioner committed a contemnor to prison for a period which extended beyond the time of expiry of the Commission, then the Commissioner would have no right as Commissioner, to release the contemnor from imprisonment. This would seem to imply that if any act which would have been contempt while the Royal Commission was still in existence, is committed when the Royal Commission has been dissolved, there would be no power to punish this as an act of contempt. Therefore, the power to punish acts which constitute contempt of Royal Commissions in New South Wales is limited to the time in which the Commission is in existence.

Persons Authorised to Appear Before a Royal Commission

3.22 It is to be observed that our terms of reference require us to inquire into and report on whether the recording of the proceedings of Royal Commissions should be permitted by "persons granted leave to appear before a Royal Commission... and their legal representatives". Of course, a Royal Commission may, pursuant to its inherent power to regulate its own proceedings, grant a request by any person present, including persons granted leave or authorised to appear, legal representatives, representatives of the news media and even members of the public, to use a sound recorder to record the proceedings. Similarly, a Royal Commission may, as we have seer make a ruling that such recorders not be used.

3.23 According to Hallett:

> "Whilst there are no 'parties' involved in the proceedings of an inquiry in the same sense as there are in legal proceedings, there are often individuals or groups which have a special interest in the outcome of an inquiry."[38]

This may be because "there is a likelihood that findings will be made which are adverse to a particular person or organization".[39] Section 7(2) of the New South Wales Royal Commissions Act, 1923 provides:

> "Where it is shown to the satisfaction of the chairman, or of the sole commissioner, as the case may be, that any person is substantially and directly interested in any subject-matter of the inquiry, or that his conduct in relation to any such matter has been challenged to his detriment, the chairman or sole commissioner may authorise such person to appear at the inquiry, and may allow him to be represented by counsel or solicitor."

3.24 The right of appearance carries with it the privilege, at the Commission's discretion of legal representation and the opportunity, again at the Commission's discretion to examine and cross-examine any witness called before the Commission.[40] Permission to address the Commission when the giving of evidence has concluded, may also be granted.[41] At the recent New South Wales Royal Commission of Inquiry into "certain committal proceedings against KE. Humphreys", three persons were granted general leave to appear and be legally represented. A further two persons and two organisations were granted limited leave to appear, be legally represented and to participate in aspects of the proceedings affecting them.[42]

3.25 It can be seen that one of two criteria must be satisfied in order for a person to be authorised to appear before a Royal Commission: either the person is substantially and directly interested in any subject matter of the Commission or the person's conduct in relation to any subject matter of the Commission has been challenged to the detriment of that person. In contrast, the Commonwealth Royal Commissions Act 1902 refers to persons "authorized by a Commission to appear before it"[43] but no criteria for determining when such authorisation may be given are specified in the legislation.[44]

3.26 In Victoria, the Evidence Act 1958, which is the only statutory provision in that State regulating Royal Commissions and Boards of inquiry, does not refer to persons being granted leave to appear. However, Sir Gregory Gowans, Q.C., after hearing applications for leave to appear at a Victorian Board of Inquiry stated:

> "If there are no further applications, I think it would be appropriate to say something of the considerations which move me in granting appearances in this matter. The question of whether leave to appear should be granted is a discretionary matter for this Board. It is not to be accorded to everybody who merely feels interested in the subject matter. Representation should be confined to those who have a peculiar and material interest to protect or advance. I use the word 'peculiar in the sense of an interest attaching to the individual and not merely shared by him or with a substantial section of the public. I use the word 'material' in the sense of describing something more than a self inspired or a merely temporary or passing interest."[45]

Persons Appointed to Assist a Royal Commission

3.27 It is usual for a Royal Commission to have legal assistance for the duration of the inquiry. In *Bretherton v. Kay & Winneke*,[46] Gillard J., stated with respect to a Victorian Board of Inquiry:

> "... the practice is now well established of counsel appearing to assist a board. It is to the public benefit that in an inquiry of the serious character of this board counsel should be briefed to carry out the usual duty imposed upon an advocate."[47]

The functions of counsel appointed to assist a Commission usually include the correlation and presentation of material the making of the opening and closing address and the examination of witnesses.[48] Section 7(1) of the New South Wales Royal Commissions Act, 1923 states that any "counsel or solicitor appointed by the Crown to assist the commission may appear at the inquiry". A barrister or solicitor so appointed may, with the leave of the Commission, examine or cross-examine any witness on any matter deemed relevant to the inquiry by the Commission.[49]

SPECIAL COMMISSIONS OF INQUIRY

3.28 Special Commissions of Inquiry are a very recent form of government inquiry, the enabling legislation being passed by the New South Wales Parliament in November 1983.[50] Special Commissions of Inquiry are intended to operate separately from Royal

Commissions. Although both types of Commission share many similarities, there are two main differences. First, it is the statutory duty of a Special Commission of Inquiry.

> "to make a report or reports to the Governor as to whether there is or was any evidence or sufficient evidence warranting the prosecution of a specified person for a specified offence."[51]

In other words, Special Commissions of Inquiry are restricted to inquiring into possible offences which may justify prosecution No such limitation is evident in the Royal Commissions Act 1923 and Royal Commissions can be employed for a wide range of purposes, including making recommendations to government on matters of Policy.[52]

3.29 The second main difference is that a Special Commission of Inquiry shall, *in the course of a public hearing,* only receive evidence that, in the opinion of the Commissioner, would be likely to be admitted into evidence in relevant criminal proceedings.[53] However, in the case of a Royal Commission:

> "There is no rule of law which obliges a Commission... to observe the rules of evidence applicable in courts of law and it is common for an inquiry to refer to the fact that the rules of evidence are not applicable to it."[54]

In introducing the Special Commissions of Inquiry Bill into the Legislative Council the Hon J.R. Hallam on behalf of the Attorney General, the Hon D.P. Landa, stated:

> "The fundamental principle of this bill is that public hearings in special commissions of inquiry will be governed by the rules of evidence applicable to criminal proceedings. The proceedings of a Royal Commission are not governed by the rules of evidence. That is not to say that there is anything wrong with Royal Commissions. They have their place and function where what is needed is a wide- ranging inquiry, a broad gathering of information. But there are matters of urgency that arise, from time to time, where what is needed is a clearly-defined inquiry, an expeditious inquiry. This bill is designed to meet that need. The rules of evidence have evolved over centuries in the practice of the courts. They have been tested by experience and represent the wisdom of generations of lawyers and Judges. They establish a delicate balance between the rights of those accused of wrongdoing and the right of the community to be protected from wrongdoing. In inquiries where serious allegations are being investigated, these rules should not be lightly discarded.

Proceedings in public before a special commission of inquiry will therefore, be governed by the rules of evidence. Proceedings will be held in public, although the commissioner will have discretion to close the commission when it is considered appropriate to do so ... The object of the legislation therefore, is to provide a form of inquiry which will be both expeditious and just, protecting the basic rights of citizens to be presumed innocent until proved to be guilty."[55]

3.30 The other significant differences between Special Commissions of Inquiry and Royal Commissions are as follows.

> A Commission under the Special Commissions of Inquiry Act, 1983 may only be issued to a Judge or Queen's Counsel.[56] A Commission under the Royal Commissions Act, 1923 may be issued to "any person", although certain coercive powers are available only if the Chairman of the Commission or the sole Commissioner is a Judge of the Supreme Court.[57]
>
> Special Commissions of Inquiry, like Royal Commissions, have inherent power to control their own practice and procedure. However, a Commission under the Special Commissions of Inquiry Act 1983 may contain directions 11 relating to the practice

and procedure to be followed in the conduct of the Special Commission to which it relates".[58] No such limitation is evident in the Royal Commissions Act, 1923.

A hearing before a Special Commission of Inquiry shall take place in public unless the Commissioner directs that the hearing take place in private, "by reason of the confidential nature of any evidence or matter or for any other reason."[59] No details are specified in the Royal Commissions Act 1923 for holding hearings in private, although as we have seen, it is well established that a Royal Commission has a discretion whether or not to exclude the public.[60]

3.31 The main similarities between Special Commissions of Inquiry and Royal Commissions are as follows.

A Special Commission of Inquiry may authorise a person to appear before it and be legally represented where that person "is substantially and directly interested in any subject-matter of the inquiry, or that person's conduct in relation to any such matter has been challenged to the person's detriment."[61] This provision is identical to that contained in the Royal Commissions Act 1923.[62]

Any counsel or solicitor appointed by the Crown to assist a Special Commission of Inquiry may appear before the Commission and may, with the leave of the Commissioner, examine or cross-examine any witness on any matter which the Commissioner deems relevant to the Special Commission.[63] This provision is similar to that contained in the Royal Commissions Act, 1923.[64]

Both Commissions have similar powers to inspect documents, compel witnesses to attend and to answer questions.[65] A witness summoned to appear before a Special Commission of Inquiry or a Royal Commission is not excused from answering any question on the ground that the answer may incriminate the witness.[66]

Both Commissions have statutory power to punish acts of contempt. For the purposes of a Special Commission it is specified that "the Commissioner shall have all such powers, rights and privileges as are vested in the Supreme Court or in any Judge thereof in or in relation to any proceedings, in respect of ... punishing persons guilty of contempt.[67] In the case of a Special Commission the contempt power will not have effect unless in the relevant letters patent the Governor declares that the section shall apply to the Commission.[68]

3.32 The first Commission pursuant to the Special Commissions of Inquiry Act, 1983 was issued in November 1983 and the Hon R.F. Cross, a Judge of the Supreme Court of New South Wales, was appointed Commissioner to inquire into and report on certain allegations of the Hon I.M. Sinclair.[69] We have been informed by the Secretary of the Special Commission that representatives of the news media were not permitted to use sound recorders to record the proceedings but were restricted to making hand-written notes.[70] Sketching of the participants for later publication was permitted. A daily transcript was prepared by court reporters of the Court Reporting Branch of the Department of the Attorney General and of justice and was available for viewin by representatives of the news media and the public.[71]

SUMMARY

3.33 In this chapter we have examined the principles underlying the workings of Royal Commissions and Special Commissions of Inquiry and the law that regulates the powers exercised by these Commissions. In particular, we have discussed the manner in which Commissions may control their own proceedings and the application of contempt powers. We have also referred to the criteria upon which a person may be authorised to appear

before a Royal Commission and a Special Commission of Inquiry as our terms of reference require us to report on the question whether these persons and their legal representatives should be permitted to record the proceedings of Commissions. In the following chapter we examine recent United Kingdom legislation which controls the use of sound recorders in courts and we evaluate that legislation as a possible precedent for New South Wales.

FOOTNOTES

1. See generally L Hallet, *Royal Commissions and Boards of Inquiry* (1982).

2. See for example, Royal Commissions Act 1902 (Cth) and Royal Commissions Act, 1923. For discussion of the history of Royal Commissions in New South Wales prior to the enactment of the Royal Commissions Act 1923, see Mr. Justice McClemens, “The Legal Position and Procedure Before a Royal Commission” (1961) 35 *Australian Law Journal* 271.

3. Note 1 above, p.28.

4. T.J. Cartwright, *Royal Commissions and Departmental Committees in Britain* (1975), p.32.

5. *Id*., p.34.

6. *Id.,* P.37.

7. *Id*., p.38.

8. D. H. Borchardt, *Checklist of Royal Commissions, Select Committees of Parliament and Boards of Inquiry*, Commonwealth of Australia 1900-1960; New South Wales 1855-1960; Victoria 1856-1960; Tasmania 1856-1959. For research on the use of Royal Commissions in Queensland, see C.S. Clark, “The Royal Commissions of Queensland 1859-1901” (1962) 36 *Australian Law Journal* 131.

9. Borchardt, note 8 above.

10. *Id.*

11. *Lockwood v. The* Commonwealth (1954) 90 C.LR. 177, per Fullagher J., at p.181.

12. Royal Commissions Act 1902 (Cth.), s.6 D(5).

13. *Id*., s.6D(3).

14. *Toohey v. Lewer* [1979] 1 N.S.W.L.R. 673, at p.682.

15. Note 1 above, p.173.

16. *Id*., p.149. See also M.V. McInerney, “Procedural Aspects of a Royal Commission” (1951) 24 *Australian Law Journal* 386 where it is stated, “The mode of conducting the enquiry before the Commission seems to be left for each Commission to work out for itself.”

17. See also Commissions of Inquiry Act 1950 (Qld), s.17 which is expressed in similar terms.

18. *R. V. Collins; ex parte ACTU-Solo Enterprises Pty. Ltd*. (1976) 8 A.L.R. 691, at p.699.

19. *Radio CHUM-1050 Ltd. v. Toronto Board of Education* (1964) 43 D.L.R. (2d) 231.

20. *Id.,* at p.234. The decision was upheld by the Ontario Court of Appeal: *Radio CHUA4-1050 Ltd. v. Toronto Board of Education* (1964) 44 D.L.R. (2d) 671.

21. The memorandum is reprinted in Appendix 2 of the *Report of the Royal Commission of Inquiry into Certain Committal Proceedings Against KE. Humphreys*, July 1983, pp.110-111.

22. *Lutchmeeparsad Badty v. Director of Public Prosecutions* [1983] 2 A.C. 297.

23. Royal Commissions Act, 1923, s.18(1).

24. Note 1 above, p.254.

25. *R. v. Arrowsmith* [1950] V.L.R, 78, at pp.85-86.

26. G. Borric and N. Lowe, *The Law of Contempt* (1973), pp.301-307.

27. See for example, *The Queen v. O'Dea,* 4 October 1983, Federal Court, Davies J.

28. "Contempt With Respect to a Commonwealth Royal Commission" (1983) 57 *Australian Law Journal* 550, at p.551.

29. The Australian Press Council, *General Press Release* No.57, September 1983.

30. *Id*., p.2. The Australian Law Reform Commission received a reference from the Commonwealth Attorney-General in April 1983 to inquire into and report on inter alia, "whether the laws and procedures relating to contempt of Tribunals and Commissions created by or under laws of the Commonwealth are adequate and appropriate". See generally, Australian Law Reform Commission, *Reform of Contempt Law,* Issues Paper No.4, January 1984.

31. *Gallagher v.* Durack (1983) 57 A.L.J.R. 191, at p.193.

