International Society for the Reform of Criminal Law
20th International Conference
Justice for All – Victims, Defendants, Prisoners, and The Community
2 – 6 July 2006 Brisbane QLD Australia

Plenary 4 Pre-Trial Publicity: "Guilty Until Proven Innocent?"

When does pre-trial publicity become too much? Can it ever be a reason for not dealing with a crime? What of the recent tendency for law enforcement agencies to actively engage in pre-trial publicity?

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News as crime or crime as news: publicity in the digital age.

Crimes, the investigation of crimes, the prosecution of alleged offenders, and the punishment of convicted persons are newsworthy matters.[1] There is a public interest in discussing these issues and the 'right to free speech' may be invoked by those who wish to do so. Typically this 'right' is weighed up against the 'right of an accused person to have a fair trial according to law'.[2] Because a balance must be made there are competing dangers of chilling free speech or failing to protect the accused's right to a fair trial.

There is a special value in media attention given to crime, its investigation and prosecution. This is sometimes referred to as the public's 'right to know' though it is not a right as such. Rather, it is the other side to free speech, as scrutiny protects the public interest by holding the state to account for its actions. However, free speech does not necessarily equate to the public being informed about matters of importance.

Law enforcement by press release

In *R v Glennon*, Brennan J noted the trend then developing for law enforcement agencies to manage the publicity attached to particular cases:

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[1] A few recent Australian cases illustrate the enormous potential for public interest in criminal cases:

- Chamberlain http://www.harrymmiller.com.au/Lindy_Chamberlain.html,
- Martin Bryant http://www.crimelibrary.com/serial/bryant/,
- Snowtown murders http://www.crimelibrary.com/serial_killers/weird/snowtown/index_1.htm,
- Pauline Hanson, *R v Hanson R v Etteridge* [2003] QCA 488 http://www.courts.qld.gov.au/qjudgment/QCA%202003/QCA03-488.pdf,
- Di Fingleton http://www.abc.net.au/tv/enoughrope/transcripts/s1401486.htm,
- Zdravko Micevic http://www.abc.net.au/7.30/content/2005/s1458713.htm,
- Bruce Burrell http://www.abc.net.au/7.30/content/2006/s1656791.htm,
- Bradley John Murdoch http://en.wikipedia.org/wiki/Bradley_John_Murdoch,
- Faheem Lodhi http://www.news.com.au/story/0,10117,19517154-2,00.html http://news.ninemsn.com.au/article.aspx?id=72605.

[2] See for example, *R v Glennon* (1992) 173 CLR 592

> One developing phenomenon is the holding of press conferences or the issuing of press releases by some law enforcement agencies after a person has been charged with a criminal offence, in apparent disregard of the risk that the fair trial of the person may be prejudiced unless the matter published is restricted to what this court in *Packer v Peacock* (1912) 13 CLR 577 described as the 'bare facts'. …Sometimes the holding of a press conference or the issuing of a press release wears the appearance of corporate advertising of the work of the agency in solving a crime. Advertising of that kind is inconsistent with the impartial performance of the functions of a law enforcement agency in conducting or assisting to conduct a criminal prosecution.[3]

There have been some notable examples of the use of the media by law enforcement agencies. The New South Wales Police Service was severely criticised by the Royal Commission into the Arrest of Harry Blackburn for the arrest of Harry Blackburn who was then a senior Police office and for engaging in a parade of the accused before the media at the time of his arrest.[4] The Australian Competition and Consumer Commission was also criticised for the way in which it used the media.[5] It can be generally said that law enforcement agencies in Australia have developed media policies (and media units) that avoid excess and they do so by professionally managing their relations with the media. This is a good thing provided the coverage is kept to a minimum and is scrupulously fair.[6]

It should also be noted however, that politicians are increasingly involved in the issuing of press releases on the results of operations conducted by agencies in their portfolio. In this age of media grooming and 'spin', there is the potential for publicity to be controlled and selectively used by the executive to serve its own interests.

