



FreeTV
Australia

44 Avenue Road
Mosman NSW
Australia 2088

T : 61 2 8968 7100
F : 61 2 9969 3520
W : freetvaust.com.au

10 February 2004

Carolyn Marsden
Senior Policy Advisor
Legislation and Policy Division
NSW Attorney Generals Department
Goodsell Building
8-12 Chifley Square
SYDNEY NSW 2000

Dear Carolyn,

NSW Law Reform Commission Report on Contempt by Publication

I refer to Free TV's meeting with the Attorney General on 2 March 2004 and to our letter of 20 April 2004 which summarised our member's concerns regarding the recommendations of the NSW Law Reform Commission in its Report on Contempt by Publication.

Thank you for the opportunity to set out our concerns in more detail to assist your review of the issues.

As discussed in our meeting with the Attorney General, commercial television broadcasters are concerned that in the main, the Commission's recommendations take the view that the public interest in the due administration of justice should usually prevail over the public interest in freedom of speech. These interests do not in fact generally conflict. For the reasons discussed below, media reporting of hearings is of fundamental importance to maintenance and integrity of the justice system.

Broadcasters recognise that appropriate limits on freedom of speech are important to ensure criminal trials are not compromised. However, we believe that the Commission has not given sufficient weight to the fact that media reporting is essential to open justice and to public awareness of matters of public importance.

As recently stated by the Chief Justice of New South Wales (with whom the other members of the Court of Appeal agreed) in *John Fairfax Publications Pty Ltd v District Court* (2004) 50 ACSR 380 at 386:

"It is well-established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public including, relevantly, the taking of verdicts after a criminal trial, is an essential quality of an Australian Court of justice."

We believe that a number of the recommendations in the Report would limit freedom of speech and are likely to have the effect of discouraging the media from reporting widely on judicial proceedings. Such an outcome would not serve the public interest in freedom of speech and would be contrary to open justice principles.

The courts have recognised that media reporting of trials is a fundamental requirement for the effective administration of justice. As stated in *R v Richards & Anor* [1999] NSWCCA 114:

“The paramount duty of the courts in administering justice according to law is to ensure that justice is done. All else is subservient to the discharge of this duty. In the ordinary course, court proceedings are conducted in public and exposed to the cathartic glare of publicity. Publicity of proceedings is one of the great protections against the exercise of arbitrary power and a reassurance that justice is administered fairly and impartially. As Lord Hewart put it in R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256, ‘justice must not only be done but must be seen to be done’.”

Unfortunately, the Commission appears to have focussed on the rare instances in which the media may make an error rather than the vast number of cases it routinely reports without incident. This appears to have led to a presumption that media reporting is in general prejudicial to a trial and contrary to the interests of administration of justice. In fact, media reporting is essential to open justice and thus to the administration of justice. As stated by the Chief Justice in *John Fairfax Publications Pty Ltd v District Court* (2004) 50 ACSR 380 at 386 (with whom the other judges agreed):

“The entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public. Nothing should be done to discourage fair and accurate reporting of proceedings” [emphasis added]

Media reporting is also an essential safeguard against corruption in the justice system more generally. For example, broadcasters have had a key role in exposing police corruption in NSW.

Preserving the willingness of the media to report widely on judicial proceedings is necessary to preserve the due administration of justice. Accordingly, any restrictions on freedom of speech should only be imposed in exceptional circumstances.

Where there is a conflict between the public interest in freedom of speech and the public interest in due administration of justice, it is not the case that the latter will always prevail. Rather, a balancing exercise is required. In fact, the courts have suggested that in some cases the balance will be tilted in favour of freedom of speech (see eg. Mason CJ and Wilson J in *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, cited with approval by Spigelman CJ in *Attorney General v X* [2000] NSWCA 199; see also, eg., paragraph 2.17 of the Report).

It is important to give full recognition to the importance of the media in providing a free flow of information so that the open justice principle is preserved and that the public receives information on matters of public importance (such as organised crime: see *Attorney General v X* [2000] NSWCA 199). Cases of proven contempt by media organisations, particularly television broadcasters, are extremely rare. In this context, we do not believe that the Commission's recommendations are justified or that they strike an appropriate public policy balance.

Our key concerns include the Report's recommendations to:

- restrict access to documents tendered in bail and committal hearings and in coronial inquiries (recommendations 23 to 25);
- expand courts' suppression powers, which is likely to compromise open justice in New South Wales (see recommendation 22);

- impose maximum penalties which we consider to be excessive (up to 5 years' imprisonment, fines in excess of \$200,000);
- orders requiring payment of costs of an aborted trial) (see recommendations 28 to 30);
- make a trial judge's decision as to whether to dismiss a jury admissible in contempt proceedings (recommendation 3).

Set out in the attachment to this letter are specific comments on the recommendations of most concern to Free TV's members. Should the Government wish to proceed with any of these recommendations we would appreciate the opportunity for further consultation on drafting issues.

Please contact Pam Longstaff, Director, Legal and Broadcasting Policy if you have any queries regarding these matters.

Yours sincerely

JULIE FLYNN
Chief Executive Officer

cc: Maureen Tangney, NSW Attorney-General's Department

NSW Law Reform Commission Report on Contempt by Publication Free TV Australia – Comments on Recommendations

Recommendation 1

“Liability for sub judice contempt should be retained.”

Broadcasters recognise that some form of common law sub judice contempt should remain in place to ensure that criminal jury trials are not compromised. However, we welcome the recommendation in the Report that legislation make it clear that it is not a contempt to publish a fair report of proceedings. This recommendation does not appear to have made its way into the Summary of Proposals. We submit that it is of the utmost importance that this be included in any legislation so that the public's right to receive fair reports of hearings is not compromised.