32. [1950] V.L.R. 78.

33. *Id*., at p.92.

34. Royal Commission (Communist Party) Act 1949 (Vic.), s.3(1)(a).

35. Note 32 above, at p.85.

36. (1978) 19 A.L.R. 188.

37. *Id*., at p. 190.

38. Note 1 above, p.194.

39. *Ibid.*

40. Royal Commissions Act 1923, s.7(3).

41. As occurred in the Royal Commission of Inquiry into Certain Committal Proceedings Against KE. Humphreys. See Report, Appendix 3, p.114.

42. *Id*., Appendix 2, pp. 109-110.

43. Royal Commissions Act 1902 (Cth), s.6FA.

44. A different provision again is found in section 4A of the New Zealand Commissions of Inquiry Act 1908 which states:

"4A. Persons entitled to be heard -

(1) Any person shall, if he is a party to the inquiry or satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry.

(2) Any person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.

(3) Every person entitled, or given an opportunity, to be heard under this section may appear in person or by his counsel or agent."

See *Re Erebus Royal Commission; Air New Zealand v. Mahon (No.2)* [1981] 1 N.Z.L R. 618, per Woodhouse P. and McMullin J., at p.628.

45. Board of Inquiry into Housing Commission Land Purchases 1977, Transcript of Proceedings, p.7, quoted in Hallet, note 1 above, p.197.

46. [1971] V.R. 111.

47. *Id*., at p.123.

48. Note 1 above, Chapter 12.

49. Note 23-above, s.7(i). In the Royal Commission of Inquiry into Certain Committal Proceedings Against K.E. Humphreys, two counsel and a solicitor of the State Crown Office were appointed to assist the Commission (Report, Appendix 2, p.109). The procedure adopted by the Commission was for evidence to be elicited from witnesses by oral questioning by Counsel assisting the Commission. Legal representatives of persons authorised to appear were then permitted to question each witness after which Counsel assisting the Commission questioned the witness further (Report, Appendix 3, p.113).

50. Special Commissions of Inquiry Act, 1983.

51. *Id.,* s.10(1).

52. Note 1 above, Chapter 2.

53. Note 50 above, s.9.

54. Note 1 above, p.158.

55. *New South Wales Parliamentary Debates (Hansard),* Legislative Council, 3 November 1983, p.2400. The Opposition moved an unsuccessful amendment in committee that "A Commissioner shall not be bound to observe the rules of procedure and evidence applicable to proceedings before a court of law" (p.2441).

56. Note 50 above, s.4(2). "Judge" is defined to mean a Judge of the Supreme Court, a judicial member of the Industrial Commission, a Judge of the Land and Environment

Court, a judge of the District Court or a member of the Workers' Compensation Commission.

57. Royal Commissions Act, 1923, ss.15-18.

58. Note 50 above, s.5(1).

59. *Id.,* s.7(2).

60. Para. 3.6.

61. Note 50 above, s.12(2). For discussion of s.12(2) and its application to the first Special Commission of Inquiry, see *Report of the Special Commission of Inquiry into Certain Allegations by the Right Honourable Jan McCahon Sinclair*, January 1984, Appendix 3.

62. Note 57 above, s.7(2): see paras.3.22-3.26.

63. Note 50 above, s.12(1), (2).

64. Note 57 above, s.7(1), (3): see para.3.27.

65. *Id*., ss.11 and 12; note 50 above, ss.17 and 18.

66. Note 57 above; s.17(1) and note 50 above, s.23(1). In both cases the sections will not apply to a particular Royal Commission or Special Commission of Inquiry unless this is specified in letters patent from the Governor. For discussion of the abrogation of the privilege against self-incrimination in the Royal Commissions Act 1902 (Cth.) see *Sorby v. Commonwealth of Australia* (1983) 46 A.L.R 237.

67. Note 50 above, s,24; note 57 above, s.18(1). See also paras.3.11-3.21.

68. Note 50 above, s.21(1).

69. Note 61 above. The second Special Commission of Inquiry has now concluded: see *Report of the Special Commission of Inquiry into Certain Allegations by Mr. R Bottom*, February 1984.

70. Personal communication with Mr. S. Cole, Secretary, Special Commission of Inquiry, 9 December 1983.

71. *Ibid.*

4. The United Kingdom Approach to the Sound Recording of Court Proceedings: A Possible Precedent?

4.1 In June 1971 the Lord Chancellor appointed a committee under the chairmanship of Lord Justice Phillimore to consider whether any changes were required in the law of England Wales and Scotland relating to contempt of court. The committee reported in 1974. One of its general conclusions was that the law of contempt contained uncertainties which impeded and restricted reasonable freedom of speech. Accordingly, it recommended that the law should be amended by statute so as to allow as much freedom of speech as would be consistent with the objectives of maintaining the rights of the citizen to a fair and unimpeded system of justice and protecting the orderly administration of the law.[1]
4.2 The Phillimore Committee made a number of recommendations relating to the law of contempt generally. One was that in relation to publications it should be a defence to an allegation of contempt to show that a publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith[2] or that the publication formed part of a legitimate discussion of matters of general public interest and that it only incidentally and unintentionally created a risk of serious prejudice to particular proceedings.[3] The Committee further recommended that all distinctions between "civil" and "criminal" contempts in England and Wales should be abolished.[4] Many of the Committee's recommendations were enacted seven years later in the Contempt of Court Act 1981, which applies to England, Wales and Northern Ireland and in this report is referred to as the Contempt of Court Act 1981 (Eng).

4.3 The Committee was specifically asked by the Lord Chancellor to consider "the question of the unofficial use of tape recorders in court". The Committee did not attempt in its report to outline the law relating to the use of tape recorders or other sound recorders in court. and did not refer to any judicial proceedings where this issue had arisen for consideration. The Committee simply stated that "difficulties about this do occasionally arise".[5] In chapter 2 we discussed several conflicting English cases where a Judge or a magistrate made a ruling concerning the use of a tape recorder or other sound recorder in court.[6]

4.4 The full text of the Phillimore Committee's consideration of this matter is as follows:

> "The basic principle in all such matters is that a court must have power to regulate its own proceedings, but some uniformity of practice is no doubt desirable.
>
> We see no objection in principle to the use of recording machines. For many purposes they are no more than a modern substitute for shorthand and in some courts they are officially used as such. The main objection to the use of recorders is that they produce a more dramatic but not necessarily more accurate record of what occurred in court. We consider that it would be particularly undesirable for recordings to be broadcast or otherwise made public especially since, in the wrong hands, they can be tampered with so as to produce a false record of what occurred. Such a practice could well make witnesses even more nervous than they tend to be already.
>
> We recommend that the general practice in relation to the unofficial use of mechancial records and recordings should be that:-
>
> > (a) no mechanical recorder should be used in court without the prior leave of the judge. Leave should not normally be given except to the parties to the proceedings and their legal advisers, and to members of the press as a substitute for short or long hand notes. Standing permission could be asked for by court reporters. Having given

leave, the Judge should be empowered to prohibit the recording of particular parts of the case, or to revoke permission in his complete discretion if, for example, the use of the machine disturbed the proceedings or appeared to inhibit a witness in the giving of his evidence;

(b) the recordings themselves should normally be used only for the purposes of the litigation by the parties, or for compiling newspaper reports of proceedings or a wireless or television report to be read by a reporter or announcer. They should not themselves be broadcast or otherwise made public without the leave of the appropriate court and then only for specified purposes. Examples of the purposes for which leave might appropriately be given are certain education purposes (eg. at a police college) or the broadcasting of a historical account long after the trial.

We recommend that legislation should provide for penalties to be imposed in the event of any breach of these rules or of an order of the court. Where the breach occurs in court, the court should be empowered to deal with it as a contempt in the face of the court."[7]

4.5 Section 9 of the Contempt of Court Act 1981 (E rig.) implemented these recommendations of the Phillimore Committee. This section provides:

9. (1) Subject to subsection (4) below, it is a contempt of court -

(a) to use in court or bring into court for use, any tape recorder or other instrument for recording sound except with the leave of the court;

(b) to publish a recording of legal proceedings made by means of any such instrument or any recording derived directly or indirectly from it by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;

(c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).

(2) Leave under paragraph (a) of subsection (1) may be granted or refused at the discretion of the court, and if granted may be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave; and where leave has been granted the court may at the like discretion withdraw or amend it either generally or in relation to any particular part of the proceedings.

(3) Without prejudice to any other power to deal with an act of contempt under paragraph (a) of subsection 1, the court may order the instrument, or any recording made with it, or both to be forfeited; and any object so forfeited shall (unless the court otherwise determines on application by a person appearing to be the owner) be sold or otherwise disposed of in such manner as the court may direct.

(4) This section does not apply to the making or use of sound recordings for purposes of official transcripts of proceedings.

"Court" is defined in section 19 to include "any tribunal or body exercising the judicial power of the State".

4.6 In summary, section 9 provides that it is contempt of court to use in court or bring into court for use, any tape or other sound recorder although the court has a discretion to permit the use of such a recorder. It is also contempt to play a recording of legal proceedings in the hearing of the public or any section of the public. This would, by implication seem to preclude any broadcast of the recording. It is to be noted that section 9 allows any person to seek leave to record court proceedings. It is not limited to representatives of the news media but

encompasses authors of books and articles, parties and their legal representatives and members of the public.

4.7 There are several differences between the recommendations of the Phillimore Committee and section 9 of the Contempt of Court Act 1981 (Eng.). First it is provided in the Act that the court may order the sound recorder or the actual recording, or both to be forfeited; and any object so forfeited shall be disposed of in such manner as the court directs. The Phillimore Committee made no recommendation on this point. Secondly, section 9 states that it is contempt to publish or broadcast a recording of legal proceedings. The Act makes no provision for the court to exercise a discretion to allow broadcasting or publication while the Phillimore Committee envisaged that the court should have power to grant leave to broadcast the recording for specified purposes.[8] Moreover, the definition of "publication" contained in section 9 is not confined to broadcasts of court proceedings over radio or television but also includes playing the tape within the hearing of the public. It is also to be noted that section 9 refers to the "use" of tape recorders or other sound recorders in court which may, as a matter of interpretation include the playing of a tape already recorded.

4.8 In November 1981 a Practice Direction concerning the use of sound recorders in courts was issued by the Lord Chief Justice of England, Lord Lane, together with Lord Denning, Sir John Arnold and Sir Robert Megarry.[9] The Practice Direction stated that the discretion given to the courts to grant withhold or withdraw leave to use sound recorders or to impose conditions as to the use of the recording is unlimited, but the following factors may be relevant to its exercise:

> the existence of any reasonable need for the recording to be made;
>
> the risk that the recording could be used for the purpose of briefing witnesses out of court; and
>
> any possibility that the use of a recorder would disturb the proceedings or distract or worry any witness or other participants.

4.9 It was suggested during the parliamentary debates on the Contempt of Court Act 1981 (Eng.) that section 9 should be amended to ensure that tape recorders or other sound recorders could be used as of right. A new clause was moved by the House of Commons Standing Committee in the following terms:

> "(1) It is a contempt of court for anyone other than a solicitor acting in the proceedings in question to use in court any tape recorder or other instrument for recording sound while the proceedings are taking place in chambers or in camera and any such tape recording made by such a solicitor shall not be used for any purpose except for the conduct of those proceedings and shall not be played to the public or any section of the public.
>
> (2) It is a contempt of court for anyone to reproduce any recording of proceedings for the purpose of a broadcast.
>
> (3) Subject to subsections (1) and (2) above it is hereby declared that it is lawful to use in court and to bring into court for use any tape recorder or other instrument for recording sound and that the leave of the court shall not be required."[10]

4.10 While maintaining the restriction on broadcasting a recording of the proceedings of a court the amendment would have allowed any person to use a sound recorder without first obtaining leave of the court. Where proceedings are taking place either in camera or in chambers, only a solicitor would have been able to use a sound recorder and then only for the purpose of the conduct of the proceedings.

4.11 One difficulty with the new clause identified during the parliamentary debates was whether the clause would effectively abolish the inherent jurisdiction or power of a court to regulate the use of sound recorders. One member of the House of Commons was of the opinion that despite the provisions of the clause, a judge would still have an inherent right to prevent the use of a sound recorder that was interfering with the course of the proceedings.[11] The Attorney-General expressed a contrary view, namely, that Part 3 of the clause would provide an absolute right for any person to use a sound recorder in open court and this could not be prevented by a Judge.[12]

4.12 In order to overcome this difficulty, an amendment to the clause was moved by two members of the Standing Committee. This amendment provided that there was a general right to use a tape recorder or other sound recorder in court:

> "except that the court may make an order prohibiting the bringing into court of such tape recorders or instruments for all or part of the proceedings in question on the grounds that there is a substantial risk that such recording will interfere with the course of justice in those proceedings."[13]

This amendment was not adopted, but in any event the clause recommended by the Standing Committee which would have allowed the use of sound recorders in open court as of right was defeated.[14] Opposing the suggestion that sound recorders should be used as of right Lord Roskill stated:

> "... I can imagine nothing more alarming and more terrifying than to try a case, either criminal or civil which has perhaps attracted a large amount of public attention with an absolute battery of tape recorders around the court. Anything more distracting for witnesses, anything more distracting for counsel and anything more unnecessary to the successful trial of the action it is difficult to imagine."[15]

4.13 However, criticisms of section 9 of the Contempt of Court Act 1981 (Eng.) have been echoed by others outside Parliament One commentator has stated:

> "It is characteristic of the cautious conservatism underlying the Act that the presumption is against the use of tape recorders, rather than simply allowing a judge to prohibit if it is necessary for the conduct of orderly proceedings."[16]

4.14 Given that the Contempt of Court Act 1981 (Eng.) makes the use of sound recorders in court an offence but allows the court a discretion to permit their use, it is important to ascertain to what extent the discretion contained in section 9 is being exercised. During the parliamentary debates on the Contempt of Court Act 1981 (Eng.) the Lord Chancellor, Lord Hailsham stated that he would:

> "... certainly visualise a liberal use of the permission to be granted by judges, in the regulation of their own proceedings to authorise the use of a tape recorder to legitimate persons."[17]

4.15 In February 1982 the High Court of justice in England allowed a reporter to use a tape recorder to record proceedings in the case of *Attorney-General v. Lundin.*[18] Prior to this decision Lord Denning had refused an application by *The Observer* newspaper to tape record one of his judgments and the House of Lords refused an application to tape its proceedings.[19] The Lord Chancellor's Department has informed us that very few applications have been made and was unable to refer us to cases, apart from *Attorney-General v. Lundin,* where permission has been given pursuant to section 9 of the Contempt of Court Act 1981 (Eng.), to use a tape recorder or other sound recorder. We were informed that no sound recorders are allowed at all in the Central Criminal Court (Old Bailey), presumably because of the risk that the recording could be used to brief subsequent witnesses.[20]

4.16 For the purposes of this report, it needs to be determined whether section 9 of the Contempt of Court Act 1981 (Eng) provides a suitable precedent for regulating the use of sound recorders (and recordings made thereby) in New South Wales courts, Royal Commissions and Special Commissions of Inquiry. The main question is whether there should be a statutory right conferred on certain persons to use a sound recorder to record the proceedings of courts and Commissions. In Chapter 2 we examined the question whether in England a court could have prevented the use of a sound recorder in court prior to the enactment of the Contempt of Court Act 1981 (Eng.) and we referred to several occasions when English courts have had cause to consider the use of sound recorders in courts. The response of the Phillimore Committee was to recommend that sound recorders not be used in courts without the prior leave of the court, and this recommendation was enacted in section *9* of the Contempt of Court Act 1981 (Eng). However, representatives of the news media and other persons already have a right to take hand-written notes in court. If a sound recorder is to be used in substitution for hand-written notes, then there seems to be no reason in principle why a right to use a sound recorder should not be given on sensible conditions. This is the thrust of our recommendations in the following chapter.