Media commentators

Brennan J also pointed to the creation of media commentators where the media of television and radio promote personalities:

> …who affect to convey the moral conscience of the community and to possess information, insights and expertise in exceptional measure.[7]

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[3] *R v Glennon* (1992) 173 CLR 592

[4] Royal Commission 1990. *Report of the Royal Commission of Inquiry into the Arrest, Charging and Withdrawal of Charges Against Harold James Blackburn and Matters Associated Therewith*, Sydney.

[5] Trade Practices Act Review 2003, *Review of the Competition Provisions of the Trade Practices Act, Commonwealth of Australia* Canberra January 2003
http://tpareview.treasury.gov.au/content/report/html/Preliminaries.asp
See also Australian Broadcastign Corporation 2002. Petrol: the politics, profits and posturing *The Business Report* Radio National Broadcast 27 April 2002
http://www.abc.net.au/rn/talks/8.30/busrpt/stories/s542878.htm

[6] See for example, the media contact page set up by the NT DPP for the Bradley John Murdoch prosecution http://www.nt.gov.au/justice/dpp/html/cases/falconio.shtml

[7] ibid

The prominence of some media identities in driving law and order debates has been described in some detail by the NSW Director of Public Prosecutions.[8] Media commentary of this type reveals a distrust of the protections afforded to accused persons by the common law and the need for 'common sense' solutions. The law and order debate is characterised by myths about crime rates and court leniency.

Publicity in a small number of special cases has become a tool in the hands of the executive to justify the stripping away of rights for those who are portrayed as outsiders and not deserving of protection. Indeed, it is now argued that it is necessary to gag free speech in certain terrorism related cases and allow only the executive to speak about them.[9]

What is meant by pre-trial?

The phrase 'pre-trial publicity' deserves close consideration. There are many steps prior to trial and publicity can take numerous forms. Among the possible steps towards the conclusion of a criminal trial, there is an obvious public interest in the reporting of crime as it is discovered. The facts of some crimes are such that considerable public interest will be excited, particularly murder, sexual assault and other crimes of violence. In some cases it will be the parties involved that generates additional attention and scrutiny.

Along the way from the discovery of a crime to a concluded trial are a number of stages such as the investigation, possibly a Coronial inquiry, the charging of a defendant, possible committal proceedings, the trial itself a possible appeal and in some cases, a possible re-trial following appeal.

Critical points towards trial

- Before charge – in this stage there may be good reasons for suppressing or publicising details of an offence.
- Details of arrest – the public is ordinarily entitled to know when a person is charged and what the charges are. This should not however, be used as an opportunity to parade the accused before the media.
- Coronial hearing – there is a public interest in these proceedings being conducted openly and there is a positive aspect of eliciting more information about a crime in response to publicity.
- Committal – there is a public interest in these proceedings being conducted openly.
- Immediately prior to trial. At this point, if there has been significant adverse pre-trial publicity the accused may apply for a stay of proceedings. In many cases the court may consider a delay in commencing the hearing,

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[8] Cowdery QC, N. 2001. *Getting Justice Wrong: Myths, Media and Crime* Sydney: Allen & Unwin
[9] See Head M 2004. ASIO, secrecy and accountability 11 (4) *Murdoch University Electronic Journal of Law* http://www.murdoch.edu.au/elaw/issues/v11n4/head114_text.html

the use of pseudonyms, a change of venue or the judge's directions to the jury as adequate protection. A stay of proceedings would only be granted in exceptional circumstances where the judge's directions or other measures would not relieve the unfair consequences of a fundamental defect.[10]

- During the trial the defence may apply for the judge to discharge the jury. This may occur because of publicity given before the trial has come to light or for some other reason it may be supposed that the jury has been exposed to material that it should not have during the course of the trial. The fact of publication may be obvious in the media reportage of the trial. Less obvious contamination of the jury may come to attention in a variety of ways such as a report from the jury itself, an observation by those in charge of the jury or by the disclosure of a juror outside the trial. Given the protections on the privacy of the jury room and that jurors are not sequestered in Australia, It will only be in exceptional circumstances that the actions of jurors will come to notice.[11]
- In many instances it may be considered that a direction from the judge will cure any potential for the deliberations of the jury to be contaminated by information from other sources.
- Finally, the defence may seek to overturn a conviction based on adverse pre-trial publicity. The test to be applied in Australia laid down in Glennon is that there is a serious risk that the pre-trial publicity has deprived the accused of a fair trial. This must be determined in the light of the evidence as it stands and the time of the trial and in the light of the way in which the trial was conducted, including the steps taken by the trial judge with a view to ensuring a fair trial.[12]

What is meant by publicity?

