Report to Chief Justice on In-Court Media Coverage

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Introduction

[1] This report to the Chief Justice reviews the existing guidelines and practices relating to cameras and recording in court, and recommends changes to them. We review the history of in-court media coverage in New Zealand and briefly summarise the existing regime. We refer to the situation in comparable overseas jurisdictions. We identify the principles that should be taken into account in considering media coverage in court. We consider why we have coverage, should it continue, and how we can improve it. We traverse the options for change and the submissions received and set out our recommendations. We attach suggested draft guidelines and schedules, which track the proposed changes.

[2] As a preliminary step a consultation paper was circulated in May 2014. Twenty-four submissions were received, and posted on the Courts of New Zealand website. Portions of that consultation paper are repeated in this report. As a final preliminary step a draft report was circulated and further submissions sought.

[3] We have relied on our research as disclosed in the consultation paper, submissions received and results from the judicial questionnaire, as well as our discussions with and experience as Judges. We have been greatly assisted by our two independent advisors, Professor John Burrows QC and Dr Gavin Ellis.

Summary of key conclusions

[4] Our view is that the presence of film recording, cameras and audio recording in New Zealand courts facilitates a more open and accessible court system for the

New Zealand public. Public access to court proceedings is necessary to inform the public of the courtroom process, and media reporting is an important aspect of that access. Given the role of the media in publicising court proceedings a working relationship between the courts and the media is necessary and has, to an extent, been achieved, and will hopefully further improve.

[5] However, a difference must be recognised. The Courts are bound to uphold the rule of law and ensure fair trials. Media organisations on the other hand, despite the presence of dedicated and principled journalists, work in a commercial environment that is driven by profit. The media want to record and film material that will be of interest to their target audience, and improved access and procedures to assist them in attracting that audience. A tension remains between the goal of film in improving public understanding of what happens in the courts and objectively informing the public about court cases, and the commercially driven imperatives of the media. It is unsurprising, therefore, that recording and filming by the media has given rise to procedural challenges. By and large the courts and the media have responded to those challenges.

[6] We do not recommend any fundamental change to the 1995 reforms and the In-Court Media Guidelines 2012 (the Guidelines). We consider it better to have the present coverage than none at all. There is room for improvement, particularly in the procedures, and the quality and detail of the publications. Lawyers and Judges want more accuracy and balance in reporting. We make a number of recommendations regarding the existing practices and the Guidelines. We summarise these as follows:

(a) No change to the protection given to witnesses. Existing witness protection should be extended to victims who appear in court.

(b) Pre-trial conferences between trial Judges and the media when considered appropriate by the trial Judge, to deal with practical issues before the commencement of a trial of high media interest.

(c) The consolidation of recent efforts to provide more streamlined processing of applications and the allocation of special designated media liaison staff to deal with media issues.

(d) A shorter and improved form of application.

(e) An increased role for the Media and Courts Committee in monitoring compliance with the existing Guidelines. A review procedure should be set up so that in-court media coverage is scrutinised, and breaches of the Guidelines noted and reported to the Media and Courts Committee.

(f) The development of further informal contact between the Courts and the media to improve understanding and procedural efficiency.

(g) The improvement of communication between Registry and media, particularly in relation to changed hearing dates.

(h) Consideration to be given to designating particular staff to process all media applications.

(i) Consideration to be given to appointing particular staff to deal with media issues in a high profile trial.

(j) The recognition of the more limited role that cameras and recording have for pre-trial matters.

(k) A restriction or formula to limit close-ups in court.

(l) When media organisations apply for in-court media coverage they undertake that their staff have been properly trained to meet their obligations under the Guidelines and will do so.

(m) The judiciary and Ministry of Justice in consultation with the media further develop timely access by the media to judicial decisions

including posting on the Courts of New Zealand Decisions of Public Interest website.

(n) The Institute of Judicial Studies continues to develop additional presentations for Judges which deal with the Guidelines and the relationship with and an understanding of the media.

(o) Informal meetings between Judges and reporters about matters of mutual interest to become regular events.

(p) That "accuracy" be added to fairness and balance as a requirement of in-court media coverage.

(q) There continue to be only one video camera in a courtroom from which any accredited media may take moving footage, unless in the particular circumstances a Judge orders an additional camera.

(r) Ongoing investigation of fixed cameras and live streaming.

(s) Filming or photographing children under 18 years in Court be prohibited unless specifically approved by a Judge.

(t) Ongoing liaison with the media to improve procedures, avoid sensationalist stand-alone excerpts, and encourage the publication of full and informative coverage.