FOOTNOTES

1. *Report of the Committee on Contempt of Court* (Cmnd.5794, 1974), para.216(4).

2. *Id*., para.141.

3. *Id.*, para.142.

4. *Id.*, para.176.

5. *Id.*, para.42.

6. Para.2.33.

7. Note 1 above, paras.42-43.

8. *Id.*, para.43.

9. [1981] 3 All E.R 848.

10. *Parliamentary Debates (Hansard), House of Commons* (1981), vol.6, col.882.

11. *Id*., col.894.

12. *Id*., col.S96.

13. *Id*., col.893.

14. *Id*., cols.900-901.

15. *Parliamentary Debates (Hansard)*, House of Lords (1981), vol. 416, col.382.

16. J. Young, “The Contempt of Court Act 1981” (1981) 8 *British Journal of Law and Society* 243, at p.245. See also C.J. Miller, “The Contempt of Court Act 1981” (1982) *Criminal Law Review* 71, at p.83, for a similar criticism.

17. Note 15 above, col.383.

18. (1982) 75 Cr. App. R 90. Although no mention is made in the report of the use of a tape-recorder during proceedings: see *The Observer*, 21 February 1982.

19. *Ibid*.

20. Letters from the Lord Chancellor's Department dated 15 July 1983 and 25 August 1983.

5. The Use of Sound Recorders in Courts, Royal Commissions and Special Commissions of Inquiry by Representatives of the News Media and Other Persons

INTRODUCTION

5.1 In this chapter we recommend that the following persons be permitted to use sound recorders in courts and Commissions in substitution for, or in addition to, handwritten notes:

representatives of the news media;

authors of certain books and articles;

parties to court proceedings and their legal representatives;

persons authorised to appear before a Royal Commission or a Special Commission of Inquiry and their legal representatives; and

persons appointed by the Crown to assist a Royal Commission or a Special Commission of Inquiry.

Our conclusion is that these persons should have a right to use sound recorders and should not have to seek leave of the court or Commission. The right should arise or exist only where the person concerned is entitled to be present at the proceedings.[1] in addition the right should be subordinate to the power of the court or Commission to prohibit or order the cessation of the use of a sound recorder where the court or Commission reasonably believes that such use constitutes or would constitute a substantial interference with the administration of justice or the functions of the court or Commission. Moreover, we do not advocate altering the existing principles, outlined in Chapters 2 and 3, whereby in certain circumstances a Judge or Commissioner may hold all of the proceedings or part of the proceedings in camera. We recommend that the use of sound recorders be subject to conditions which we set out in detail One of these conditions is that the sound recording may not be broadcast publicly without the express permission of the court or Commission.

5.2 Of course, the fact that our recommendations are directed to the categories of persons described above would not alter the present law as it relates to other members of the public. Under the present law (as outlined in Chapters 2 and 3), a member of the public may apply to a court or Commission for permission to record all or part of the proceedings. Permission maybe given pursuant to the inherent power of the court or Commission to control its own proceedings. In our forthcoming Issues Paper we discuss whether members of the public should also have a right to use sound recorders to record the proceedings of courts and Commissions and not have to seek leave of the court or Commission.

THE USE OF SOUND RECORDERS BY REPRESENTATIVES OF THE NEWS MEDIA

Reasons for our Recommendations

5.3 The media occupy an important role in Australian society. Both the print media and the electronic media have a vital function in disseminating information concerning current events and matters of current public interest. In 1982 there were 589 newspapers and periodicals being published in Australia.[2] While most of these publications have limited circulation the national and metropolitan daily newspapers have substantial circulation. In Sydney, for

example, two metropolitan daily newspapers which are published by one organisation had a combined daily circulation of more than 550,000 copies in March 1983.[3]

5.4 At the end of June 1982 there were 43 commercial radio broadcasting stations in operation in New South Wales, 23 radio broadcasting stations operated by the Australian Broadcasting Commission (now the Australian Broadcasting Corporation), 10 "public" broadcasting stations and one broadcasting station operated by the Special Broadcasting Service. At the same time, there were 14 commercial television stations in operation in New South Wales,14 television stations operated by the Australian Broadcasting Commission and one television station operated by the Special Broadcasting Service.[4] Of these television stations, three commercial stations, one Australian Broadcasting Commission station and the Special Broadcasting Service station operate in the Sydney metropolitan area. All others serve non-metropolitan areas of New South Wales.[5]

5.5 While the provision of news is the dominant characteristic of newspapers and many periodicals, it is also clear that the provision of news and information concerning current affairs is a significant part of the activities of the electronic media. Two surveys undertaken by the Australian Broadcasting Tribunal of 57 metropolitan radio broadcasting stations indicated that news programs constitute 8 per cent of total broadcast programs. For non-metropolitan stations, the percentage was 11.3 per cent.[6] A statistical analysis of television programs undertaken by the Australian Broadcasting Tribunal over a nine week period in 1981-82 revealed that news and current affairs programs constituted 9.8 per cent of all television programs broadcast by metropolitan stations and 10.6 per cent of all programs broadcast by non-metropolitan television stations.[7]

5.6 These statistics indicate the important role the media play in the provision of news and information concerning current affairs. We believe that the media should have available facilities for presenting news and current events in the best and most efficient way possible, making use of modern technological innovations, including compact unobtrusive sound recorders, provided that the administration of justice in courts is not thereby impeded or the proceedings of Commissions hindered. Journalists would have a more accurate report of proceedings if sound recorders were used, rather than relying solely on hand written notes. This is the opinion of journalists we have consulted in the course of our work on this reference. Indeed the original submission from a media organisation to the Attorney General which was the reason for this Commission giving preliminary consideration to this subject stated that although the majority of published court reports accurately record the proceedings:

> "It would be fair to say that there have been instances where reporters have misheard and have made mistakes and misrepresented proceedings ... Tape recorders would facilitate accurate reporting."

Increased accuracy in the reporting of proceedings of courts and Commissions can only be in the best interests of the public.

5.7 We said in Chapter 2 that an essential element of the principle that justice must be administered in open court is that judicial proceedings should be open to public scrutiny. The news media are clearly an important part of this process and we believe that the implementation of our recommendations will assist in the production of fair and accurate reports of judicial proceedings. However, despite the opinions given and the authorities cited above in paragraph 2.13 and in the following paragraphs, the New South Wales Bar Association does not agree with this assessment of the role of the media. As part of their comments on a draft of our report in this reference the Association stated:

> "But the media are not in truth the representatives of the public. Those persons who attend Court from the media are employees of very large companies who seek to make profits out of news. The companies in question have little or no particular concern about either the administration of justice or the interests of the public. They do greatly prize the

> opportunity to report Court proceedings. The advantage to them of Court proceedings is that the coercive power of the State is used to compel the provision of salacious or embarrassing information which would otherwise be very hard to collect in circumstances where they enjoy substantial immunities from suit for defamation. If the press did not enjoy those immunities, they would take very much less interest in Court proceedings. In the circumstances, the proposal appears to be based on a desire to assist a particular class of the community whose activities have only adventitious connections with the public benefit."[8]

5.8 By way of contrast, other commentators, including Judges, have confirmed the importance and value of the media not only in relation to the principle of open justice but in relation to the administration of justice itself. Professor Sawer has observed that:

> "in a democracy it is ... essential that public interest in the Working of the law be maintained. That can be achieved to some extent by the principle of public hearings, but the number of laymen with interest in a knowledge of the law likely to visit courts is very limited. Press reporting is much more likely to ensure widespread awareness of the legal system and prompt information about features of the law likely to require attention."[9]

Lord Denning, too, has been generous in his praise of journalists who report judicial proceedings for the media, and has referred to them as the "watchdog[s] of justice".[10]

5.9 In 1950, the United States Supreme Court stated that:

> "One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."[11]

In 1980, the United States Supreme Court again addressed the same point:

> "As a practical matter ... the institutional press is the likely, and fitting, chief beneficiary of a right of access [to courts] because it serves as the "agent" of interested citizens, and funnels information about trials to a large number of individuals."[12]

5.10 We made the observation in Chapter 2 that representatives of the news media usually have special accommodation or facilities provided for them in courtrooms. This can be viewed as an acknowledgment of the important role of the media in reporting judicial proceedings. The Supreme Court of Queensland has stated:

> "Courtrooms vary very muck but almost invariably there is some special provision made therein for the accommodation of representatives of the press. To my mind, this would imply that the King desires that the representatives of the press should be afforded special facilities for reporting the proceedings in his Courts, and custom sanctions this and common sense demands that it should be so."[13]

The United States Supreme Court has said that:

> "while media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system'."[14]

5.11 Nobody could reasonably suggest that media organisations are faultless. Criticisms are wide-ranging, including the view that concentration of ownership can have a distorting effect on news reporting.[15] Yet, as one commentator has said:

> "It is no disparagement of their motives, either corporate or individual to say that newspapers need news to print and that court proceedings, even nowadays, represent a fruitful source of copy. What must be remembered is that there are courts sitting daily in this country where the only member of the public present is a representative of the press. If anything important or untoward occurs this solitary individual may represent the communities only chance of learning about it, for the litigants may have cause to keep silent or be inclined to be partial and it is no part of the court's job to act as a town-crier. At the other extreme, when some notable trial takes place the public gallery cannot possibly contain even a small fraction of those anxious to follow the proceedings and the way in which the man in the street learns the outcome is through the news media. From time to time a judge or magistrate, justice clerk or advocate may take exception to what is written or what is left out of press reports, not always without justification. All the more important to remember, therefore, that despite their faults, real or imagined, in a society as large and complex as ours only the existence of a zealous and diligent body of newspaper and broadcasting reporters can make a reality of the doctrine of trial in open court and thereby ultimately the integrity of the judicial process."[16]

5.12 Our recommendation that representatives of the news media should have a right to use sound recorders differs from the approach adopted in England, where the use of sound recorders in court without consent is now an offence. Sound recorders may only be used in England with the leave of the court. However, we have already observed that in principle representatives of the news media have a right to be present and to take hand written notes in court where the proceedings are open to the public If a sound recorder is to be used in substitution for, or in addition to, hand written notes and for the purpose of preparing a fair and accurate report of the proceedings, we can see no good reason why making hand written notes for a news report should be prima facie lawful while the use of a sound recorder for the same purpose should be prima facie an offence. This approach, which we first outlined in our draft report received the support of every person and organisation consulted (including members of the judiciary), except the Bar Association.

5.13 Several arguments against the use of sound recorders in courts and Commissions can be made.

Argument: Sound recorders would constitute both a nuisance and a distraction to the proceedings of courts and Commissions

Comment: Mr. S.M. Littlemore, Barrister, and the New South Wales Bar Association consider that the use of hand-held sound recorders could amount to a distraction during court proceedings.[17] Mr. Littlemore said that:

> "although the public interest is totally in favour of a system where journalists should have access to a complete tape recording of the court's procedure, the process of making that recording should in no way intrude upon the processes of the court or the attention of witnesses giving evidence. Small hand-held recorders, being operated during a witness' evidence... with cassettes being turned over, and checks made on play back that the recording is satisfactory... would create a risk of distracting the witness, and interrupting the flow of evidence."

Mr. Littlemore suggested that courtrooms should be wired for in-court amplification and master-tape recording of proceedings and the master-tape monitor should provide either multiple "split" with which journalists recorders could be connected, or multiple cassettes made simultaneously with the master recording, for later distribution to journalists. While we agree that this is the most desirable of all alternatives, it is not necessarily the case that sound recorders must constitute a nuisance and a distraction to the proceedings of courts and Commissions. This may have been the situation in the past when such recorders were bulky and cumbersome.

However, sound recorders can now be conveniently hand-held, are simple to operate, unobtrusive and may prove less of a distraction than journalists taking hand written notes. This has been confirmed by manufacturers of small compact sound recorders in Australia, who have provided us with the following information in connection with these recorders.[18]

(i) The power requirements of the recorders are usually between 3 and 6 volts (DC) which can be provided by batteries.

(ii) The weight of the recorders, with batteries, is usually less than 400 grams.

(iii) The dimensions of the recorders are usually less than 100 mm (W) x 150 mm (H) x 40 mm (D).

(iv) Most recorders have an in built condensor microphone with the option of connecting an external microphone. Some recorders allow the user to adjust the microphone sensitivity. For example, if the speaker is some distance from the microphone, the sensitivity can be increased.

(v) Some small recorders allow 90 minutes of recording without interruption. This is achieved by the recorder automatically reversing and recording on the second side of the cassette tape.