Publicity can be considered in terms of traditional media such as the print media, radio and television. Until recently these media could be considered largely to be transient with a confined mode of delivery. Because information conveyed in these media could be said to have a temporal and geographical limit it has been considered possible in the past to limit the effects of pre-trial publicity by geographical exclusion. For example, the ABC television drama 'Blue murder' dealt in a fictionalised format with allegations against a NSW police officer and other persons liable to prosecution. The production was withheld from broadcast in New South Wales to avoid contaminating potential jurors. Much of this old media is also now available through the internet and in digital formats and this means that it is no longer transient in nature and geographically focused.

The reporting of news or information in the digital media occurs in many formats such as: internet news, information websites, weblogs, crime sites, newsgroups,

[10] Jago (1989) 168 CLR at 34, Barton (1980) 147 CLR at 111.
[11] Jury view of the alleged crime scene. Jury looking up criminal record.
[12] R v Glennon op cit. per Mason CJ and Toohey J.

viral text/e-mail, e-mail, texting, IMS. Information and communications technologies have created an information platform that is persistent and universally available. Information is re-cycled and perpetuated in ways that the original author cannot control. Old sites can be visited after they have in real-time been taken down from the internet.[13] Web crawlers can make diverse data sources available in new ways and the content of the internet is constantly being indexed.[14]

Accepted uses of publicity

There are a number of ways in which publicity can serve the public interest:

- Providing information to the public about crimes that have occurred and any response to those crimes.
- Placing law enforcement agencies under scrutiny and holding them to account.
- Furthering the investigation of a crime by prompting members of the public to come forward with information. In this way Coronial investigations are held in open and persons of interest are placed under public scrutiny.

Misuse of publicity

Publicity can be consciously or unconsciously misused in various ways such as:

- To advance the cause of the investigating agency as opposed to the investigation. This potential for misuse can be reduced by the reporting of 'bare facts' and by providing balance in the reporting of the results of investigations and the laying of charges.[15]
- To excite scorn or contempt for, or fear of, particular persons.[16]
- To present as fact, matters that eventually may be in contest in any prosecution. Because the allegations are untested and very often the defence case is not known at an early stage, this can lead to the expression of enormously damaging unfounded allegations.[17]

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[13] See http://www.archive.org/index.php

[14] For this reason some courts are working to clean electronically recorded judgments of personal identifying information to limit data aggregation. See Spigelman J 2005. *The internet and the right to a fair trial* Address to the 6th World Wide Common Law Judiciary Conference: Washington 1 June 2005 http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman010605 See also http://en.wikipedia.org/wiki/Web_crawler

[15] See Trade Practices Act Review. op cit.

[16] See for example, Stufflebeem J 2002, Press briefing quoted in Australian Broadcasting Corporation 2005 Four Corners *The Case of David Hicks* broadcast 31 October 2005. Speaking of Guantanamo detainees: 'They are bad guys. These are the worst of the worst. And if let out on the street they will go back to the proclivity of trying to kill Americans and others.' http://www.abc.net.au/4corners/content/2005/s1494795.htm

[17] See, for example, the announcement in the United States of the Candyman investigation where the investigator's assertion that persons who signed up to join a particular website were

- To present information that would be likely to be excluded by a court under evidential rules designed to ensure a fair trial.[18]
- Publicity or information also exists as an artefact. It is now recognised that the capacity of information and communications technologies to make information available from disparate sources, simultaneously in real time, has enormous implications for managing the information made available to potential jurors before a trial, and jurors during a trial. This development makes it enormously difficult to ensure the effectiveness of traditional controls within a trial for the jury to act only on admissible evidence. The internet not only a source of information that a juror may be exposed to but also a potential, though impermissible, mechanism for jurors to gather their own information outside the trial process.