History of in-court media coverage in New Zealand

[7] In 1991 there were no guidelines or other documents that related to the coverage of court proceedings by the media in New Zealand. Reporters were allowed to attend court and report on proceedings, generally sitting at press benches and taking notes in shorthand. Reports were based on what reporters heard and noted in court. There were no cameras allowed in court and as a matter of general practice recording in court was not permitted (as distinct from taking shorthand notes), even by reporters. It was (and is) a recognised aspect of the jurisdiction of a Judge that the

court had control of its own procedure, including the role that the media would play in court.

[8] In 1991 the Courts Consultative Committee (CCC), chaired by the then Chief Justice Sir Thomas Eichelbaum, commenced discussions about the introduction of expanded television media coverage in courts. The issues ranged from fundamental questions of principle, such as the nature of a system of open justice, to practical concerns such as the media frenzy or "scrum" of reporters pursuing participants in the court proceedings on the street outside the courthouse. A working party chaired by Sir Ivor Richardson of the Court of Appeal was set up, which reported to the CCC. The CCC concluded that the best way forward was to conduct a pilot, during which expanded media coverage would be permitted under controlled conditions. The pilot would allow television and radio recording for delayed broadcasts and documentaries and the taking of still photographs.

[9] The essential argument for allowing cameras in courtrooms was that it gave the public better access to court proceedings and facilitated the principle of open justice. It was also argued that showing court proceedings on television had an educative value. The arguments against televising court proceedings rested on fair trial and privacy concerns. There were further concerns that given television is an entertainment medium, in-court coverage would trivialise or sensationalise proceedings. These concerns were accentuated by the media coverage of the OJ Simpson trial in the United States in 1994.

[10] On 10 February 1995 the CCC established a further working party chaired by Sir Ivor Richardson with a brief to consider the issues and the conduct of the pilot. In November 1995 Sir Ivor Richardson tabled draft rules. A number of organisations were invited to comment including the New Zealand Police, the New Zealand Law Society, the New Zealand Bar Association, the Criminal Bar Association, the New Zealand Council of Victim Support Groups, the National Collective of Rape Crisis and Related Groups of Aotearoa, and the three main media organisations which had expressed interest: Radio New Zealand, Independent Radio News and the Commonwealth Press Union.

[11] There was significant opposition from some members of the media. Two senior New Zealand editors and columnists, Colin McKay and Pat Booth, deplored the notion that television coverage of courtroom proceedings could ever be in the public interest.[1] There were concerns expressed about what was said to have been the debacle of the OJ Simpson trial.

[12] The working party received submissions. The media organisations made various suggestions as to how the coverage should work on a practical basis. All the organisations listed above save the media organisations expressed opposition to filming or recording in court.

[13] The working party considered the submissions and concluded that the draft rules should be amended to require print and radio organisations to archive the recorded material during the pilot period, but that otherwise the draft rules permitting in-court media coverage should be unaltered.

[14] Draft rules were prepared. They included the following two provisions:

> 1. Material obtained from expanded media coverage which is broadcast shall be presented in a way which gives an accurate, impartial and balanced coverage of the proceedings and of the parties involved. Any such broadcast is to be without editorial comment and to be of at least two minutes duration per news item.
>
> 2. There shall be no use of material obtained from expanded media coverage otherwise than for normal news programmes or articles unless prior approval for that use has been given by the trial judge or, where that judge is unavailable, another judge of the relevant court.

[15] In March 1996 an independent research team from Massey University was commissioned by the Department for Courts on behalf of the CCC to evaluate media coverage. More than 20 cases were covered by the media under the pilot rules during the initial full three-year period. The research team found that expanded coverage had minimal impact on jurors and witnesses, but television cameras in courtrooms were seen as a distraction and were stressful to Judges.

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[1] John Cumming "Opinions Run Hot on Courtroom TV" *Northern Law News* (New Zealand, 1994).

[16] According to the research team's survey, most counsel claimed they were not significantly affected by the cameras. Further, most participants in the survey felt cameras in courts were educating the public but that this could be improved by more in-depth, longer and continuous coverage. The media were not satisfied with some of the restrictions imposed on them, particularly those relating to witnesses' rights to request identity protection. The media preferred a judicial discretion on filming witnesses rather than the issue being left to the whim of a witness. However, the media were generally of the view that changes to the guidelines, wider access to the courts, and the types of cases involved, would enhance the appeal of in-court coverage from their perspective.

[17] During the pilot, the television broadcasters provided coverage of all programmes that featured in-court film coverage to an Evaluation Committee. Coverage was viewed by this Committee, which reported to the CCC. The Chief Justice and Sir Ivor Richardson (then President of the Court of Appeal) together with Paul Norris, a senior representative of the television media and part of the working group and other members of the Committee, watched the programmes to monitor general standards and compliance with the draft rules. The monitoring revealed general compliance.