Recommendation 2

“The publication of matter should constitute a contempt if it creates a substantial risk, according to the circumstances at the time of publishing the matter, that:

- (a) members, or potential members, of a jury, or a witness or witnesses, or potential witness or witnesses, in legal proceedings will:
 - (i) become aware of the matter; and*
 - (ii) recall the content of the matter at the relevant time; and**
- (b) by virtue of those facts, the fairness of the proceedings will be prejudiced.”*

The Commission has rejected the suggestion that the wording in (b) above should be “by virtue of the facts that fairness of the proceedings will be *seriously* prejudiced” because the preamble uses the term “substantial risk”. Whilst stronger than the existing “tendency” it remains our view that the words “substantial risk” may be interpreted by the judiciary as not imposing a significantly higher standard than the existing “tendency” test.

We submit that the test should be one of “serious” prejudice, particularly in view of the seriousness of the penalties imposed by recommendations 28 and 29 and the trial costs proposals, which indicate the offence is considered to be extremely serious.

If the Commission’s recommendation is accepted, the legislation should make it clear that a risk of slight prejudice is insufficient for a contempt charge. The legislation should also make it explicit that publication of fair reports of court proceedings does not constitute contempt.

Recommendation 3

“Section 129(5)(b) of the Evidence Act 1995 (NSW) should be amended to allow for a trial judge’s decision to dismiss, or not to dismiss, a jury in a criminal trial following the publication of matter, and the reasons given for that decision, to be admissible in the related contempt proceedings, subject to s135 of the Evidence Act 1995 (NSW). The mere fact that the trial judge cannot be cross-examined should not be considered in itself to cause unfair prejudice to a party for the purpose of s135. Evidence of the decision, and the reasons for the decision, should be inadmissible as relevant to the issue of liability for sub judice contempt, but should not be determinative of the question of liability.”

We strongly oppose this recommendation. The decision of a trial judge to dismiss or not dismiss a jury has no probative value in determining the question of liability for contempt. This is an objective question that should be considered wholly independently of the dismissal of a jury. The recommendation invites the judge deciding a contempt charge to rely on factors that may have influenced a trial judge, whose decision making process and environment are entirely different. Quite distinct issues are involved in deciding whether to dismiss a jury and whether contempt has

been committed, including a large number of matters other than the effect of any particular publication.

Further, the recommendation expands the evidence required and the extent of enquiry of the Court in relation to a contempt charge, which is unnecessary and largely prejudicial to the person charged with contempt.

It should be noted that this recommendation was only made by a majority of the Report's authors and would place New South Wales out of step with the manner in which these issues are dealt with in other States. We understand that the recommendation received little support at the consultation stage.

Recommendation 4

“Legislation should provide that the risk of prejudice presented by the publication of matter is not reduced by reason only that matter containing similar content has been published on a previous occasion.”

We oppose this recommendation.

What should be assessed is the extent to which a publication creates a risk of prejudice in all the circumstances. This position will often be greatly affected by the extent of prior publicity. This is particularly so in relation to publications which occur soon after the sub judice rule becomes applicable (eg. the day after an arrest).

Prior publications may have been made in circumstances in which the publication was permissible and thus it is unfair to expect broadcasters to assume total risk for notorious circumstances, particularly which such publications are likely to impact upon whether there has been substantial prejudice.

For example, publication of a photograph of an accused after the commencement of the sub judice period, say the day after that person's arrest, may be serious if that person's identity has not been previously revealed.

However if publication occurs after a manhunt extending over a period of weeks in which the person's photograph has been published or where that person's image is extremely well known (such as an international sportsperson), it is apparent that the risk of prejudice arising substantially from the subsequent publication the day after arrest is unlikely and the broadcaster should not be held liable for those circumstances or at least should be able to rely upon them in relation to penalty.

We note that there is often a delay between an arrest occurring and the fact of the arrest being communicated to the media. Where this occurs, and the media has extensively shown a person's face or published other potentially prejudicial material, those media organisations which continue to publish the material in question for a short time after arrest should not be penalised.

Recommendation 5

“Legislation should provide that it is a defence to a charge of sub judice contempt, proved on the balance of probabilities, that the person or organisation charged with contempt, as well as any person for whose conduct in the matter it is responsible:

- (a) did not know a fact that caused the publication to breach the sub judice rule; and*
- (b) before the publication was made, either:*
 - (i) took reasonable steps to ascertain any fact that would cause the publication to breach the sub judice rule; or*
 - (ii) relied reasonably on one or more other person to take such steps and to prevent publication of any such fact was ascertained.”*

This recommendation is opposed because the defence would be very difficult to establish, in particular that reasonable steps were taken to ascertain any fact that would cause publication to breach the sub judice rule.

In particular, the term “reasonableness” has had a chequered history and there is a large degree of uncertainty as to what is reasonable.

It is apparent that the judiciary have adopted a very high standard for reasonableness, one which usually fails to take account of the realities of broadcasting.

The Report does not recognise the important role that broadcasters play as a conduit of information to the public concerning the administration of justice. The fact that media publishing is commercial should not affect the underlying principles to be considered. Unfortunately, it does appear to have reduced the weight the Commission has afforded to freedom of speech. Such an approach is contrary to the position expressed in *John Fairfax Publications Pty Ltd v District Court* (2004) 50 ACSR 380 at 386, set out above, that the importance of media reporting to the justice system is such that “*nothing should be done to discourage fair and accurate reporting of proceedings*”.

We submit that the law should be framed in a way which continues to encourage broadcasters to keep the public informed about the administration of justice and contains a standard of reasonableness that is not too onerous.

At paragraph 5.29 the Commission lists examples of precautions that media organisations may take to avoid liability. Those steps, in our experience, are invariably taken, however it is the quality of the information provided that often causes broadcasters to fall into error and if information were not provided or refused then it would be asserted that the broadcaster had not taken reasonable steps.

This recommendation should be considered in light of proposals 36 to 39 concerning a system by which the media can obtain information concerning current proceedings. Paragraph 5.34 notes that it is not intended that the term “reasonable steps” should be read as “all reasonable steps” and this should be reflected in the recommendation.