Argument: The sound recording could be used to brief future witnesses in a case.

Comment: This would constitute the offence of contempt of court and no new problem is created by the use of sound recorders. Witnesses can also be briefed from memory and from hand written notes, but whether a sound recorder is used or note it is an offence already punishable by the court. Attempts to influence any witness in the evidence he or she is about to give in court "is obviously prejudicial to the course of justice since it is likely to jeopardise the fair hearing of the action."[19]

Moreover, our recommendations envisage only limited classes of persons being given a right to use a sound recorder. A witness who is giving evidence or who intends to give evidence in court proceedings or the proceedings of a Commission would not come within those classes. We recommend that a right to use sound recorders be conferred on barristers and solicitors. However, it is to be noted that barristers and solicitors are subject to ethical rules which clearly prohibit the briefing of future witnesses in proceedings. Rule 32 of the New South Wales Bar Association Rules states that "under no circumstances shall a barrister advise a witness or suggest to him that he should give false evidence", or advise "what answer he should give to questions he might be asked". A similar provision applies to solicitors as officers of the court:

"Fabrication of evidence, coaching to induce false evidence, hinting at the results which certain evidence will induce with the expectation that it will be altered, interviewing witnesses together, so as to induce agreement must be a departure from the solicitor's duty as an officer of the Court."[20]

We also recommend that where a person has a statutory right to use a sound recorder, the court or Commission should have power to prohibit that use where the court or Commission believes, on reasonable grounds, that substantial interference with the administration of justice or the exercise of functions of the court or Commission would result. Consequently, where a court or Commission reasonably believed that a sound recording, if permitted to be made by a person would be used to brief a future witness, then that person could be prevented from using a recorder.

Argument: The sound recording could be altered or "doctored"

Comment: We recommend that any recording made by a representative of the news media shall not except with the leave of the court or Commission be used to correct or call in question the official transcript of the proceedings. Of course, any published report based on an altered tape would be subject to the laws of contempt and defamation.

Argument: The use of a sound recorder could disturb witnesses and affect the giving of evidence

Comment: This argument would have greater force in relation to the use of cameras in the courtroom or if an excerpt from the sound recording were to be publicly broadcast. However, if neither of these actions is permitted and the recording is only to be used to prepare a report, then there is very little difference when compared with the use of hand written notes by journalists and the argument loses considerable force. Further, as was noted in Chapter 2, sound recording of the proceedings of many New South Wales courts is already undertaken for the purpose of preparing official transcripts.

Royal Commissions and Special Commissions of Inquiry

5.14 Unlike courts. Royal Commissions do not exercise a judicial function although a Royal Commission may be required to "act judicially" if it has the power to affect the "rights" of persons.[21] Special Commissions of Inquiry, also, as we have seen do not exercise a judicial function.[22] Rather, a Royal Commission or Special Commission of Inquiry has an investigatory or inquisitorial function and is not concerned with the "administration of justice".[23] The question then arises whether this difference in functions between Commissions and courts is a sufficient basis upon which to deny the news media the right to use sound recorders in substitution for, or in addition to, hand written notes to record the proceedings of Commissions, if we recommend that sound recorders be allowed in courts.

5.15 Given that we do not advocate altering the power of a Commissioner to conduct the proceedings in camera, we believe that it is proper for representatives of the news media to have a right to use sound recorders in substitution for, or in addition to, hand written notes when the Commissioner has already permitted the media access to the proceedings. The reasons for this recommendation are the same as those we previously discussed in relation to the recording of court proceedings. Representatives of the news media should have a right to use sound recorders to record the proceedings of Commissions, subject to conditions which we outline in the following section.

Recommendations

5.16 **Our first recommendation relates to the proccedings of courts, Royal Commissions and Special Commissions of inquiry when those proceedings are open to representatives of the news media. The recommendation is that those representatives be entitled, as of right, to use sound recorders to record the proceedings in substitution for, or in addition to, hand written notes.** The right and its exercise is not to interfere with the power of the court or Commission to impose restrictions on the reporting of the proceedings, for example, to make an order, when it may lawfully be made, suppressing publication of the name of a witness or party. In addition the right and its exercise should be subordinate to the power of the court or Commission to prohibit or order the cessation of the use of a sound recorder where it is believed on reasonable grounds that the use of the sound recorder constitutes a substantial interference with the administration of justice or the functions of the court or Commission or that such interference would occur if recording were permitted.

5.17 **We recommend that a number of conditions should generally apply to the use of sound recorders in courts and Commissions by representatives of the news media.** We deal later with the conditions that should apply to authors of books and articles, and to parties to legal proceedings and persons authorised to appear before a Commission and their legal

representatives. The following conditions relate to the use of sound recorders in courts and Commissions by representatives of the news media.

> **The recording shall be used solely for the purpose of reporting the proceedings of a court or Commission.**
>
> **The report shall be published or broadcast only by one or more of the following, namely, a newspaper, journal, magazine or other publication, a radio or television station controlled by the Australian Broadcasting Corporation or the Special Broadcasting Service, or a radio or television station licensed in accordance with the provisions of the Broadcasting and Television Act 1942 (Cth.).**
>
> **A recording to be made for any purpose other than the foregoing may be undertaken only with the leave of the court or Commission.**
>
> **No part of the recording may be broadcast to the public except with the leave of the court or Commission.** (We note that in England, the broadcasting of a sound recording of judicial proceedings is not permitted in any circumstances and there is no provision for leave to be granted. However, in our Issues Paper, to be published shortly, we observe that this has already occurred in Australia without criticism and therefore it seems inadvisable to introduce a blanket prohibition that has hitherto not been thought necessary.)
>
> **The recording shall be made only by a representative of a publisher or broadcaster.**
>
> **The representative of the publisher or broadcaster making the recording shall not make the recording available to any person other than an agent or servant of that publisher or broadcaster and then only for the purpose of reporting the proceedings.**
>
> **No copy of the whole or any part of the original recording shall be made by any person and a person shall not have in his or her possession a sound recording which is a copy of the original recording.**
>
> **The recording shall not, except with the leave of the court or Commission, he used to correct or call in question the whole or any part of an official transcript of the proceedings.**

We recommend that legislation should provide for penalties to be imposed in the event of a breach of any of these conditions.

THE USE OF SOUND RECORDERS BY AUTHORS OF BOOKS AND ARTICLES

Reasons for our Recommendations

5.18 While our original terms of reference referred only to representatives of publishers and broadcasters, our amended terms of reference require us to inquire into and report on whether recording of the proceedings of courts and Commissions should be permitted by "a person who is or intends to be the author of a book or article devoted entirely or in part to the proceedings". Although in some circumstances an intending author may be considered to be a representative of a publisher, in the words of one of our consultants:

> "People who write books about court cases are not usually representatives or employees of anyone. Such activity, while not frequent has an honourable tradition and such works are likely to be a far more thoughtful and enduring record of what occurs than the output of the mass media."[24]

5.19 Moreover, an independent person (including a freelance journalist) who intends to publish an article in a periodical would not have been permitted to use a sound recorder as of right under our original recommendations. If such work is considered to be of equal value to news media reports of the proceedings of courts and Commissions, there can be no logical reason for distinguishing (in terms of a right to use a sound recorder) between journalists who are employees and intending authors of books and articles, including freelance journalists.

5.20 While the news media occupy a special position in the provision of information concerning the proceedings of courts and Commissions, the principle that justice is to be administered in open court requires that court proceedings can be freely reported and commented upon by any person In the words of Lord Diplock "justice is to be administered in open court where anyone present may listen to and report what was said."[25] It has also been said that:

> "the public interest in ensuring that litigation is in general conducted in open court and freely reported, and be the subject of legitimate comment and indeed criticism, admits of no doubt."[26]

If authors of books and articles which are devoted wholly or in part to the proceedings of a court or Commission fulfil this function and if the use of a sound recorder will assist in the accuracy of those reports, then we believe that these persons should be permitted to use a sound recorder as of right, subject to the conditions outlined below.

5.21 There may be difficulties in defining satisfactorily those authors entitled to avail themselves of the statutory right to use sound recorders. It may be that persons who have no real claim to describe themselves as authors would do so in order to qualify for the right to make a sound recording. We think that abuse of this kind could be controlled by the supervisory powers of the court or Commission and its role in determining eligibility. We envisage that an "author" for this purpose could be defined as a person who, in the opinion of the court or Commission is bona *fide* engaged or intending to engage in the writing of a book or article on a subject in respect of which those proceedings are relevant. A person who seeks to exercise this right will be liable to answer questions put by the Judge or Commissioner and to give an account of his or her eligibility to exercise the right. The discretion to be extended to the court and Commission should act as a sufficient safeguard particularly if coupled with the ultimate sanctions associated with the contempt power and the penalties that we recommend should be available for breach of conditions imposed on the use of sound recorders.

Recommendations

5.22 **We therefore recommend that authors of the kind described in the preceding paragraph be entitled, as of right, to use a sound recorder to record the proceedings of courts, Royal Commissions and Special Commissions of Inquiry in substitution for, or in addition to, hand written notes.** This right will exist only where the author is entitled to be present at the proceedings of the court of Commission. Further, the right and its exercise should be subordinate to the power of the court or Commission to prohibit or order the cessation of the use of a sound recorder where it is believed on reasonable grounds that the use of the sound recorder constitutes a substantial interference with the administration of justice or the functions of the court or Commission or that such interference would occur if recording were permitted. In addition we recommend that the following conditions should generally apply.

> **The recording of the proceedings shall be used solely for the purpose of writing a book or an article on a subject in respect of which those proceedings are relevant.**
>
> **A recording to be made for any purpose other than the foregoing may be undertaken only with the leave of the court or Commission.**

No part of the recording may be broadcast to the public except with the leave of the court or Commission.

The recording shall not be made available to any person other than an agent or servant of the author making the recording and then only for the purpose of assisting with the writing of the book or article.

No copy of the whole or any part of the original recording shall be made by any person and a person shall not have in his or her possession a sound recording which is a copy of the original recording.

The recording shall not, except with the leave of the court or Commission, be used to correct or call in question the whole or any part of an official transcript of the proceedings.

We recommend that legislation should provide for penalties to be imposed in the event of a breach of any of these conditions.

THE USE OF SOUND RECORDERS BY PARTIES, LEGAL REPRESENTATIVES AND OTHERS

Reasons for our Recommendations

5.23 In our draft report on this reference we included a section on the recording of the proceedings of courts and Commissions by barristers and solicitors. Although not strictly within our original terms of reference, we considered that the subject was so closely related to our terms of reference that it warranted mention. Several of our consultants suggested that our terms of reference be amended so as to allow a recommendation to be made.[27] For example, the Law Society of New South Wales said:

> "The Committee was again unanimously of the view that it would be of great assistance in the conduct of litigation for barristers and solicitors to be able to record proceedings in appropriate cases. The Committee hopes that the Commission will accordingly request either a separate reference or an amendment to the terms of reference from the Attorney General to enable further consideration of this proposal it was of the view that if barristers and solicitors were to have the right to record proceedings then it should be on the same basis as that already suggested in your Draft Report for recording by representatives of the media, namely a prima facie right subject to certain conditions."[28]

Mr. D. Levine, Barrister, said:

> "The efficient conduct by Counsel or legal representatives in Court can only be aided by a facility available for themselves to record the proceedings ... Counsel should be able to record by means of sound recording the proceedings as they are conducted subject to the various considerations mentioned in the report in relation to technical impracticalities and the like. The official record of the proceedings will be that kept by the Court itself. I am simply considering the problem from the point of view of the efficient conduct of the legal representatives on behalf of their clients. It would be invaluable (and I have left aside the question of costs) for Counsel or Solicitors to have available at all times during the hearing a running record of the evidence for consideration simply, for example, during an adjournment."[29]

Subsequently, as mentioned in Chapter 1, the Commission's terms of reference were widened to allow consideration of this subject.

5.24 It is to be noted that unlike judicial proceedings, there are no parties to the proceedings of Royal Commissions and Special Commissions of Inquiry. However, as stated in Chapter 3,

in both types of Commission where it is shown to the satisfaction of the Commissioner that any person:

> is substantially and directly interested in any subject-matter of the inquiry; or
>
> that the person's conduct in relation to any such matter has been challenged to his or her detriment

the Commission may authorise that person to appear at the inquiry and be legally represented.[30] We also observed in Chapter 3 that there is provision in both the Royal Commissions Act 1923, and the Special Commissions of Inquiry Act 1983 for the Crown to appoint counsel or solicitors to assist the Commission.[31]

5.25 The main reason why

> parties to court proceedings and their legal representatives;
>
> persons authorised to appear before a Commission and their legal representatives; and
>
> persons appointed by the Crown to assist a Commission

may wish to record the proceedings, or part of the proceedings, would be to obtain a daily record that can be studied while the hearing continues. To some extent it might be a substitute for the transcript provided by the Court Reporting Branch of the Department of the Attorney General and of Justice. Daily transcripts can be provided by the Court Reporting Branch for the Supreme Court the District Court the Industrial Commission and the Workers' Compensation Commission although it is rare to be able to obtain daily transcripts for the District Court and the Workers' Compensation Commission.[32] Where daily transcripts are available, they are provided to parties and their legal representatives at a present cost of $1.50 per page.[33] Moreover, in some circumstances there can be a delay in obtaining a transcript. A judge may not wish to have a daily transcript provided (although a court reporter would still be present to take shorthand notes). If, for example, a barrister later requested a transcript to assist in advising on a possible appear there could be some delay while the shorthand notes of the court reporter were transcribed. Even where a daily transcript is provided, this usually includes only the evidence that has been presented in court. Other parts of the proceedings, such as addresses by counsel are not recorded by court reporters unless this is specifically requested by the presiding Judge.