[18] Following the conclusion of the pilot and the evaluation by the Massey research team the CCC made recommendations to the judiciary for a continuation of coverage. These recommendations were approved at the Higher Courts Judges' conference in 1999. In accordance with the CCC recommendations the rules of the pilot were incorporated, with modifications, into new guidelines, together with a Voluntary Code of Conduct for the Media.

[19] By 2000 it was observed that there was "slippage" in the application of the two-minute guideline, as the media increasingly mixed in-court and out-of-court footage. For their part, media representatives were concerned that the guidelines prevented them from taking pictures or filming out of court. They felt the guideline relating to witness protection needed reconsideration. In its review of the guidelines and their implementation, the CCC produced a consultation paper. In 2003, the guidelines were redrafted. They provided a more detailed formulation of the

procedures to apply under the guidelines, and they dispensed with the Voluntary Code of Conduct.

[20] Key features of the 2003 guideline redraft were:

- The period of notification of the court for any media application was increased from four working days to 10 working days.

- Witness protection (which was still available as of right in criminal trials) was clarified and refined substantially beyond the previous rules.

- There was a Schedule of Standard Conditions. One condition was that material could not be broadcast until 10 minutes had lapsed from recording (it later became known as the "ten minute rule"). It had previously been one hour.

- The "two-minute rule" about the duration of news items was also dispensed with in the new edition of the guidelines.

- The guidelines were expressly said not to have legislative force or to be construed so as to create expectations.

[21] In 2012 there were further amendments: the interests of members of the media in court as distinct from the public were given further emphasis; the practice that only members of the media could take written or electronic notes in court without leave of a Judge was confirmed.

[22] Other particular changes included:

- Electronic communications from court were brought within the Guidelines.

- A definition of "member of the media" was provided, based on the definition in s 198(2) of the Criminal Procedure Act 2011. The organisations to which the media representatives belong must be

subject to the discipline of the Press Council or the Broadcasting Standards Authority.

- The requirement for a 10 minute delay in publication was extended to electronic communications from court.

- There were other more minor changes including extending the exclusion of the 10 minute rule to a Judge's summing up.

Brief summary of the existing regime

[23] Judges have a broad discretion as to the procedures followed in courtrooms over which they preside, subject to certain specific provisions such as the various rules of court, and statutory requirements. In particular, s 198(1) of the Criminal Procedure Act provides that the media cannot be excluded from criminal cases, save where the matters being heard relate to national security. Thus members of the media may be present in court even when all other members of the public are excluded.

[24] Subject to that overriding discretion there are other practices and conventions that apply. Judges in New Zealand only allow members of the media and other persons with express permission from the Judge to take notes or use electronic devices in court. This is reflected in the Media Guide for Reporting the Courts and Tribunals (the Media Guide).[2] Requirements of courtroom courtesy are set out in that guide.[3] Members of the media must provide suitable identification,[4] so that those who are at the press bench and taking notes and using devices, are known to the Judge.

[25] The 2012 Guidelines apply to all proceedings in the Court of Appeal, High Court, Employment Court and District Court. These are set out at Appendix A. Separate guidelines apply to the Supreme Court, and there is a separate protocol for application of the guidelines for the District Court non-jury jurisdiction. There are also Environment Court Media Coverage Guidelines.

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2 Ministry of Justice *Media Guide for Reporting the Courts and Tribunals* (3rd ed, Wellington, 2012).
3 At 26.
4 At 27.

[26] If a member of the media wishes to record proceedings in court for broadcast on radio or television, or wishes to photograph a court in session, there must be an application to the Registrar of the Court concerned in accordance with the Guidelines. A copy of the application is sent to the other parties, and after submissions have been received the application is determined by the trial Judge. Decisions are made on the papers, but there can be a hearing.

[27] As noted above, the Guidelines do not have legislative force, do not create rights, and should not be construed to create expectations.[5] They are intended to ensure that applications for in-court media coverage are dealt with expeditiously and fairly and that so far as possible like cases are treated alike.[6] The Court may have regard to various matters, including the need for a fair trial, the desirability of open justice, the principle that the media have an important role in the reporting of trials as the eyes and ears of the public, the importance of fair and balanced reporting of trials, court obligations to victims, and the interests and reasonable concerns and perceptions of victims and witnesses.[7]

[28] The Guidelines reiterate that all matters relating to in-court media coverage are at the discretion of the Court,[8] including time limits and procedures for the making of applications. There are special provisions limiting coverage in sexual cases.[9]

[29] There is witness protection for non-official witnesses as of right in criminal trials. If the witness so requests, the witness cannot be filmed while giving evidence. Other witnesses may apply for a ruling that they not be filmed, photographed or recorded. If there is name suppression or any statutory prohibitions at play, they continue to apply.[10] The authority to film or record may be revoked at any time by the Judge.[11] There is a standard application form in schedule one.