In our view it remains preferable that a formulation be reached which realistically sets obligations on broadcasters. A formulation of “reasonably practicable steps” may be preferable to reasonable steps. This approach gives recognition to the role publishers play in promoting the interests of administration of justice rather than focusing on the punitive elements of the law.

It would be desirable that any courts’ consultative committee referred to in recommendation 37 give consideration and guidance as to what steps may be considered reasonably practicable. We strongly support the recommendation that such a committee be established.

Recommendation 6

“Legislation should provide that it is a defence to a charge of sub judice contempt if the accused can show, on the balance of probabilities:

- (a) that the offending matter was published pursuant to an agreement or arrangement whereby the content of matter to be published by the accused was to be determined by a person or persons other than the accused or any employee or agent of the accused; and*
- (b) that either:*
 - (i) at the time of the publication, having made such inquiries as were reasonable in the circumstances, neither the accused or any servant or agent of the accused knew or had any reason to suspect that the material to be published would comprise or include the offending matter or any like matter; or*
 - (ii) prior to the publication, having become aware, or having reason to suspect, that the material to be published would or might comprise or include the offending matter or*

any like matter, the accused, or a servant or agent of the accused, took reasonable steps to endeavour to prevent such matter from being published.”

This recommendation relates to what is described as a “proposed defence for persons with no editorial control of the content of the publication”. Unfortunately, this recommendation is unlikely to assist regional broadcasters.

The requirements in (a) and (b) are such that most affiliate broadcasters will remain exposed to the difficulty raised in *Thompson v Australian Television Pty Ltd* (1996) 186 CLR 574. In that case, it was held that a television broadcaster which took no part in the production of a program, but had the ability to supervise and control the material televised (whether or not they could exercise control in practical terms), was not an innocent disseminator. Under (a) the affiliate broadcaster would have to show that its program affiliation arrangements afford it no role whatsoever in determining whether or not material is televised. It would be extremely unlikely that all or even some of such agreements or arrangements would completely abrogate that right.

Further, (b) requires the affiliate broadcaster to make reasonable enquiries in the circumstances which lead to not knowing of the offending material. A regional broadcaster publishing a court story from, say, Sydney would have far more limited access to material necessary and resources available to undertake the enquiries required by recommendation 6. Moreover, it is likely that courts will find extensive enquiries must be made to satisfy paragraph (b)(i), and it is difficult to envisage circumstances in which a regional broadcaster would not itself be able to prevent a broadcast which means that (b)(ii) is likely to be irrelevant in practice.

In the circumstances of many broadcasts by regional affiliates, there is no practical opportunity to make any inquiries.

In our view this recommendation does not advance the position of affiliate broadcasters and ignores the practical realities they are faced with in broadcasting such material. It would be preferable to adopt a test of actual editorial control.

Recommendation 7

“The legislation should provide for costs penalties if a defendant does not disclose evidence of the availability of a defence under Recommendation 7 to the prosecutor within 14 days of being served with summons commencing contempt proceedings.”

We submit that the period suggested of 14 days should be extended to 28 days to enable adequate inquiries to be made concerning possible defences.

In addition, the requirement should be that the defendant discloses the defences upon which it proposes to rely, not evidence of those defences. It would be unreasonable to require the defendant to disclose the evidence upon which it relies other than in the course of usual pre-trial processes such as when statements are filed and served. It would be particularly unfair to do so within such a short time of the summons. Depending upon the availability of relevant witnesses (such as the journalists) and other relevant information, it may not be possible for a defendant to identify and obtain legal advice in relation to the relevant evidence within this time.

Further it should allow for the possibility that material may subsequently become available in relation to a defence. If material comes to light and the prosecution is promptly notified, then no cost penalty should attach to its late provision.

Recommendation 8

“Legislation should make it clear that mere intent to interfere with administration of justice does not constitute sub judice contempt, in the absence of publication that creates a substantial risk of prejudice to the administration of justice.”

We note that generally this proposal was supported and there was no opposition to it. We have no further comment on the proposal.

Recommendation 9

“The sub judice rule should continue to apply to civil proceedings in the terms recommended in Recommendation 2.”

We note that this is inconsistent with submissions by broadcasters that the sub judice rule should not apply to civil proceedings without a jury. See further comments in relation to recommendations 10 & 11.

Recommendations 10 to 11

Recommendation 10

“Legislation should provide that, having regard to the circumstances of publication, a person or organisation that publishes material that gives rise to a substantial risk that a person of reasonable fortitude in the position of a party to civil or criminal proceedings will make a different decision in relation to those proceedings, for the reason that it vilifies the person in their character of a party to the proceedings is liable for contempt.

‘Party’ in this context includes a prospective party, being a person who reasonably believes that they may become a party to the proceedings, or who is or appears to be in a position to institute the proceedings, whether or not they are minded to do so.

‘Decision’ in this context means a decision to institute, not to institute, to discontinue, to participate, or to participate further or to take a particular step in proceedings.

‘Vilifies’ in this context means inciting hatred towards, serious contempt for, or severe ridicule of the party through unfair comment and/or material misrepresentations of fact.

The ‘defences’ available in other cases of sub judice contempt should be available in this case.

Recommendation 11

“Legislation should make it clear that liability for sub judice contempt cannot be founded simply on the basis that a publication prejudices issues at stake in proceedings.”

These recommendations concern the application of sub judice contempt to civil proceedings.

Civil contempt issues mainly arise where an individual litigant or his or her solicitor threatens to make disparaging public statements unless a potential defendant settles a claim. The reality is that the media only occasionally publishes the relevant material (for defamation reasons) if the threat is carried out, and is not usually in position to know that the material supplied to it is contemptuous. This is reflected in the case law, in which the accused is almost invariably a party to the proceedings affected by publicity: see, eg. *Commercial Bank of Australia Ltd v Preston and Another* [1981] 2 NSWLR 554; *Harkianakis v Skalkos* (1997) 42 NSWLR 22. The focus of the law in this area should therefore be individuals and corporate litigants rather than the media.