5.26 At present a barrister or solicitor appearing in proceedings before a court or Commission may seek the permission of the judge, magistrate or Commissioner to record all or part of the proceedings. As previously stated, there is no statutory provision which prohibits the use of sound recorders in New South Wales courts and Commissions. In England the Contempt of Court Act 1981 (Eng) allows any person to seek the leave of the court to use a sound recorder.[34] The Phillimore Committee Report, upon which the legislation was based, stated that:

> "Leave should not normally be given except to the parties to the proceedings and their legal advisers, and to members of the press..."[35]

During the Parliamentary Debates on the Contempt of Court Act 1981 (Eng) it was said that there were strong reasons for allowing the legal advisers of parties to use sound recorders in court particularly where any difficulty is experienced in obtaining a transcript of the days proceedings.[36]

Recommendations

5.27 We recommend the creation of a right on the part of parties to court proceedings and their legal representatives, persons authorised to appear before a Commission and their legal representatives, and also persons appointed by the Crown to assist a Commission, to record the proceedings in which they are involved. There is in our opinion an overwhelming case to support this recommendation. We believe that these persons should be entitled to the benefits of technological innovations such as unobtrusive sound recorders for the preparation and presentation of cases. Our consultants have emphasised that these innovations will assist the efficient conduct of proceedings. The right and its exercise should be subordinate to the power of the court or Commission to prohibit or order the cessation of the use of a sound recorder where it is believed on reasonable grounds that the use of the sound recorder constitutes a substantial interference with the administration of justice or the functions of the court or Commission or that such interference would occur if recording were permitted. **We further recommend that the following conditions should generally apply.**

> **The recording shall be used solely for the purposes of the particular proceedings.**
>
> **No part of the recording may be broadcast to the public or used for any purpose other than the foregoing except with the leave of the court or Commission.**
>
> **The recording of the proceedings shall be made available only to:**
>
> > **(i) where the proceedings recorded are court proceedings, a party to the proceedings and his or her legal representatives;**
> >
> > **(ii) where the proceedings recorded are proceedings of a Royal Commission or a Special Commission of Inquiry, a person authorised to appear before the Commission and his or her legal representatives;**
> >
> > **(iii) where the proceedings recorded are proceedings of a Royal Commission or a Special Commission of Inquiry, a person appointed by the Crown to assist the Commission;**
> >
> > **(iv) a servant or agent of any of the persons described above;**
>
> **and then only for the purposes of the proceedings.**
>
> **No copy of the whole or any part of the original recording shall be made by any person and a person shall not have in his or her possession a sound recording which is a copy of the original recording.**
>
> **The recording shall not, except with the leave of the court or Commission, be used to correct or call in question the whole or any part of an official transcript of the proceedings.**

We also recommend that legislation should provide for penalties to be imposed in the event of a breach of any of these conditions.[37]

COURTS AND COMMISSIONS TO WHICH OUR RECOMMENDATIONS WILL APPLY

5.28 Our opinion is that legislation implementing the recommendations in this report should apply to Royal Commissions and Special Commissions of Inquiry established after such legislation takes effect. We do not believe that the legislation should also apply to Commissions established prior to that time but still conducting proceedings when the legislation takes effect.

5.29 As far as courts are concerned the recommendations are intended to apply to the following courts of law:

the Supreme Court of New South Wales;

the Land and Environment Court of New South Wales;

the Industrial Commission of New South Wales;

the District Court of New South Wales;

the Workers' Compensation Commission of New South Wales;

Courts of Petty Sessions;

Coroners Courts.[38]

There are in New South Wales many tribunals that are required to act judicially "in the sense that the proceedings must be conducted with fairness and impartiality.[39] Yet this does not mean that these tribunals are courts of law. *In Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation*,[40] Lord Sankey LC. said:

> "The authorities are clear to show that there are tribunals with many of the trappings of a Court which nevertheless, are not courts in the strict sense of exercising judicial power ... In that connection it may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court 6. Nor because it is a body to which a matter is referred by another body.[41]

5.30 More recently, Lord Edmund-Davies listed several other factors which he stated were "not decisive" in determining whether a tribunal is a court of law.

The fact that the tribunal is called a "court".

The necessity of sitting in public.

The fact that the tribunal has power to administer oaths and hear evidence on oath.

The fact that prerogative writs may issue in relation to the tribunals proceedings.

The fact that absolute privilege against an action for defamation protects those participating in its proceedings.[42]

His Lordship concluded:

> "At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakable hall-mark by which a court ... may unerringly be identified. It is largely a matter of impression."[43]

5.31 In a recent decision of the Victorian Supreme Court,[44] Starke J., in considering whether the Workers Compensation Board established under the Workers Compensation Act 1958 (Vic.), is a court of law, referred to a large number of features of the Board including the provisions governing contempt of the Board, costs and taxation the procedure for taking evidence and the allowance of cross-examination and concluded:

> "Whilst some or all of the matters referred to above if taken alone would be insufficient to constitute the Board a court of law, when taken together it appears to me that an impressive case is made out that the legislature intended to set up, and did set up, a

court of law to deal with the complex and important issues which arise under the Workers Compensation Act."[45]

Recommendation

5.32 It is not possible nor is it necessary for this report to identify all tribunals in New South Wales which may be categorised as courts of law or as exercising judicial power. Ultimately this must be resolved by courts themselves in the case of particular tribunals if and when the question arises for decision While we limit our recommendations to the courts listed in paragraph 5.29, we take the view that as the use of sound recorders in courts by representatives of the news media, legal representatives and others develops and the advantages become apparent, tribunals in New South Wales whose proceedings are open to the public and the news media could, in the public interest follow the principles of this report and allow the use of sound recorders. We recommend that the draft legislation should allow for regulations to be made which would prescribe as courts bodies other than those listed in paragraph 5.29 should this be considered desirable at a future date. These additional courts would then be subject to the provisions of the legislation in relation to the use of sound recorders.

FOOTNOTES

1. We note that there may be occasions when representatives of the news media are permitted to remain in court while other persons are excluded. Section 186(1) of the Community Welfare Act 1982 (which is yet to be proclaimed), provides that any person not directly interested in proceedings before a children's court shall be excluded from the court but that" any persons bona fide engaged in reporting or commenting upon the proceedings of the court for dissemination through a public news medium shall not be excluded unless the court otherwise directs. In these circumstances, where representatives of the news media may remain in court and report the proceedings, we see no reason why they should not be allowed to use a sound recorder as of right in substitution for, or in addition to, hand written notes, subject of course to the conditions outlined later in this chapter.

2. *Willing's Press Guide 1982* (108th Annual Edition 1982), pp.726-753.

3. John Fairfax Ltd. Publishes the *Sydney Morning Herald* and *The Sun* which in March 1983, had circulations of 255,748 and 303,721 respectively. A Sunday newspaper published by the same company *The Sun Herald* had a circulation of 671,654. These statistics are reprinted from *The Australian Press Council Annual Report N*o.7, 1983, p.65.

4. Australian Broadcasting Tribunal Annual *Report* 1981-1982 (1982), pp.79-94. The figures do not distinguish between medium frequency (MF) stations or frequency modulation (FM) stations.

5. *Id.,* pp.95-106.

6. *Australian Broadcasting Tribunal Annual Report* 1979-1980 (1981), p.146.

7. Note 4 above, p.156.

8. Letter from the New South Wales Bar Association, 30 November 1983.

9. G. Sawer, "Privilege" in The Australian Press Council, *To Name or Not to Name* (1980), p.11.

10. A. Denning, *The Road to Justice* (1955), p.64.

11. *Maryland v. Baltimore Radio Show Inc*. (1950) 338 U.S. 912, per Frankfurter J., at p.920.

12. *Richmond Newspapers Inc. v. Commonwealth of* Virginia (1980) 448 U.S. 555, at p.586, f.n.2.

13. In re Andrew Dunn and the Morning Bulletin Ltd. [1932] St R. Qd. 1, at p.15.

14. Note 12 above, at p.987, quoting *Nebraska Press Association v. Stuart* (1976) 427 U.S. 539, at p.587.

15. See for example, H. McQueen, Australia's *Media Monopolies (1977*).

16. B. Harris, *The Courts, The* Press *and The Public* (1976), p.9.

17. Letter from Mr. S.M. Littlemore, 3 November 1983, and letter from the New South Wales Bar Association, 30 November 1983.

18. Information received from AIWA Australia Pty. Ltd,, Sanyo Australia Pty. Ltd. and Sony Australia Pty. Ltd.

19. G. Borrie and N. Lowe, *The Law of Contempt* (1973), p.206. According to Arlidge and Eady, whether the influence or persuasion in fact amounts to contempt will depend upon whether the purpose is that the witness shall give true or false evidence; the means employed to persuade the witness; and the degree of risk and prejudice involved: A. Arlidge and D. Eady, *The Law of Contempt* (1982), para.4-107.

20. P.J. Atkins, *The New South Wales Solicitors' Manual* (3rd ed., 1975), p.49.

21. LA. Hallett, *Royal Commissions and Boards of Inquiry* (1982), p.24.

22. See paras.3.28-3.31.

23. *See Lockwood v. The Commonwealth* (1954) 90 CLR 177, per Fullagar J., at p.181; *R. v.Arrowsmith* [1950] VLR 78, per Dean J., at p.85.

24. Letter from Mr. T. Molomby, Australian Broadcasting Corporation 19 October 1983.

25. *Home Office v. Harman* [19821] All E.R. 532, at p.536.

26. *Id*., per Lord Roskill at p.554.

27. Mr. D. Levine, Mr. T. Molomby, Professor KG. Nettheim and the Law Society of New South Wales.

28. Letter from the Law Society of New South Wales, 5 December 1983.

29. Letter from Mr. D. Levine, 7 November 1983.

30. Royal Commissions Act 1923, s.7(2) and Special Commissions of Inquiry Act 1983, s.12(2). See paras.3.22- 3.23 and para.3.31.

31. Royal Commissions Act 1923,s.7(1) and Special Commissions of Inquiry Act l983, s.12(1). See paras.3.27 and 3.31.

32. This point was stressed in the letter from the Law Society of New South Wales. We have been informed by the Recording Services Section of Magistrates Courts Administration that it is also rare to be able to obtain a daily transcript for Courts of Petty Sessions.

33. Information supplied by the Court Reporting Branch of the Department of the Attorney General and of Justice.

34. Contempt of Court Act 1981 (Eng.), s.9. See para. 4.5.

35. *Report of the Committee on Contempt of Court* (Cmnd 5794, 1974), para.43 (a).

36. *Parliamentary Debates* (Hansard)*, House of Lords* (1981), vol. 416, col.380-381.

37. Of course. other sanctions maybe imposed on barristers and solicitors, who have a special relationship with the court and, in the words of Arlidge and Eady, "should be scrupulous to obey the orders of the court": note 19 above, p.54. See also pp.54-57, 189-194. In the case of solicitors, who are officers of the court, the court has:

> "a punitive and disciplinary jurisdiction... which is exercised, not for the purpose of enforcing legal rights but for the purpose of enforcing honourable conduct on the part of the Court's own officers." *(Re Grey* [1892] 2 Q.B. 440, at p.443)

38. The Coroners Court is an inferior court of record: see *Attorney General v. Mirror Newspapers Ltd*. [1980] 1 NSWLR 374.

39. *Halsbury's Laws of England,* vol. 10 (4th ed, 1975), para. 702. The concept of "judicial power" as distinct from a requirement to act judicially, has been considered in a number of Australian cases in the context of s.71 of the Constitution which vests judicial power in certain federal courts and such other courts as Parliament invests with federal jurisdiction. See, for example, *Huddart Parker & Co. Pty. Ltd. v. Moorehead (1909*) 8 CLR. 330, per Griffith C.J., at p.357; R. v. *Kirby; ex parte Boiler Makers' Society of Australia* (1956) 94 CLR 254; *Attorney-General (Cth) v. The Queen* (1957) 95 CLR 529 (P.C.); and C. Howard, *Australian Federal Constitutional Law* (2nd ed., 1972), pp.154-190.

40. [1931] AC 275.

41. *Id*., at pp.296-297.

42. *Attorney-General v. British Broadcasting Corporation* [1981] AC 303. at p.348.

43. *Id*., at p. 351.

44. *Trevor Boiler Engineering Co. Pty. Ltd. v. Morley* [1983] V.R. 716.

45. *Id*., at p.720.

6. Notification Procedures and Remedies

NOTIFICATION PROCEDURES

6.1 In our view the procedures, if any, to be adopted by courts, Royal Commissions and Special Commissions of Inquiry to identify those persons who intend to use sound recorders prior to the commencement of proceedings should be a matter for each court and Commission. We observed in Chapters 2 and 3 that all courts and Commissions have power to regulate their own proceedings. This power extends to establishing notification procedures. In the case of courts, it may be thought desirable to proceed by way of rules of court or practice directions. While most courts in New South Wales are granted statutory power to make rules of court,[1] all courts have inherent power to make rules of court and practice directions.[2]

6.2 Notification procedures could take a variety of forms.

> At the commencement of proceedings, the judge, magistrate or Commissioner could ascertain those persons who intend to use a sound recorder and verify their *bona fides.* This may be an appropriate procedure in country courts and courts where, for example, there is only one representative of the news media present who intends to use a sound recorder. However, it might be a cumbersome procedure to follow in proceedings that have attracted a high degree of media interest.
>
> A register for each court could be established (for example, separate registers for the Supreme Court, Land and Environment Court, District Court). All persons who intend to use a sound recorder, apart from parties and their legal representatives, could be required to enter certain details in the register, including the purpose for which the recording is being made. Inquiries could be handled by an officer of the court who would have the task of determining the *bona fides* of those persons making an entry into the register. A register could also be kept by each Royal Commission and Special Commission of Inquiry for the duration of the proceedings.
>
> Although we do not suggest that members of the public, as suck should have a statutory right to use a sound recorder to record the proceedings of courts and Commissions, the existing law allows members of the public to use a sound recorder with the leave of the court or Commission.[3] If members of the public wish to apply for permission it may be thought desirable for them to enter details of their request in a register. These details could be placed before the presiding judge or Commissioner who would then decide whether the use of a sound recorder should be permitted.

6.3 We consider that each court and Commission should decide whether notification procedures are necessary and, if so, the most efficient way to establish and conduct such procedures. There will be no difficulty in the vast majority of cases since it will only be the parties and their legal advisers, together perhaps with a single representative of the news media, who wish to avail themselves of their statutory entitlement. It will only be in exceptional cases that a significant number of persons will wish to use sound recorders. In these circumstances appropriate notification procedures could be provided in the form of rules of court or practice directions.