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5 In-Court Media Coverage Guidelines 2012, cl 1.
6 Clause 2.
7 Clause 2.2.
8 Clause 4.1.
9 Clause 8.
10 Clause 13.
11 Clause 14.

[30] Schedule two of the Guidelines sets out standard conditions for filming. Only one camera may be present in the courtroom and it must be in a position approved by the Judge.[12] While the Judge is sitting in court for chambers or in closed court, no filming may take place.[13] No juror may be deliberately filmed and no publication or broadcast of a juror may be shown.[14] Members of the public attending the trial or review must not be filmed,[15] and counsel's papers must not be filmed.[16] Exhibits are not to be filmed without leave of the Judge, and the defendant may be filmed without consent only when giving evidence or for the first 15 minutes of any sitting day (and is not to be filmed without leave of the Judge when the verdict is being taken or a sentencing is underway).[17] No filming may take place in court when the Judge is not present except with prior leave of the Judge.[18]

[31] Film or recordings must not be published or broadcast until at least 10 minutes have elapsed,[19] although there are certain exceptions, for instance on a sentencing or summing up.[20] A media applicant must maintain a copy of all publications or broadcasts,[21] and film must not be used while the trial continues other than in a programme or on the website nominated in the application form.[22]

[32] The Guidelines provide:[23]

> Film taken must be used having regard to the importance of fair and balanced reporting of trials, and must not be published or broadcast out of context.

[33] This rule and many others also apply to still photographs and audio recordings.

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12 Schedule 1 at [1]–[2].
13 At [4].
14 At [5].
15 At [6].
16 At [7].
17 At [8]–[9].
18 At [10].
19 At [12].
20 At [13].
21 At [14].
22 At [15].
23 At [16].

The Media and Courts Committee

[34] The Media and Courts Committee is an informal committee that was created by the Chief Justice in liaison with the media. It consists of four Judges nominated by the Chief Justice and four senior media representatives nominated by the Media Freedom Committee. It is chaired by a Judge. It has responsibility for the Guidelines and, with the Ministry of Justice, for the Media Guide. It deals with current issues arising between the media and the Courts, and seeks to resolve them by discussion and consensus. It is an important forum for the resolution of issues as they arise, and provides a working interface between the media and the judiciary.

Relevant principles and concepts

[35] There are two dominating principles relevant to in-court media coverage both recognised by the New Zealand Bill of Rights Act 1990. The first is the principle of open justice; that the fullest access of the public and the media to court proceedings is in the interests of the community.[24] Related to this is the often expressed view that it is not realistic to expect that all interested members of the public are able to attend court in person, and that it is through media publications that the public can understand what happens in a court case. This principle while frequently expressed is less frequently defined. Bentham famously expressed a key aspect of the ability to publish this way:[25]

> Publicity is the very soul of justice. It is the cleanest spur to exertion and the surest of all guards against improbity. It keeps the Judge himself, while trying, under trial.

[36] Open justice is a principle and not a right.[26] It is different from freedom of expression, and cannot be expressed in fixed and immutable terms.[27] The purposes

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24 As found in s 25(a) of the New Zealand Bill of Rights Act 1990 which entitles those charged to a "public hearing".

25 Jeremy Bentham *Works of Jeremy Bentham: Published under the Superintendence of His Executor, John Bowring* (Tait, Edinburgh, 1843) vol 10 at 142.

26 *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271 at [29], endorsed by *Schenker AG v Commerce Commission* [2013] NZCA 114 (CA) at [32]. See also *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [29].

27 *Police v O'Connor* [1992] 1 NZLR 87 (CA) at 95 and 97; *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [117] per McGrath J; and *John Fairfax Publications Pty Ltd v Ryde Local Court*, above n 26, at [60].

behind the concept include the importance of the public being able to understand the Court processes, and how and why a particular decision is reached.[28] Such information and understanding ensures there is transparency of decision-making and judicial accountability, and assists in maintaining public confidence in the judicial system. The ability of the media to attend court proceedings is an important aspect of open justice. It is long established and is now recognised by statute.[29] However, the needs and wishes of the media do not define open justice.