We submit that the test proposed in recommendation 10 is inappropriate in that it does not take into account that the contemnor will usually have an actual intention to deter (as recognised in the case law: see eg. the *BLF* case cited at paragraph 6.26) and does not make it clear that “a comment made by a stranger to the principal litigation in the course of public debate” does not constitute a contempt: *Vajda v Nine Network Australia Ltd*, cited at paragraph 6.30. It is of great importance as part of the open justice principle that independent commentators retain the right to comment on civil cases, including by legitimately criticising the conduct of parties.

Recommendation 12

“Subject to one exception relating to influence on prospective parties, the sub judice rule should not apply to a publication unless the proceedings to which it relates are pending at the time of publication.”

This is not contested other than the “one exception” (recommendation 16) discussed below.

Recommendation 13

“Legislation should provide that, for purposes of the sub judice rule, criminal proceedings should become pending, and restrictions on publicity designed to prevent influence on juries, witnesses or parties should apply, as from the occurrence of any of these initial steps and proceedings:

- (a) the arrest of the accused (for the relevant charge);*
- (b) the laying of the charge;*
- (c) the issue of a court attendance notice and its filing in the registry of the relevant court; or*
- (d) the filing of an ex officio indictment.”*

We note that this proposal adopts joint broadcasters' submissions concerning the original limitation of item (a).

This proposal gives certainty as to the time at which the rule commences, however, its implementation is critical to many broadcasters because knowledge of the factual circumstances relating to each of those events is often not available.

We note that this recommendation should be accompanied by complementary legislation which enables the press to be provided with and/or obtain information relating to each of the initial steps and proceedings referred to. Absent that legislation, a broadcaster may not know that a court attendance notice has been issued and filed in the relevant court registry.

Such legislation should include a positive obligation on police and prosecutors to make that information available in a manner that reasonably ensures it reaches all media promptly (eg. by way of email or facsimile alerts). The absence of such steps by police or prosecutors should constitute a defence in favour of the media.

Recommendation 14

“Legislation should provide that:

- (a) where the accused is not in New South Wales but is in another Australia jurisdiction, criminal proceedings become pending from the arrest of the accused in the other jurisdiction; and*
- (b) where the accused is overseas, the criminal proceedings become pending from the making of the order for the extradition of the accused.”*

We note that there were no submissions or opposition to this proposal. However we again repeat that there should be some mechanisms whereby applications for extradition and/or information relating to the arrest of accused persons in other jurisdictions is made available to broadcasters by the relevant authorities.

Recommendation 15

“Legislation should provide that in its application to publications which create a substantial risk of prejudice by virtue of influence to witnesses in civil or coronial proceedings, the sub judice rule should apply as from the issue of a writ or summons.

In its application to publications which create a substantial risk of prejudice by virtue of influence on jurors, the sub judice rule should apply as from the time when it is known that a jury will be used in the civil or coronial proceedings.

In its application to publications which create a substantial risk of prejudice by virtue of influence on parties, the sub judice rule should apply as from the issue of a writ or summons.”

There were no substantive submissions on this proposal. Again, key issues are whether broadcasters know that a writ or summons has issued and/or whether they have the means of finding out. There should be a convenient way to find out (including after hours given publications may occur at any time, day or night) whether this has occurred. To facilitate fair reporting, appropriate access should also be given to court documents (see recommendation 23 below).

Recommendation 16

“Legislation should provide that, in its application to publications which create a substantial risk of influence on prospective parties to criminal or civil proceedings, the sub judice rule may apply even though no proceedings have commenced.”

This is foreshadowed as an exception to the recommendation 12.

We strongly oppose this recommendation.

There is little discussion of the recommendation in the Report and no clear justification for it. The recommendation eliminates any certainty for publishers as to when the sub judice rule will start to apply and when a publication will create “a substantial risk of influence on prospective parties to criminal or civil proceedings”. It is not clear how the term “influence” will be interpreted. The concept of “influence” is not used in recommendation 10 which applies after the commencement of proceedings and is not otherwise a concept contained the current law of contempt.

We submit that if the Government wishes to pursue this recommendation, further consultation would be required to ensure that its limits are clear.

Recommendation 17

Legislation should provide that for purposes of determining whether there has been contempt of court on the ground of influence on jurors or potential jurors, a criminal proceeding remains “pending” and sub judice restrictions remain operative until:

- (a) the verdict of the jury in the proceedings is handed down, or*
- (b) the making of an order, or any other event, having the effect of the offence or offences charged will not be tried before a jury, or not at all.*

For purposes of determining whether there has been contempt of court because of influence on parties, witnesses or potential witnesses, a criminal proceeding remains “pending” and sub judice restrictions remain operative until the conclusion of appeal proceedings or the expiry of any period of appeal or further appeal.

Where a re-trial before a jury is ordered following a successful appeal against a conviction, the sub judice rule as it applies to all types of publications (including those that create risks of influence on a jurors, potential jurors, witnesses, potential witnesses and/or parties) begins to operate again from the time the order for re-trial is made..

We have particular concerns regarding the second paragraph of this recommendation, which maintains the sub judice period during an appeal stage if a publication could influence parties, witnesses or potential witnesses. Thus, pending the outcome of an appeal broadcasters could not publish material which includes accounts of the circumstances relating to the alleged offence as this may have some influence on parties or witnesses or potential witnesses. This is a substantial change from the current common law position. Generally it is not considered that there is substantial risk of prejudice during that period on those persons; who presumably have already given evidence in the proceedings and committed to a version of events.

The Commission also asserts that adverse publicity may influence any person found guilty of an offence in their decision to appeal. In our view this is both unrealistic and fails to recognise a considerable public interest in knowing the facts and circumstances and background relating to a person who has been found guilty of an offence. In fact, legitimate criticism must be protected as part of the open justice principle: the rationale for the open justice principle is that the media is the principal mechanism which subjects the judiciary and the administration of justice generally to scrutiny.