REMEDIES

Introduction

6.4 In this report we have recommended that certain persons be permitted to use sound recorders as of right to record the proceedings of courts, Royal Commissions and Special Commissions of Inquiry. We stated that the exercise of this right should be subject to the power of the court or Commission to prohibit or order the cessation of the use of a sound recorder where it is reasonably believed that the use of a sound recorder constitutes a substantial interference with the administration of justice or the functions of the court or Commission. or that such interference would occur if recording were permitted. We also recommend that the right to use sound recorders should be created and regulated by statute.

6.5 In this section we examine the remedies that are available to a person who claims that a court or Commission has refused or failed to give effect to the statutory right to use a sound recorder envisaged by our recommendations. The position is more complex than appears at first glance, since the remedies usually open to a person aggrieved by an order or decision of a court may not be available where the ruling relates to the use of a sound recorder. For example, one particular difficulty created by our recommendations is that the person seeking to use a sound recorder may not be a party to the proceedings and thus may not be able to take advantage of rights of appeal ordinarily open to parties. Accordingly, we first describe briefly the various ways in which the validity of a refusal by a court or Commission to permit the use of sound recorders might be tested and then assess whether new remedies are required.

Review of a Refusal to Permit the Use of a Sound Recorder

Appeals

6.6 We suggest in paragraphs 6.8 and 6.9 that the refusal of a court or Commission to permit the use of a sound recorder could be reviewed in certain circumstances. However, a more important question is whether a person aggrieved by such a refusal may appeal directly to a superior court.

6.7 There is no clear cut answer to this question because the legislation governing appeals from the various courts in New South Wales is not drafted in uniform terms and difficult questions of interpretation arise. Moreover, it is fair to say that, in general subject to paragraphs 6.8 and 6.9, there seems to be no right of appeal from a refusal by a court or Commission to permit the use of a sound recorder, even where this is alleged to contravene a right conferred by statute. For example:

> Section 101 (I) (a) of the Supreme Court Act 1970, provides for an appeal from a “judgment or order’ of the court Similarly, section 112(l) of the justices Act 1902, provides for appeals by any person aggrieved by any “order” of a Justice. While the issue is not free from doubt it is likely that a refusal to permit a sound recorder to be used in the proceedings is not an “order” within the meaning of these Acts, since it does not determine an issue between the parties.[4]
>
> Other legislation provides for appeals only by parties to the proceedings and would appear to preclude an appeal by an aggrieved person such as a journalist who is not a party to the proceedings.[5]
>
> Neither the Royal Commissions Act 1923 nor the Special Commissions of Inquiry Act, 1983 provide for appeals to a court of review against rulings made by the Commissioner.

Denial of a Fair Trial

6.8 Our recommendations envisage that the parties to legal proceedings and their legal representatives should be permitted to use sound recorders, subject to certain

restrictions. It is possible that an unjustified refusal by a court to permit a party, or his or her counsel to use a sound recorder could warrant an appeal on the ground that the refusal effectively denied the aggrieved person a fair trial.[6] If, for example, the defendant in criminal proceedings could demonstrate significant prejudice in the preparation and presentation of the defence because of the inability to use a sound recorder, a conviction arising out of those proceedings might be quashed on appeal. This is not to suggest that an unjustified refusal to permit the defendant s counsel to use a sound recorder would necessarily constitute grounds for quashing a conviction. However, the possibility of that result would provide a means of challenging the validity or propriety of the trial courts refusal to permit the use of a sound recorder.

Contempt of Court

6.9 The validity of a refusal by a court or Commission to permit the use of sound recorders could also be tested in the context of contempt proceedings. All courts of record in New South Wales have inherent power to punish for contempt in the face of the court.[7] Royal Commissions and Special Commissions of Inquiry have statutory power to punish for contempt.[8] The issue could arise if a court or Commission gives a direction that sound recorders are not to be used and a person not necessarily a party to the proceedings, defies that direction. In these circumstances the court or Commission may seek to impose a penalty on the offending person for contempt If a penalty is imposed and a right of appeal or review is available, the offender (the contemnor) may apply to have the finding of contempt reviewed by a higher court Any such proceedings, whether formally byway of appeal or for prerogative relief (for example, for a writ of certiorari), would raise for consideration the validity of the original refusal to permit the use of a sound recorder.[9]

Prerogative Writs

6.10 It may be possible for a person who has been denied a statutory right to use a sound recorder to obtain judicial review of the order by means of the prerogative writs, for example, certiorari or prohibition.[10] In brief, certiorari consists of

> an order that the official record of a court or authority be removed into the court of review; and
>
> an order by the review court that the decision involved in the record be quashed.[11]

Prohibition either prevents an order being made or prohibits the continuation of a course of action based on an order already made.[12]

6.11 It has been said that certiorari and prohibition lie against “any body of persons having legal authority to determine questions affecting the rights of subjects.”[13] In our view, a person who is denied a statutory right to use a sound recorder by a court is clearly able to satisfy this requirement. Prerogative relief is available against Royal Commissions and can be obtained in the Court of Appeal.[14] However, a significant limitation is that the Supreme Court is immune from orders in the nature of certiorari and prohibition.[15] Other superior courts in New South Wales, namely, the Industrial Commission and the Land and Environment Court may also be immune, although the position is open to some doubt.[16]

Declarations

6.12 A person who has been refused permission to use a sound recorder may challenge the decision by seeking a declaration that the refusal violated a statutory entitlement and was thus invalid or improper. Declaratory relief may be awarded by the Supreme Court pursuant to section 75 of the Supreme Court Act, 1970, which states, *inter alia,* that

> "the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

There is little doubt that a person who has been refused permission to use a sound recorder would have standing to claim a declaration,[17] whether or not he or she was a party to the original proceedings. There is also little doubt that the Supreme Court has jurisdiction to issue declarations against other courts and Commissions. Proceedings for declarations concerning the powers of certain courts are assigned to the Court of Appeal.[18]

6.13 The declaration is a discretionary remedy so that even where the court has jurisdiction it is not bound to grant relief. Nonetheless, declaratory relief has a number of advantages compared with other remedies, and is regarded as a flexible and expanding remedy. According to Meagher, Gummow and Lehane,[19] declarations afford a comparatively speedy remedy, are generally less expensive than other remedies, tend to avoid or minimise protracted litigation and can be made in circumstances where no other relief would be available. Moreover, declaratory relief has the advantage of simplicity. The Chief justice of New South Wales has stated that:

> "The declaratory jurisdiction of this Court is not hedged about with the restrictions, nor clouded by the complications, that attach to the remedy by way of prohibitions."[20]

6.14 Declarations are considered to provide a broad and flexible remedy. in the words of the President of the New South Wales Court of Appeal:

> "Because of the nature of a declaration and its availability for use in isolation the power provides a useful judicial tool, apt to mould procedures to meet the changing needs of society."[21]

The cases make it clear that the circumstances in which declarations can be awarded are not closed.[22] As one judge has observed, the power of a court to make a declaration is "only limited by its own discretion."[23]

6.15 While the declaration is a discretionary remedy, generally speaking there are several prerequisites which must be satisfied before the remedy is available.

> "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."[24]

6.16 Another principle of special relevance in the present context is that the court may exercise its discretion to refuse relief if the declaration will lack utility and be of little practical value.[25] For example, a judge may order that a sound recorder not be used to record proceedings and the person concerned may immediately institute separate proceedings to obtain a declaration. However, it can be envisaged that in some instances the proceedings which were to have been recorded would have concluded by the time the application for a declaration is heard. It could be argued, therefore, that a declaration should be refused because it would lack utility in the circumstances. Yet relief will be granted if the declaration " is of some value ... or benefit to the plaintiff",[26] or if it "will serve some useful purpose".[27] If the court accepts the need to clarify the scope of the right to use sound recorders and believes that the making of a declaration would serve a useful purpose in this respect then relief may be available, despite the fact that the proceedings which were to have been recorded by the aggrieved person, have concluded.[28]

6.17 A further, and perhaps more difficult, question arises in relation to declarations. The question is whether the Supreme Court of New South Wales would make a declaration that amounts to a review of an order of a superior court The same question arises in relation to applications for orders in the nature of certiorari and prohibition in the hypothetical case of a Supreme Court Judge, after the introduction of the statutory right envisaged in this report, making an order forbidding a person to use a sound recorder, would the Supreme Court entertain proceedings that sought a declaration on the correctness of that order? Some doubt arises because there is judicial authority in New South Wales suggesting that declarations should not be made which would have the effect of contradicting a decision of a Superior Court unless an order can also be made which quashes the decision or in some way operates so that the decision ceases to have effect.[29] The judicial comments to this effect were *obiter dicta* and related to proceedings in which the impugned orders affected rights that were the subject of those proceedings.[30] However, they merit consideration because there is a substantial discretionary element in the granting of relief by way of declaration.

6.18 As far as declarations are concerned we are of the view that sufficient power is conferred upon the Supreme Court by the Supreme Court Act, 1970, to enable the court to make a declaration that would effectively review the hypothetical order referred to above.[31] It may be that the status of superior courts and the discretionary nature of the remedy would suggest that such a declaration should only be made by the Court of Appeal. Whatever may be the most desirable procedures, our view is that their development is best left to the Supreme Court itself and is noL at this stage, a matter for this Commission.

6.19 We note that no declaration (or other remedy) lies against a Special Commission of Inquiry.[32] There is no section in the Royal Commissions Act, 1923 which prevents declarations being issued against Royal Commissions.

Summary

6.20 This analysis suggests that the position of a person wishing to challenge the refusal of a court or Commission to permit the use of a sound recorder, where the refusal may be said to contravene that persons rights as recommended in this report, is broadly as follows:

> It is unlikely that there would be a right of appeal as suck against an order of a court or Commission not to use a sound recorder.
>
> In limited circumstances the order, if it affects a party to the proceedings, may give rise to an appeal on the ground that that party was denied a fair trial.
>
> If a person is punished for contempt because he or she has breached a direction not to use a sound recorder, it would be open to that person on appeal or review to challenge the validity of the original direction.
>
> Certiorari or prohibition may be appropriate remedies in some circumstances where, for example, it is sought to have the order of an inferior court or a Royal Commission prohibiting the use of a sound recorder quashed. Prerogative relief will not be available in respect of Special Commissions of Inquiry, the Supreme Court and perhaps other superior courts of record in New South Wales.
>
> The Supreme Court Act, 1970 gives power to the Supreme Court to make a declaration in respect of the refusal of a court or Royal Commission (but not a Special Commission of Inquiry) to allow the use of a sound recorder.

Conclusion

6.21 We have considered whether we should recommend legislation providing specific remedies for a person aggrieved by the apparent refusal of a court or Commission to give effect to the statutory right we have suggested should be created. Such legislation might, for example, establish a right of appeal in respect of an order or direction that a sound recorder not be used, or state clearly that declaratory relief should be granted in an appropriate case. There is much to be said for legislation of this kind. The principal argument is that the statutory right to use a sound recorder may prove illusory in the absence of an effective means of challenging a direction not to use such a recorder. If there is no ready avenue of appeal or review, there might be a tendency to give an unduly broad interpretation to the grounds on which on our recommendations, the use of sound recorders may be prohibited.

6.22 Nevertheless, we are reluctant to recommend the creation of special remedies for this class of case. We think it should be assumed that courts and Commissions will act in accordance with the spirit of any legislation implementing our recommendations and will not place a restrictive interpretation on its provisions. We also consider that existing remedies and powers, although by no means perfect are sufficient to allow the courts to provide guidance and to intervene in appropriate cases.[33] Moreover, the existing law provides an opportunity to individuals and organisations who wish to test particular rulings to do so.

6.23 For these reasons we do not think it necessary to recommend special procedures to give effect to the statutory right to use sound recorders. We prefer to leave it to the courts to apply any legislation and to formulate the necessary rules and practice directions. We are confident that the courts would adapt existing remedies to ensure that the intention of a statute is not frustrated Should it become clear that the legislation is not proving effective, it would be feasible for the Attorney General to reassess the circumstances with a view to the creation of specific remedies.

FOOTNOTES

1. See, for example, Supreme Court Act, 1970, s.124; Land and Environment Court Act 1979, s.74; District Court Act 1973, s.161; Workers' Compensation Act, 1926, s.38(e).

2. See *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, per Lord Devlin at p.1347. See also I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23, at pp.33-37. Clause 21 of the draft legislation attached to this report provides that where a court has power to make rules regulating the practice or procedure of the court, the court may make rules regulating its practice and procedure in respect of the making and use of sound recordings.

3. In our forth coming Issues Paper we discuss the question whether members of the public should have a right to record the proceedings of courts and Commissions and not have to seek leave to use a sound recorder.

4. *Halsbury's Laws of England* (4th ed., 1979), vol 26, para.501.

5. See, for example, Workers' Compensation Act, 1926, s.37(4); Land and Environment Court Act, 1979, Part V.

6. See generally, J, Bishop, *Criminal Procedure* (1983), Chapter 8.

7. See para.2.37, f.n.78.

8. Royal Commissions Act 1923, s.18(l) (d); Special Commissions of Inquiry Act, 1983, s.24(d).

9. Unlike the United Kingdom Administration of Justice Act 1960, s.13(1), there is no specific statutory right of appeal in New South Wales from an order of a court punishing for contempt. Usually, however, an appeal would lie under general appeal provisions. See, for example, Supreme Court Act, 1970, s.101; *Skouvakis v. Skouvakis* [1976] 2 NSWLR 29. An order for certiorari may be obtained in the Court of Appeal. For example, to quash an order for contempt made by a Royal Commission: *Thelander v. Woodward* [1981] 1 NSWLR 644. The position would seem to be otherwise in the case of Special Commissions of Inquiry. Special Commissions of Inquiry Act, 1983, s.36(2).

10. Section 69 of the Supreme Court Act, 1970 provides that the Supreme Court shall not issue prerogative writs, but the court continues to have jurisdiction to make appropriate orders.

11. E.I. Sykes, D.J. Lanham, and R.R.S. Tracey, *General Principles of Administrative Law* (1979), para.2009.

12. *Ibid,*

13. *R. v. Electricity Commission; ex parte London Electricity Joint Committee Co.* [1924] 1 KB. 171, per Atkin LJ., at p.205.