> The internet poses a challenge to the ability to ensure that a fair trial has occurred and renders less efficacious some of the mechanisms hitherto adopted to insulate the tribunal of fact from available information about the accused and witnesses or about the events. The internet opens up the prospects of new forms of misbehaviour by jurors during the course of the trial, by directly accessing the internet to acquire information about the events, about an accused or a witness, or for the purpose of checking expert evidence.[19]

- To place pressure on the investigator, prosecutor or judge to afford an accused more or less favourable treatment than they might otherwise be entitled to or to increase or decrease the harshness of any penalty to be imposed.[20]

A new development: Justifying the removal of human rights protections

A new concern in relation to pre-trial publicity is the use of the media to denigrate an individual accused or a group of accused in order to justify a lesser standard of due process being applied in their case. In this way, publicity is used to denigrate the suspect party and to deflect criticism of the state's removal of human rights protections. This has been practiced by some officials in relation to

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automatically provided with e-mails containing child pornography. It was subsequently established that there was an opt-out facility which meant that not all persons who subscribed to the site received child pornography.
http://www.wired.com/wired/archive/10.10/kidporn.html?pg=1&topic=&topic_set=

[18] This was at issue in *R v Glennon* op cit. where a radio announcer, Derryn Hinch had broadcast prejudicial material concerning the previous convictions of a former catholic priest facing further charges of child sexual abuse.

[19] Spigelman op cit.

[20] See *R v Hanson R v Etteridge* op cit where various politicians were criticised by the Queensland Court of Criminal Appeal per McMurdo P for commenting on the case as follows:

> If these observations were accurately reported, they are concerning. They demonstrate, at the least, a lack of understanding of the Rule of Law, the principle that every person and organisation is subject to the same laws and punishment and not to the arbitrary wishes of individuals or the passing whim of the day. Such statements from legislators could reasonably be seen as an attempt to influence the judicial appellate process and to interfere with the independence of the judiciary for cynical political motives.

persons detained at the will of the executive of the United States government at Guantanamo Bay in Cuba. David Hicks is reported to have been described by government figures as 'not worthy of sympathy', as having 'trained with al Quaeda', and as being 'a serious danger'. At the same time it is admitted that legal advice to government is that no charge is available against him in Australia.[21] The depiction of terrorists as menacing 'others' not deserving of human rights protections is an attack on the universalism of human rights and is mirrored in the attitudes expressed towards and the treatment of other out groups such as asylum seekers and 'dangerous criminals'. The opportunity for Australian courts to review the Guantanamo process were Hicks ever to be transferred back to serve a sentence in Australia was also quietly blocked with the passage of amendments to the *International Transfer of Prisoners Act 1997* (Cth) in 2004.[22]

Conclusion

The problems described briefly in this paper point to a sense of failing confidence in the common law trial process. In part this lack of confidence flows out of the law and order rhetoric which suggests that the system is somehow loaded too much in favour of 'the crooks'. Standard critiques are of the protections afforded an accused and the attacks on the supposed inadequacy of sentences and the failure to 'look after' victims.[23]

In Australia, the adherence to common law values is the more tenuous because of the lack of a Bill of Rights. There is a need to put human rights protections back as the cornerstone of the rule of law and to accept that the judicial arm of government has a legitimate and proper role in oversighting and moderating the actions of the legislature and the executive.

At the same time it is necessary to confront the enormous changes to the management of information in the digital age. The good sense of jurors and their ability to focus on the material before them in a trial cannot be taken for granted in the current digital age. It may be that the nature of those protections will have to change but let us hope that in the end the balance is struck in favour of the protection of civil liberties with the maximum protection possible afforded to the right to a fair trial according to law.

[21] See for example, Australian Broadcasting Corporation, The Case of David Hicks op cit..
[22] Section 4 was inserted to deem United States Military Commissions to be a court or tribunal of the United States of America, thus seeking to invoke general provisions of the Act to preclude judicial review of the findings and sentence of the overseas sentencing body. See http://www.austlii.edu.au/au/legis/cth/consol_act/itopa1997396/s4a.html
[23] See for example Cowdery op cit.