In effect, the recommendation advocates a form of “stay” on public discussion which is inconsistent with the fact a person has been found guilty of a crime. In relation to potential witnesses, it may be said that any publicity concerning a matter may result in witnesses coming forward with fresh information and it should not be presumed that it would discourage them from doing so or to change any future evidence merely on the basis someone were convicted and has been the subject of publicity. For example this sort of section would have prevented public comment on the trial and sentencing of Ms Pauline Hanson which was of considerable public interest and importance and drew commentary from a wide range of people.

Further, it appears that the Commission is concerned that Crown Law Officers may be influenced by the media in relation to the decision whether or not to appeal a sentence. This concern is misconceived. Crown Law Officers should (as judicial officers are) be presumed to execute their functions without fear of favour and or influence from media publications. Experience shows they so act and express strong views concerning media publicity.

This concern (which we believe is misplaced) should not outweigh the vastly more important public interest in discussion of matters relating to the trials after their conclusion.

The fact the person has been found guilty and subsequently sentenced and the publicity relating those events plays a fundamental role in informing the public, providing the public with confidence in the judicial system and deterrence. Each of these is important to the administration and outweigh a concern that an offender will not appeal or that a Crown Law Officer will not perform their duties impartially.

Recommendation 18

“Legislation should provide that publications relating to civil and coronial proceedings cease to be subject to the sub judice rule when the proceedings are disposed of by judgment at first instance, settled or discontinued. The rule should become operative again only when and from the time a re-trial, or another inquest or inquiry in the case of coronial proceedings, is ordered.”

We support this recommendation, subject to our position that the sub judice rule should not apply to civil proceedings without a jury.

Recommendation 19

“Legislation should provide that the same time limits for the operation of sub judice restrictions apply whether or not there was an actual intention to interfere with the administration of justice.”

We have no comment on this recommendation.

Recommendation 20

“Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if:

- (a) the material relates to a matter of public interest; and*
- (b) the public benefit from the publication of the material, in the circumstances in which it was published, and from the maintenance of freedom to publish such material, outweighs the harm caused to the administration of justice by virtue of the risk of the influence on one or*

more jurors, potential jurors, witnesses, potential witnesses and/or litigants created by the publication.”

We note this recommendation differs from the original proposal 19. The Commission has come to the view proposal 19 should not be pursued largely on the submissions made by various parties including the joint broadcasters submission. The opposition to proposal 19 was on the basis that the common law was adequate setting down the parameters in this area of contempt law.

The Commission now asserts that recommendation 20 contains the main elements of the principles developed at common law as expressed in the Hinch's case. Our concern is that in the draft bill attached to the Commission's recommendations, recommendation 20 would stand in place of the common law position in relation to matters of public interest including all the various nuances of the development of that law.

The Commission states “our recommendation does not propose to make any changes to the current state of the common law in this issue. It is an issue that may be left for the courts to develop.”

In those circumstances it is difficult to see the need for this recommendation which may have the effect of developing in a direction different to the common law. We believe that further consideration should be given to this recommendation as on the Commission's view it appears unnecessary.

Recommendation 21

“Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if the publication the subject of the charge was reasonably necessary or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public, or to facilitate investigations into an alleged criminal offence.”

The fundamental rationale behind this recommendation is that there is an overriding and significant public interest in broadcasters in providing assistance to authorities to conduct investigations or protect the safety of the public. This should be encouraged. We support this recommendation, but believe the rationale could be furthered by reversing the presumption, in favour of the publication being reasonably necessary and desirable.

This suggestion was made in the joint broadcasters' submission. We note that the Commission has not adopted this suggestion, perhaps because it believes that such a presumption could be abused.

We submit that to the extent that any safeguard is required against abuse, this could be built into the recommendation and ultimately legislation. For example, requiring that the publication has to be requested by the nominated persons within the relevant authority (ie: above the rank of commander in the police force).

Recommendation 22

“A new provision should be introduced into the Evidence Act 1995 (NSW) which provides that any court in any proceedings, has the power to suppress the publication of reports of any part of the proceedings (including documentary material), where this is necessary for the administration of justice, either generally, or in relation to specific proceedings (including proceedings in which the order is made). The power should apply in both civil and criminal proceedings and should extend to suppression of publication of evidence and oral submissions, as well as material that would lead to the identification of parties and witnesses involved in proceedings before the court. The new section should not replace the common law, and should operate alongside existing statutory provisions that restrict publication unless a successful application has been made rendering such a

provision inapplicable in the circumstances. However, section 119 of the Criminal Procedure Act 1986 (NSW), together with any other provisions contained in other statutes which give courts discretion if grounds are affirmatively made out to impose suppression orders, should be replaced.

A section should be introduced into the Crimes Act 1900 (NSW) making breach of an order a criminal offence. The offence created by this section should be one of strict liability.

The Evidence Act 1995 (NSW) should also expressly provide that a person with a sufficient interest in the matter should be eligible to apply to the court for the making, variation or revocation of a suppression order. The applicant for a suppression order, together with the media and anyone else regarded by the court as having a sufficient interest may be heard on the application. The same categories of persons should also be able to appeal in relation to a suppression order. Such a person, if heard previously on the original application, should be entitled to be heard on the appeal. Any other person with a sufficient interest may seek leave to be heard. An appeal against a decision should be heard by a single judge of the Supreme Court, except where a suppression order was made in the Supreme Court, in which case an appeal should be heard by the Court of Appeal.

The court should also be empowered to make an interim suppression order, having a maximum duration of seven days, before proceeding to a final determination. The court should have the power to grant subsequent interim suppression orders.”

As discussed earlier in this letter, the principle of open justice is a cornerstone of our judicial system. It is “one of the most fundamental aspects of the system of justice in Australia”: *John Fairfax Publications Pty Ltd v District Court* (2004) 50 ACSR 380 at 386.

The courts have recognised that suppression orders can and should only be made in exceptional circumstances due to the overriding importance of open justice. Thus, it is well-established that “the exceptions to the principle of open justice are few and strictly defined” and any order that “some aspect or aspects of court proceedings not be the subject of publication “must, in light of the open justice principle, be regarded as exceptional”: *John Fairfax Publications Pty Ltd v District Court* (2004) 50 ACSR 380 at 386.