14. *Thelander v. Woodward* [1981] 1 NSWLR 644. Prerogative relief is not available against Special Commissions of Inquiry: Special Commissions of Inquiry Act, 1983, s.36(2).

15. H. Whitmore and M. Aronson, *Review of Administrative Action* (1978), p.421. In *Ferraro v. Woodward* (1978) 19 ALR 188, Gibbs A.C.J stated that prohibition would not tie against a Judge sitting as a member of the Supreme Court of New South Wales but would lie against the same judge sitting as a Royal Commissioner (p.189).

16. it has been said that:

> "the inquiry into the status of the court in such matters [certiorari and prohibition] is one based on objective criteria and not necessarily on a legislative statement as to the status of the court" (Note 11 above, para.2010)

Thus. it has been held that prohibition would lie against the Industrial Court of Queensland (Attorney-*General of Queensland v. Wilkinson* (1958) 100 CLR 422) and certiorari against the Family Court of Australia(R. v. Watson; *ex parte* Armstrong (1976) 9 ALR 551) despite the fact that both courts are declared by statute to be superior courts of record.

17. H. Whitmore and M. Aronson, note 15 above, p.479.

18. Supreme Court Act, 1970, s.48(l)(a), (2)(e) (covering the Land and Environment Court, the Industrial Commission, the District Court and the Workers' Compensation Commission). Proceedings for a declaration against a magistrate may be commenced in the Common Law Division of the Supreme Court: Supreme court Act. 1970, s.53(3C), (4). The Court of Appeal would also have jurisdiction to grant declarations against Royal Commissions. Declarations do not lie against Special Commissions of Inquiry. Special Commissions of Inquiry Act, 1983, s.36(2).

19. R.P. Meagher, NV.M.C. Gummow and J.PF. Lehane, *Equity Doctrines and Remedies* (1975), paras.1926-1927.

20. *Connor v. Sankey* [1976] 2 NSWLR 570, per Street C.J., at p.592. See also *Sankey v. Whitlam* (1978) 142 CLR 1, per Gibbs A.C.J., at p.25.

21. *Johnco Nominees Pty. Ltd. v. Albury-Wodonga (New South Wales) Corporation* [1977] 1 NSWLR 43, per Moffitt P., at p.55.

22. J.M. Evans, *De Smith's Judicial Review of Administrative Action* (4th ed., 1980), pp.482-483.

23. *Hanson v. Radcliffe Urban District Council* [1922] 2 Ch. 490, per Lord Sterndale M.P,, at p.507.

24. *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade* [1921] 2 A.C. 438, per Lord Dunedin, at p.448.

25. P.W. Young, *Declaratory Orders* (1975), para.812. See also *Coles v. Wood* [1981] 1 NSWLR 723.

26. *Id*., para.813.

27. J.M. Evans, note 22 above, p.513.

28. *Merricks v. Nott-Bower* [1965] 1 Q.B. 57; *Marion White Ltd. v. Francis* [1972] 3 All E.P, 857.

29. *News Ltd. v. Printing and Kindred Industries Union (New South Wales Branch)* [1975] 1 NSWLR 151, per Hutley J.A., at p.154; In the *Estate of Leahy (Dec'd); Earl v. Moses* [1975] 1 NSWLR 246, per Bowen C.J. in Eq, at p.252.

30. There is also English authority to the contrary. *Ellerman Lines Ltd. v. Read* (1927) 44 TLR 7; *Burr v Anglo-French Banking Corp. Ltd*. (1933) 49 TLR 405.

31. See ss.23, 75 and 48(1), (2).

32. Special Commissions of Inquiry Act, 1983, s.36(2).

33. We are aware that no remedies would be- available against Special Commissions of Inquiry. But this is because of the statutory exclusion of all remedies against such a body Special Commissions of Inquiry Act, 1983, s.36(2).

Appendix A - Copyright and the Recording of the Proceedings of Courts and Commissions

INTRODUCTION

A.1 We now intend to consider questions and problems that could arise under the law of copyright in relation to our terms of reference and recommendations. The material on copyright is placed in this Appendix to emphasise our opinion that neither the terms of reference nor the recommendations raise an issue for reform of copyright law, and that copyright law presents no obstacle to the implementation of our recommendations. Nevertheless, copyright is closely related to the entire subject matter.

A.2 If such implementation occurs, it may be that new kinds of copyright problems and disputes will appear. However, we see no reason to conclude that the courts and the existing law would be unable to deal satisfactorily with them. If they do arise, disputes may occur between participants in the proceedings of courts and Commissions (including the Crown) on the one hand, and those who publish details of the proceedings by way of report comment or otherwise, on the other.

A.3 The Copyright Act 1968 (Cth) affords protection to authors of literary, dramatic, musical and artistic works by granting to the author certain exclusive rights such as the right to publish and broadcast the work.[1] Legal proceedings may be taken if these rights are infringed.[2] In the context of this report two aspects of copyright law merit specific attention. The first is its relation to judgments and reports of courts and Commissions in New South Wales. The second is whether copyright may subsist in particular parts of the actual proceedings of the court or Commission for example, the speeches of counsel.

IN WHAT MAY COPYRIGHT SUBSIST?

A.4 For the purposes of the Copyright Act 1968 (Cth) copyright can subsist in literary, dramatic, musical or artistic “works” and also in subject matter other than “works” such as radio and television broadcasts, cinematograph films and sound recordings. The Act only applies to “works” that have been reduced to writing or to some other material form.[3] The Act further provides that the work must be “original.”[4] By this is meant:

> “that the product must originate from the author in the sense that it is the result of a substantial degree of skill industry or experience employed by him.”[5]

Part of the proceedings of a court or Commission can be recorded in a sketch or photograph Copyright protection can be given to sketches and photographs provided they are produced with skill and labour as both fall within the definition of an original “artistic work.”[6] .

A.5 Although copyright may also subsist in sound recordings, films and television and sound broadcasts, these are not referred to as “works” in the Act and therefore there is no requirement that the subject matter must be original in order for them to be protected. Furthermore, the copyright in recording media subsists independently of the copyright in the works recorded by them.”[7]

A.6 The Act defines a “sound recording” as “the aggregate of sounds embodied in a record.” “Record” means a disc, tape, paper or other device in which sounds are embodied.[8] The Act further defines “cinematograph film” as the aggregate of visual

images embodied in an article or thing so as to be capable of being shown as a moving picture.[9] It includes the aggregate of the sounds embodied in a sound track associated with visual images. Sterling and Hart state that this definition of cinematograph film is wide enough to include a film strip, tape (including videotape and tape in a videocassette), video disc or any other material substance.[10] The Act also defines television and sound broadcasts, although it has been suggested that cable television and otherwise diffusion services do not constitute broadcasting for the purposes of the act and are therefore not protected by copyright.[11]

A.7 It is thus apparent that a variety of means can be employed to record the proceedings of a court or Commission. However, this does not answer the question of ownership of copyright. Is it possible that the copyright in the proceedings of a court or Commission is held by the participants to the proceedings? For example, it may be thought that either the judge or the Crown owns the copyright in any judgment delivered in court or that a barrister owns the copyright in prepared speeches that he or she makes during the course of the proceedings. If that is the case, any subsequent recording by representatives of the media of proceedings which are already the subject of copyright protection may constitute an infringement of that copyright. For reasons which we outline below, we do not believe that any infringement will occur.

COPYRIGHT IN JUDGMENTS

A.8 There is some doubt whether the Crown has copyright in written judgments. On one hand it has been suggested that as a Judge:

> "is not under a contract of employment to the Crown and his judgments cannot be said to be made under the direction or control of the Crown or a government department, there is no Crown copyright in judgmental."[12]

Yet it has also been argued that the Crown has prerogative copyright in judgments which is preserved by s.8A of the Copyright Act 1968 (Cth).

> "[T]he Crown truly has a prerogative right in the judgments and the reasons therefor pronounced in the courts. It is not because of a master-servant relationship with the judges, but that the judges sit in the Royal courts, pronouncing judgments in the name of the Monarch. The judgments are those of the Crown."[13]

It is to be noted that the Crown in right of the State of New South Wales has traditionally claimed copyright in the judgments of New South Wales courts, and continues to do so. This claim asserted through the Department of the Attorney General and of Justice, is not conceded by all judges.

A.9 It may be thought that a case exists for the conclusion that copyright in the report of a Commission is held by the Crown pursuant to section 176(2) of the Copyright Act 1968 (Cth) in that the report of a Commission is "made by, or under the control" of the Commonwealth or a State. This argument is based on the premise that the function of a Commission is to obtain information for the executive branch of government.[14] The opposing view is that although the function of Commissions maybe to obtain information for the executive, they are independent precisely because their findings are not made under the direction or control of the government.

A.10 If copyright in written judgments is held by the Crown, then no copyright can be claimed in a verbatim report of the judgment prepared by a reporter.[15] This is because the report is only a copy of a document which is already the subject of copyright protection and the verbatim report cannot be considered an original literary work. However, the reporter may have copyright in annotations or compilations of written

judgments provided that the skill and labour expended in their preparation justifies copyright subsisting in them as original literary works.

A.11 With respect to the copying of judgments, section 182A of the Copyright Act 1968 (Cth) provides that Crown copyright in a judgment of a Federal, State or Territory court is not infringed by the making, by reprographic reproduction, of one copy of the judgment.

A.12 Should a distinction be drawn between written and oral judgments for the purposes of copyright? If a judgment is delivered orally and then transcribed, it is then a "literarcy" work within section 10 and section 31 of the Copyright Act 1968 (Cth) and copyright would then subsist in the transcript Of course, if a judgment is written and then orally delivered, copyright subsists in the written judgment. Consequently:

> "In as much as, with few exceptions, judgments delivered in open court are either in writing, or, if purely oral are transcribed, the distinction if any, between written and oral judgments, for the purposes of what constitutes a "literarcy" work within s.10 and s.31 of the Copyright Act 1968 (Cth), as amended, appears to be merely of abstract significance. All judgments may therefore be considered as original literary works of which the authors ate the judges (singly or jointly) who have delivered them."[16]

A.13 Assuming that the Crown holds copyright in judgments as literary works, the question arises whether copyright can be breached by the news media and authors of books and articles. It has been suggested that even if the Crown has prerogative copyright in judgments, it has not insisted upon this right to prevent infringement of copyright by both the news media and by the private publishing of law reports and therefore a "strong case could be made indeed for a submission that if there was a Crown prerogative right in respect to judgments, as suck it has lapsed by desuetude or renunciation."[17]

A.14 Section 42(1) of the Copyright Act 1968 (Cth), which concerns fair dealing for the purpose of reporting news, is also of relevance with respect to both judgments of courts and the reports of Commissions. The section provides that a fair dealing with a literary work does not constitute an infringement of the copyright in the work if:

> "(a) it is for the purpose of or is associated with the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or
>
> (b) it is for the purpose of, or is associated with the reporting of news by means of broadcasting or in a cinematograph film."[18]

In the case of a book or article which cannot be classed as "the reporting of news" or the purpose of section 42(1), section 41 provides that a fair dealing with a literary work does not infringe copyright in the work if "it is for the purpose of criticism and review". It has been said with respect to the equivalent English provision that the "copying of reported cases by the writers of legal textbooks now, no doubt falls to be considered in the light of this proviso".[19]

A.15 Another defence may be provided by section 43 (1) which states that the copyright in a literary work "is not infringed by anything done for the purposes of a judicial proceeding or of a *report of a judicial proceeding*" (emphasis added). In the usual course of events, this section applies to copyright works which are reproduced in evidence in judicial proceedings. However, if a judgment is considered a literary work in which copyright subsists, then one interpretation of the section is that the copyright is not infringed in a report in the media of the judgment.

A.16 If this interpretation is correct it appears that section 43(1) is also applicable to the proceedings of Royal Commissions and Special Commissions of Inquiry because “judicial proceeding” is defined in section 10 of the Copyright Act 1968 (Cth) to include a proceeding before a “person having by law power to hear, receive and examine evidence on oath”. Section 9(l) of the Royal Commissions Act, 1923 provides that a Royal Commissioner may administer an oath to any person appearing as a witness before the Commission and may examine that person on oath A similar provision is contained in section 15(1) of the Special Commissions of Inquiry Act, 1983.

A.17 In summary, although it may not be clear whether the Crown owns the copyright in judgments delivered in court or the reports of Commissions, a report by the news media of a judgment or the findings of a Commission will not infringe copyright provided that the report constitutes a “fair dealing” for the purpose of reporting news within the meaning of section 42(1) of the Copyright Act 1968 (Cth). Section 43(1) may also be relevant to news reports of the findings of Commissions and of judgments, although the application of this section depends upon an interpretation that has not been subject to judicial scrutiny. With respect to books and articles in which judgments are quoted, copyright will not be infringed pursuant to section 41 if it is a “fair dealing” for the purpose of criticism or review.

COPYRIGHT IN THE PROCEEDINGS OF COURTS AND COMMISSIONS

A.18 Separate from the issue of copyright in judgments is the question whether copyright subsists in parts of the actual proceedings of a court or Commission, for example, an address by a barrister, and if so, who owns the copyright? One approach is to equate these parts of the proceedings with the law of copyright in relation to public speeches.

A.19 If a barrister appearing in proceedings before a court or Commission reads from a written address, then the written address has copyright protection as an unpublished original literary work.[20] Any address, comments, questions and the like, made without notes, of which no permanent record has been made, will not enjoy copyright protection as they have not been “made” within the meaning of section 22(1), that is, “reduced to writing or to some other material form.”[21]

A.20 If, when the barrister was reading his or her written address, a news reporter took down the speech in shorthand and prepared a report using considerable skill and labour, this may, in itself, constitute “a making of a word” for the purposes of the Act. Consequently, while the barrister is the owner of the copyright in his or her speech there may be a separate and distinct copyright in the report belonging to the reporter or the reporters employer.[22] The reporter or employer would have no rights in the speech of the barrister but would be able to restrain others from infringing the copyright in the report of the speech Some doubts exist concerning whether a reporter can claim copyright in verbatim reports of the oral parts of a judicial proceeding,[23] although if the arguments or speeches of barristers are reported in an abridged or summary form such a summary will have copyright protection provided that it can be classed as an original literary work because of the skill and labour expended in its preparation.[24]

A.21 If a reporter makes a sound recording of the speech of a barrister, this will constitute a “making” for the purposes of section 22(2). The recording itself, as distinct from the speech will not qualify as an original work as it lacks the quality of “original word”, however, the recording will enjoy copyright protection as a sound recording.[25] Furthermore, as we have already observed, a film or video recording of the proceedings of a court or Commission will also have copyright protection as will a television or radio broadcast.

A.22 As is the case with copyright in judgments, a news media report of the proceedings of a court or Commission will not infringe copyright already held in the proceedings provided that the news report is a fair dealing for the purpose of reporting news and

thereby meets the criteria outlined in section 42(1) of the Copyright Act 1968 (Cth). Section 43(1) concerning reports of judicial proceedings may also operate to allow the media to report these proceedings. Both section 42(1) and section 43(1) have already been discussed.[26] The application of these defences to news media reports means that copyright law does not in principle present obstacles to the recording for reporting purposes of the proceedings of courts and Commissions by representatives of the news media, including television broadcasters.

A.23 With respect to the publication of books and articles not classified as "the reporting of news" for the purpose of section 42(1) and which contain extracts of the proceedings, for example, an address by counsel which is subject to copyright, section 43(1) maybe relevant if the publication can be viewed as "a report of a judicial proceeding" which as we have seer can include the proceedings of Royal Commissions and Special Commissions of inquiry for the purpose of the Copyright Act 1968.[27] Section 41 may also provide a statutory defence if the publication is a fair dealing for the purpose of criticism or review.

FOOTNOTES

1. Copyright Act 1968 (Cth.), s.31(1).

2. *Id*., ss.36(1), 115(1).

3. *Id*., s.22(1).

4. *Id*., s.32.

5. *Ladbroke (Football) Ltd.* v. William *Hill (Football) Ltd.* [1964] 1 WLF 273, per Lord Devlin, at p.289.

6. Note 1 above, s.10.

7. M. Armstrong, M. Blakeney and R. Watterson, *Media Law in Australia* (1983), p.78.

8. Note 1 above, s.10.

9. *Ibid.*

10. J. Sterling and G. Hart, *Copyright Law in Australia* (1981), p.69.

11. Note 7 above, p.79.

12. H. Laddie, P. Prescott and M. Vitoria, *The Modem Law of Copyright* (1980), para. 15.13. Section l76(2) of the Copyright Act 1968 (Cth) provides that the Commonwealth or a State is, subject to Parts VII and X of the Act, the owner of the copyright in an original literary work "made by, or under the direction or control oL the Commonwealth or the State, as the case may be".

13. C.J. Bannom "Copyright in Reasons for Judgment and Law Reporting" (1982) 56 *Australian Law Joumal* 59, at p.60. Lahore is also of the opinion that the owner of the copyright in written judgments is the Crown; J. Lahore, *Intellectual Property Law in Australia: Copyright* (1977), para.534.

14. LA. Hallett, *Royal Commissions and Boards of Inquiry* (1982), Chapter 2.

15. Lahore, note 13 above, para.534. The author observes that there is an argument that no copyright should exist in reports of legal proceedings. In the United States no reporter can have copyright in opinions delivered by the courts: Lahore, citing *Wheaton v. Peters* (1834) 33 U.S. 591.

16. "The Crown and Copyright in Publicly Delivered judgments" (1982) 56 *Australian Law Journal* 326, at p.326.

17. *Id*., p.327.

18. In *Commonwealth of Australia v. John Fairfax & Sons* (1980) 32 ALR 485, Mason J. stated that he was inclined to the view that "news" in s.42 is not restricted to "current events" (p.496). Further, s.42(1) applies to television broadcasts as s,25(1) states that a reference in the Copyright Act 1968 (Cth) to broadcasting shall "unless the contrary intention appears, be read as a reference to broadcasting whether by way of sound broadcasting or of television.

19. *Copinger and Skone James on Copyright* (12th ed., 1980), para.516.

20. Note 1 above, s.32.

21. *Ibid*. See also note 10 above, p.46.

22. *Id.*, p.47. Section 35(4) provides that where a literary work is made by the author in pursuance of the terms of his employment by the proprietor of a newspaper or magazine, and is so made for the purpose of publication in a newspaper or magazine, the proprietor is the owner of any copyright subsisting in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical broadcasting the work, or reproduction of the work for the purpose of its being so published or broadcast The owner of the copyright in a radio or television broadcast can be either the Australian Broadcasting Corporation, the Special Broadcasting Service or the radio or television licensee: s.91.

23. G. Sawer, "Copyright in Legal Proceedings" (1953) 27 *Australian Law Journal* 82 at pp.84-85.

24. Lahore, note 13 above, para.534.

25. Note 1 above, s.89. See also note 10 above, p.47.

26. Paras.A.14-A.17.

27. Para.A.16.

Appendix B - Courts and Commissions (Sound Recordings) Bill, 1984

A BILL FOR
An Act to authorise the making and to regulate the use of sound recordings by certain persons of proceedings of certain courts and commissions.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

Short title.

1. This Act may be cited as the "Courts and Commissions (Sound Recordings) Act 1984"

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as maybe notified by proclamation published in the Gazette.

Interpretation.

3.(1) In this Act except in so far as the context or subject-matter otherwise indicates or requires -

"author", in relation to proceedings of a court or commission means a person who, in the opinion of the court of commission is bona fide engaged or intending to engage in the writing of a book or article on a subject in respect of which those proceedings are relevant:

"authorised person", in relation to proceedings of a court or commission means -

(a) a person who is a party to those proceedings

(b) in the case of a Royal Commission issued under the Royal Commissions Act 1923, to a person to make an Inquiry -

(i) any counsel or solicitor appointed by the Crown to assist the Royal Commission, and

(ii) a person authorised to appear at the inquiry,

(c) in the case of a Special Commission within the meaning of section 3 (1) of the Special Commissions of Inquiry Act, 1983 -

(i) any counsel or solicitor appointed by the Crown to assist the Special Commission, and

(ii) a person authorised to appear before the Special Commission;

(d) a legal representative of a person referred to in paragraph (a), (b)(ii) or

(e) a representative of a news medium or an author;

“commission” means -

(a) a commission within the meaning of section 4 of the Royal Commissions Act, 1923; or

(b) a Special Commission within the meaning of section 3(1) of the special Commissions of Inquiry Act, 1983, and includes the Commissioner, within the meaning of that subsection to whom the commission establishing the Special Commission was issued;

“court” means -

(a) the Supreme Court of New South Wales;

(b) the Land and Environment Court;

(c) the Industrial Commission of New South Wales;

(d) the District Court of New South Wales;

(e) the Workers’ Compensation Commission of New South Wales;

(f) court of petty sessions;

(g) a person holding an inquest or inquiry under the Coroners Act, 1980; or

(h) a person who or a body which is prescribed for the purposes of this definition or a member of a class of persons or bodies so prescribed;

“regulations” means regulations made under this Act;

“representative of a news medium”, in relation to proceedings of a court of commission means a representative of -

(a) a newspaper, journal, magazine or other publication that is published daily or at other intervals; or

(b) a radio station or television station that is -

(i) controlled by the Australian Broadcasting Corporation or the Special Broadcasting Service; or

(ii) licensed in accordance with the provisions of the Broadcasting and Television Act 1942 of the Commonwealth,

who is present at those proceedings in order to enable a report of or comment upon those proceedings to be published in the newspaper, journal magazine or other publication or to be broadcast on the radio station or television station;

“sound recorder” means a tape recorder or any other instrument for recording sound.

(2) In this Act, a reference to -

(a) a function includes a reference to a power, authority and duty, and

(b) the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

Report to be an aid to interpretation.

4.(1) It is the intention of Parliament that this Act and the regulations are to give effect to recommendations made in a report of the Law Reform Commission laid before each House of Parliament, being the report on recording of court proceedings and the proceedings of royal commissions and special commissions of inquiry by representatives of the news media and other persons, and accordingly, in the interpretation of this Act and the regulations, regard may be had to that report, including the draft legislation set out in that report.

(2) Subsection (1) does not prevent regard being had, in the interpretation of this Act and the regulations, to any matter to which regard might have been had if that subsection had not been enacted.

Proceedings to which Act does not apply.

5. Nothing in this Act applies to or in respect of the proceedings of a commission which has commenced to make but which has not completed the making of an inquiry before the day appointed and notified under section 2(2).

Sound recordings to which Act does not apply.

6. Nothing in this Act applies to or in respect of the making or use of a sound recording for the purposes of an official transcript of the proceedings of a court or commission.

Sound recordings by authorised persons.

7. (1) An authorised person who is entitled to be present at the proceedings of a court or commission may, without having to obtain the leave of the court or commission use a sound recorder in order to make a sound recording of the whole or any part of those proceedings.

(2) Nothing in subsection (1) affects any entitlement of an authorised person to take handwritten notes of the whole or any part of the proceedings of a court or commission

(3) Nothing in subsection (1) prevents a court or commission from prohibiting or ordering the cessation of the use of a sound recorder by an authorised person where the court or commission believes, on reasonable grounds -

(a) that substantial interference with the administration of justice or the exercise of functions of the court or commission would occur if the sound recorder were to be used; or

(b) that the use of the sound recorder constitutes a substantial interference with the administration of justice or the exercise of functions of the court or commission.

Public broadcasting of sound recordings.

8. A person shall not publicly broadcast the whole or any part of a sound recording of proceedings of a court or commission except -

(a) with the leave of the court or commission; and

(b) in accordance with such terms or conditions as may have been imposed by the court or commission in granting that leave.

Prohibition on copying of sound recordings.

9. A person shall not make or have in his or her possession a sound recording which is a copy of the whole or any part of a sound recording of proceedings of a court or commission.

Particular restrictions relating to sound recordings by parties to proceedings, their legal representatives and others.

10.(1) In this section, “authorised person” does not include a representative of a news medium or an author.

(2) A person may, in respect of a sound recording of proceedings of a court or commission made by an authorised person use the sound recording only for the purposes of those proceedings, except-

(a) with the leave of the court or commission; and

(b) in accordance with such terms and conditions as may have been imposed by the court or commission in granting that leave.

(3) An authorised person may, for the purposes of subsection (2), in respect of a sound recording of proceedings of a court or commission made by the authorised person make the sound recording available only to -

(a) another such authorised person in relation to those proceedings or

(b) a servant or agent of the authorised person or of another such authorised person in relation to those proceedings.

Particular restrictions relating to sound recordings by representatives of news media.

11.(1) A person may in respect of a sound recording of proceedings of a court or commission made by a representative of a news medium use the sound recording only for the purpose of reporting or commenting upon those proceedings in a newspaper, journal magazine or other publication or on a radio station or television station referred to in the definition of “representative of a news medium” in section 3(1), except -

(a) with the leave of the court or commissions and

(b) in accordance with such terms and conditions as may have been imposed by the court or commission in granting that leave.

(2) A representative of a news medium may, for the purposes of subsection (1), in respect of a sound recording of proceedings of a court or commission made by the representative of the news medium, make the sound recording available only to a servant or agent of the publisher or broadcaster of whom the representative of the news medium is such a representative.

Particular restrictions relating to sound recordings by authors.

12.(1) A person may in respect of a sound recording of proceedings of a court or commission made by an author, use the sound recording only for the purposes of a book or article by the author on a subject in respect of which those proceedings are relevant except -

(a) with the leave of the court or commission; and

(b) in accordance with such terms and conditions as may have been imposed by the court or commission in granting that leave.

(2) An author may, for the purposes of subsection (1), in respect of a sound recording of proceedings of a court or commission made by the author, make the sound recording available only to a servant or agent of the author.

Restriction on publication of evidence.

13. Nothing in this Act affects any order or direction of a court or commission preventing or restricting the publication of any evidence given before the court or commission

Sound recordings by persons other than authorised persons.

14. Nothing in this Act affects any power of a court or commission to permit, to prohibit or to control and regulate, subject to such terms or conditions as the court or commission thinks fit, the use of sound recorders for the purpose of making a sound recording of the whole or any part of the proceedings of the court or commission by persons who are not authorised persons.

Prohibition on possession of sound recordings by certain persons.

15. A person who is not authorised to do so by this Act, a court or a commission shall not knowingly have in his or her possession a sound recording of the whole or any part of the proceedings of a court or commission.

Status of official transcript.

16. A sound recording made pursuant to this Act of any proceedings of a court or commission shall not, except with the leave of the court or commission be used to correct or call in question the whole or any part of an official transcript of those proceedings.

Contempt of court or commission.

17. (1) A person who contravenes or fails to comply with a provision of this Act is -

(a) where the contravention or failure occurs in the face or within ‘the hearing of a court or commission - guilty of contempt in the face or within the hearing of the court or commission; or

(b) where the contravention or failure occurs otherwise than in the face or within the hearing of a court or commission- guilty of contempt otherwise than in the face or within the hearing of the court or commission.

(2) Proceedings, pursuant to subsection (1), for a contempt of a court or commission shall not be instituted except by or with the written consent of the Minister or on the motion of a court or commission.

Offences.

18. A person who contravenes or fails to comply with a provision of this Act is guilty of an offence against this Act and liable to a penalty not exceeding $2,000.

Proceedings for offences.

19. Proceedings for an offence against this Act maybe taken before a court of petty sessions constituted by a stipendiary magistrate sitting alone.

Double jeopardy.

20. Where an act or omission constitutes contempt of a court or commission under section 17 and an offence under section 18, the offender shall not be liable to be punished twice in respect of the act or omission.

Rules of court.

21.(1) Where a court has power to make rules regulating the practice or procedure of the court, the court may make rules regulating its practice and procedure in respect of the making and use of sound recordings under this Act.

(2) Subsection (1) does not limit the rule- making powers conferred on a court by or under any other Act or law.

Regulations.

22.(1) The Governor may make regulations not in consistent with this Act for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A provision of a regulation may -

(a) apply generally or be limited in its application by reference to specified exceptions or factors;

(b) apply differently according to different factors of a specified kind; or

(c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body;

or may do any combination of those things.

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