Inherent powers of superior courts to make such orders are confined accordingly. It was held in *John Fairfax Publications Pty Ltd v District Court* (2004) 50 ACSR 380 at 393 that inferior courts do not have any implied power to make suppression orders. The basis for that decision was that the test of necessity applicable to implied powers. The Chief Justice stated that:

“it is conceivable that media publicity may create a situation in which an accused will not be able to have a fair trial within a reasonable period or at all. In that circumstance an anticipatory non-publication order may be needed to ensure fairness to the prosecution. However, that exceptional case is no unlikely that it cannot form the basis for an implication of a power on a test of necessity. Applications for a permanent stay have failed in the most sensational of cases; Anita Cobby, Ivan Milat, Phillip Bell, the Childers Backpacker Hostel fire, Lucy Dudko, William D’Arcy, Bruce Burrell. [citations omitted]

If the truly exceptional case ever arises it can be handled by the exercise of the protective inherent jurisdiction of the Supreme Court. In any event, I find it quite inconceivable that such a case could emerge from the publication of a verdict after anything like normal publicity of the course of a trial.”

We agree with the Commission that broad suppression powers which have been endowed by statute on some courts and which allow orders to be made where “desirable” in the interests of justice should be repealed.

However, we oppose the proposal to give all courts suppression powers for the following reasons:

1. Common law powers to make orders which restrict court reporting (such as pseudonym orders) are adequate and have been developed in such a way as to appropriately reflect the importance of open justice. In particular:
 - (a) Common law inherent powers are quite appropriately restricted to superior courts, which recognises that not all courts should have discretion to make such orders; and
 - (b) Common law inherent powers do not enable the court to make orders which bind the world at large, which is an appropriate limitation. The effect is that people who do not know of the court's orders are not affected by them. Those who are on notice of them commit a contempt if they do something which frustrates the orders. This is appropriate: if the Court adequately communicates the existence of the orders, then media organisations will commit a contempt if they frustrate them. If the orders are not communicated adequately then, quite rightly, an innocent media organisation with no knowledge of the orders (and also therefore no intent), will not commit a contempt.
2. The purpose of the open justice principle is to enable public scrutiny of the conduct of judicial officers, including magistrates and judges as well as others involved in administration of magistrates and justice. The powers of magistrates and judges to make suppression orders should be confined to avoid judges succumbing to a possible temptation to make orders to avoid public scrutiny and to avoid a perception that judges may succumb to such a temptation.
3. Case law makes it clear that the circumstances in which a suppression order may be made are very limited. Creation of a statutory offence may give rise to departure from this case law even though similar words are used. We are concerned that the intention of the recommendation is to broaden the court's suppression powers, which involves an implied fiat to use that power more regularly. This is particularly so in view of the proposal to also preserve common law powers.
4. There is no statement in the legislation (or recommendation) of the fundamental proposition that justice is to be administered in public view and the derogation to the principle of open justice should only be permitted in exceptional circumstances. This overriding principle should be stated in and underlie any legislation.
5. The recommendation merely adds complexity to the area of suppression orders if it is to exist with the common law.
6. The nature of the drafting in the proposed section suggests a parliamentary fiat for making of such orders on a regular basis. If this is not intended it should be stated within the legislation.
7. There is no evidence that the common law, and current statutory powers of suppression are failing to adequately resource courts with the power to make suppression orders where necessary in the interests of justice

We are of the view that this recommendation should be substantially abandoned or at least revised.

Recommendations 23 to 25

Recommendation 23

“Legislation should provide that, subject to (a) any statute, (b) any order of the court prohibiting or restricting access to the relevant document or prohibiting or postponing reporting of the proceedings, or of the relevant part of the proceedings, and (c) any objection by a party or a person having a sufficient interest, the public should have a right of access to any document in one or more of the following categories:

- (1) *pleadings to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party;*

- (2) judgments and orders;
- (3) documents that record what was said or done in open court;
- (4) documents that were admitted into evidence in proceedings other than bail and committal proceedings and coronial inquiries;
- (5) written submissions, to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party; and
- (6) documents recording the offence with which a person has been charged in open court.

Where an objection is made, the court must prohibit or limit access only if the person objecting establishes that a grant of access would be contrary to the due administration of justice.

In relation to all other categories of document, applications for access to a document must be made to the court in which the proceedings are taking place. The applicant must establish grounds for a grant of access.

The word "document" should be defined to mean any record of information including:

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph."

Recommendation 24

"The court in which the proceedings are taking place should have the power to prohibit or impose conditions on access to, or reporting of, a document referred to in Recommendation 23, including a condition restricting the purpose for which the document is to be used."

Recommendation 25

"Legislation should provide that, subject to any rule of common law or statute or any order of the court prohibiting or postponing reporting of the proceedings, or of the relevant part of the proceedings, the public should have the right to publish the contents of, or a fair and accurate summary of the contents of, a document referred to in Recommendation 23."

These recommendations relate to access to documents used in proceedings.

We strongly oppose recommendation 23 which seeks to exclude documents used in bail and committal proceedings and coronial inquiries. The open justice principle should be applied as rigorously to these proceedings as to a trial. Corruption is just as likely, and perhaps more likely, to occur at these stages of proceedings as at trial. This was demonstrated by the recent investigation of corruption of certain police stations. It is imperative that the media be given full access to all documents tendered in such proceedings so that it may critically examine the decision made, as well as the conduct of prosecutors and the defence and that the public be permitted the opportunity to inform itself of the basis upon which a particular decision has been made, ie. where a person has been deprived of their liberty following an unsuccessful bail application.

We shall not repeat the arguments put forward in relation to s.314 of the Criminal Procedure Act, but the principles that apply in relation to that section are the same as the proposed exclusion in this recommendation. It should be opposed, as the "administrative" reasons given for their exclusion clearly do not outweigh the open justice principle.

Drafting can have considerable impact on practice which is contrary to the stated intent (as was the case with s314 of the Criminal Procedure Act). We note that the revised proposals are likely to suffer the same fate. We think that use of the formula in recommendation 23 "contrary to the due administration of justice" is dangerous because it does not adequately reflect the open justice principle. There should only be power to refuse access where it is necessary for the administration

of justice to do so. Moreover, the legislation should make clear that this test will be satisfied only in exceptional circumstances.

In relation to recommendation 24 the drafting that accompanies it allows a court of its own motion to exclude or impose conditions on documents. The draft section does not impose on the court the requirement that it should not impose conditions which restrict reporting unless it is satisfied that it is necessary for the administration to do so. Again, this should be included. Recommendation 25 should be similarly amended.

In June 2004 Free TV and other media interests provided a joint submission to the NSW Supreme Court in response to its Consultation Paper on Access to Court Records. We understand that this matter has now been referred to the Department, which is considering a State-wide, multi-jurisdictional approach to the issue. Free TV is keen to be involved in further consultation on this issue.

Recommendation 26

“Legislation should provide that a private person may commence proceedings for the punishment of contempt.

This is subject to two provisos.

First, the person must, prior to the commencement of such action, notify the Attorney General and the parties to the proceeding (if any) allegedly involved.

Second, the Attorney General (or the Solicitor General or Crown Advocate acting under a delegation from the Attorney General) and the Director of Public Prosecutions shall have the discretion to take over the matter and:

- (a) carry on the proceeding,*
- (b) cause the termination of the proceeding,*
- (c) carry on, on behalf of the prosecution or as respondent, an appeal in any court in respect of the contempt,*
- (d) cause the termination of an appeal in any court in respect of a contempt,*
- (e) institute and conduct, on behalf of the prosecution, an appeal in any court in respect of the contempt, and*
- (f) conduct, as respondent, an appeal in any court in respect of the contempt.”*

This recommendation relates to the ability of a private person to commence proceedings for contempt subject to provisos which require notification of the Attorney General and that both Attorney General and DPP may then take over the proceedings.

The position taken by the joint broadcasters submission was that a private individual should not have the right to commence proceedings for criminal contempt because criminal proceedings should always be a matter for the State.

This proposition is sound, however, the Commission has rejected it. The provisos recommended by the Commission provide a safeguard in relation to proceedings namely that they can be subject to control by way of the Attorney General or the Director of Public Prosecutions. If that approach is to be adopted, we would suggest that a person should only be able to commence a prosecution for contempt with the consent of the Attorney General and the Director of Public Prosecutions. In addition, a person charged with contempt should be able to apply to the court for an order that the Attorney General or the DPP take over proceedings and do any of the matters referred to in the recommendation. This would provide a further safeguard against any perceived abuse.

Recommendation 27

“The hearing and decision of an appeal against a conviction and/or sentence for criminal contempt, and of a review of a question of law submitted by the Attorney General, should be assigned to the Court of Criminal Appeal.”

This concerns the power of the Court of Appeal to hear matters. The recommendation is that the Court of *Criminal Appeal* rather than the Court of Appeal should hear appeals from contempt convictions.

We do not have any comment on this recommendation.

Recommendations 28 to 30

Recommendation 28

“Legislation should provide an upper limit for fines that may be imposed on persons convicted of criminal contempt. The maximum amount to be set in legislation should be substantially more than \$200,000 the highest amount imposed so far in New South Wales in sub judice cases, to enable courts to deal with the worst class of criminal contempt cases. The legislation need not distinguish between the maximum fines that may be imposed on corporate offenders on the one hand, and individuals on the other.”

Recommendation 29

“Legislation should provide that the upper limit for a custodial sentence that may be imposed on a person convicted of criminal contempt should be 5 years.”

Recommendation 30

“Legislation should expressly provide that the various methods of an alternatives to serving custodial sentence, such as community service orders, good behaviour bonds, dismissal of charges and conditional discharge of the offender, deferral of sentencing, suspended sentences, periodic detection orders, home detention orders and parole, are available for the sentencing courts to use in criminal contempt proceedings.”

These recommendations relate to penalties to be imposed for contempt. We consider these penalties to be excessive in view of the fine balance which the media must achieve between its duties to provide fair reports of proceedings and to inform the public of matters relating to crime and criminal administration (such as police corruption) on the one hand, and avoiding committing a contempt on the other.

They are also excessive in view of the fact that almost all contempts are inadvertent. Whilst contempt is obviously a serious matter, it is not like other crimes (eg. theft) in that the people involved normally set out to do a good thing (inform the public on a matter of public interest) and not to do something which is bad. This should be reflected in penalties.

Further, the logic of not distinguishing between maximum fines to be imposed on corporate offenders and individuals seems curious if they are intended essentially as a deterrent. We believe that it is more appropriate that there be a smaller upper limit for individuals who generally have far more limited resources than corporations. This is the case with most other crimes.

In relation to recommendation 29, we submit that imposition of custodial sentences of 5 years is extreme. We believe it goes beyond the desired deterrent effect and is likely to discourage journalists from reporting on judicial proceedings. A conviction on its own is a very significant deterrent for a journalist, editor or manager. In all the circumstances we believe that a maximum sentence of less than 6 months should be imposed and that the alternatives in recommendation 30 are more appropriate than a custodial sentence.

Recommendation 31

“The Attorney General should create and maintain a registry of court outcomes of criminal contempt proceedings. The information in the registry should be used only for sentencing purposes.”

We have no comment in relation to this matter.

Recommendations 32 and 33

Recommendation 32

“Legislation should provide that a private individual who intends to apply for an injunction to stop an apprehended criminal contempt shall, prior to such application, notify the Attorney General and the parties to the proceedings (if any) allegedly involved.”

Recommendation 33

“Legislation should provide that the Director of Public Prosecutions may apply for an injunction to restrain the publication of material relating to criminal proceedings which would be in breach of the sub judice principle or which would be a repetition of such breach.”

These relate to the manner in which injunctions may be sought for an apprehended criminal contempt.

We do not have any comment on these recommendations.

Recommendations 34 to 35

Recommendation 34

“The Costs in Criminal Cases Act 1967 (NSW) should be amended to enable the Supreme Court to make an order for costs against a publisher of material, in contempt of any court at which a criminal trial is held before a jury, if the publication causes the discontinuance of the trial.”

Recommendation 35

“The amending legislation should substantially be in the form set out in the Costs in Criminal Cases Amendment Bill 1997 (NSW) but with the following modification:

The application of the legislation should not be restricted to media organisations.

An order for compensation should only be made where there has been a conviction for contempt.

An order for compensation should only be made where the contemptuous publication was either the sole or dominant cause of the trial being discontinued.

Reference in the Costs in Criminal Amendment Bill 1997 to “printed publication” and “radio, television or other electronic broadcast” should be omitted. “Publication” for the purposes of the legislation should be defined to mean a “publication in respect of which a conviction for contempt has been entered”.

The legislation should provide that the Court, in determining the amount of any fine to be imposed and the amount of a costs order, should take account of the total sum to be paid by the contemnor.

The Court should have a discretion to order an amount which is “just and equitable in all the circumstances”, providing that the amount ordered does not exceed the actual wasted costs. The legislation should provide that the matters to which the court should have regard in the exercise of this discretion should include:

- (a) the financial resources of the contemnor; and*
- (b) the degree of culpability of the contemnor.*

The costs in respect of which an order may be made should exclude the cost of the State of the remuneration of judicial and other court staff and any other ongoing State expenses not directly referable to the aborted trial.

The "legal costs" of the parties and the provision of "legal services" to the accused should include disbursements directly related to the aborted trial.

Where the Attorney General attaches or tenders a certificate setting out the costs that relate to the discontinued proceedings, the party against whom a costs order is to be made should be able to challenge the accuracy of the contents of the certificate. However, the certificate should amount to prima facie evidence of the costs, in the absence of contrary evidence produced by the contemnor.

The Attorney General's certificate of costs should include the costs claimed by the accused affected by the discontinued trial.

An order for costs which is less than the amount claimed in the Attorney General's certificate should, nonetheless, include the full amount of the accused's costs."

We vigorously oppose these recommendations which relate to the payment of costs for aborted trials.

It should be noted at the outset that at paragraph 14.64 the Commission asserts that:

"Except for the Australian Press Council who oppose any scheme for compensation, submissions either expressly support it or offered no opposition to the Commission's proposals that the following ratifications be made to the Bill..."

This is not correct in relation to broadcasters. Paragraph 14.6 of the Report notes that broadcasters submitted that if a costs order were to be enacted (which they also opposed) it should only follow a conviction for contempt finding contempt was intentional.

In our view the reasons for opposing these recommendations as set out in paragraphs 14.5, 14.6, 14.8, 14.10 to 14.17 are compelling. Significantly the Victorian Bar Council stated:

"Finally and possibly most importantly in the light of the freedom of speech considerations involved and the risk of unnecessary restrictions on speech such a proposal should be examined and considered very carefully before its introduction."

There is no doubt that the proposal in its current form will have a significant chilling effect upon broadcasters notwithstanding the provisos built into the recommendation, namely that the court shall order an amount which is just and equitable in the circumstances and have regard to the financial resources of the publisher. Even if the total amount of costs is reduced by those provisos, one can expect that in certain circumstances the costs in large criminal trials may run into many millions of dollars. This is a substantial risk for any broadcaster.

The recommendations proceed on a false premise, namely that the imposition of the power to order costs will be a deterrent to irresponsible media reporting. This assumes an existing lack of concern on the part of broadcasters which is patently false.

A scheme such as this does not encourage broadcasters to report widely on judicial proceedings and is thus contrary to open justice principles. In effect, the penal approach adopted by these recommendations may well have a significant negative effect on the administration of justice which it seeks to preserve.

Further, at paragraph 14.18, the Commission states that:

[The Commission] cannot accept that the law should not respond to an identified problem within the legal system by way of enacting legislation merely on the basis that the legislative power may rarely need to be invoked.

This, with respect, misses the substantive point that was made at some length by almost all of those making submissions, namely there is not an identified problem within the legal system. This was succinctly put by broadcasters as follows:

“There is no evidence to suggest an endemic problem requiring this excessive response.”

Sound policy should adopt a scheme whereby broadcasters are discouraged to engage in contemptuous conduct but encouraged to adopt systems which provide accurate and informed reporting and more extensive reporting of court proceedings. These provisions fail this test. The imposition of fines (and possibly imprisonment) is sufficient to discourage contemptuous conduct.

Recommendations 36 to 39

Recommendation 36

“A media information officer should be appointed in New South Wales with the specific function of liaising between the media and the Supreme Court (including the Court of Appeal), the Court of Criminal Appeal, the Land and Environment Court, the Children’s Court, the District and Local Courts, the Coroner’s Court, the Industrial Relation Commission, and the Dust Diseases Tribunal.”

Recommendation 37

“A Courts Media Committee should be established in New South Wales, comprising representatives of both the media and the courts, based on the courts media committee in Victoria.”

Recommendation 38

“There should be a protocol to the effect that, when a court makes a suppression order, the terms of that order are to be posted on the court’s web page within a specified period of time.”

Recommendation 39

“The registry of the court in which a suppression order is made should make available to the public the terms of the order.”

We strongly support these proposals. We agree with the Commission that this model has worked extremely well in Victoria and has resulted in a very co-operative relationship between the media and the courts. Broadcasters support immediate implementation of this model in New South Wales and would be happy to provide further input on broadcasters’ experience in Victoria. We believe this model should be put into practice before the Commission’s other recommendations are considered further. Further, we believe this model should be extended to the Director of Public Prosecutions to extend the information it makes available in relation to current or pending legal proceedings.

We note that steps have been taken by the NSW Supreme Court to implement some of those changes, and hope that it continues and is adopted by other courts.