[37] The second is the right of a defendant to a fair trial, a right identified and protected by s 25(a) of the New Zealand Bill of Rights Act 1990. That right dictates that there must be no potential interference with the fair trial rights of those accused of crime in New Zealand. For that reason, it is sometimes said that the right to a fair trial trumps open justice.[30] The Court of Appeal put it this way in *R v Burns*:[31]

> [38] [O]nce … it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of freedom of expression and open justice must then be departed from, not balanced against. There is no room in a civilized society to conclude that, 'on balance', an accused should be compelled to face an unfair trial.

[39] Nevertheless, there is no immutable concept of a fair trial, and the interaction between the two competing principles was described by the United States Supreme Court in 1980 as being "as old as the Republic".[32] It will continue to pose challenges for trial Judges.

[40] In New Zealand in 2014 there are other related and overlapping concepts relevant to media coverage of court proceedings; of freedom of information, the capacity for better coverage of the courts to further the community's understanding of their work, the protection of confidentiality, and the protection of privacy. There is

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28 *Regina (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] EWCA Civ 420, [2013] QB 618 at 650; *Rogers v Television New Zealand Ltd*, above n 27, at [34], [35], [74] and [119]; and *Broadcasting Corp of New Zealand v Attorney General* [1982] 2 NZLR 120 (CA) at 123.

29 Criminal Procedure Act 2011, s 198.

30 *R v B* [2008] NZCA 130, [2009] 1 NZLR 293 at [62] and [80].

31 *R v Burns* [2002] 1 NZLR 387 (CA).

32 *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) at 564.

also the concept that vulnerable people like children and victims should be protected from the damaging glare of publicity.

[41] Finally, there is the need for the efficient and orderly administration of justice. This means that court proceedings must be conducted efficiently without delay or interruptions, and with the respect and solemnity required when rights are being determined. The procedures followed must be simply expressed, clearly understood and predictable.

2002 survey of barristers

[42] In 2002 there was a survey of 45 Auckland practitioners as to their attitudes towards courtroom television, undertaken by Paul Murray.[33] The practitioners had personal experience of in-court electronic media coverage. Fifty-one per cent opposed the presence of cameras in court.[34] Sixty-four per cent of those polled believed that televising courts had an adverse effect on courtroom publicity,[35] and 68 per cent did not believe that having television in courts was worthwhile or of benefit.[36] However, 89 per cent found that the media had complied with the guidelines and 70 per cent believed that media behaviour had improved with experience.[37] Fifty-two per cent stated that televising had no impact on the right to a fair trial and 63 per cent considered that the outcome of cases was not affected.[38] Thirty per cent said that the presence of television made them prepare better, and 52 per cent observed that they thought it made their colleagues prepare better.[39] There has been no more recent survey of barristers.

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33 Paul Murray *Electronic media coverage in courts.*
34 The Bar Association had noted that it was continuing to oppose the new practice.
35 *Electronic media coverage in courts*, above n 33, at 47.
36 At 44–45.
37 At 48.
38 At 47.
39 At 56.

Survey of High Court and District Court Judges, December 2013

[43] To assist the review the panel surveyed High Court and District Court Judges to collect information on perceptions of audio-visual coverage in courts. Of the 166 Judges who responded, 129 had presided over hearings where there had been cameras and television in court. The questions were answered by those who had experience of media coverage in court.

[44] Thirty-four per cent had never declined applications for media coverage, while 66 per cent had done so. The reasons for declining applications were varied, ranging from fair trial concerns to late notice of the application, suppression issues, the impact on victims, sensitivity of witnesses and complainants. Privacy concerns and worries about "prurient interest" were also listed.

[45] Sixty-seven per cent of Judges did not consider that television coverage affected the way they acted in court. Those who stated that it did affect the way they acted in court generally listed fairly minor concerns, such as particular efforts being made as to the way they spoke and administered court issues. None of the comments indicated any major change in behaviour.

[46] Seventy-four per cent did not consider that the television coverage affected the way counsel for the prosecution or plaintiff acted in court, and 71 per cent did not consider that the coverage affected the way counsel for the defendant acted. Again when there was a perception that counsel had been influenced by the presence of television cameras, the behavioural changes noted tended to be relatively minor, such as counsel being not as relaxed, being better mannered and so on.

[47] In relation to witnesses, 70 per cent of Judges did not perceive any effect as a result of television coverage. Of the 30 per cent who did perceive a change, the changes listed tend to be of the "more diffident" or looked possibly "more sheepish or intimidated" type.

[48] Twenty-six per cent of parties or witnesses had opposed being filmed personally.

[49] Judges were asked what percentage of their time in court was spent on media issues in a high profile hearing with television in court. The greatest number (44 per cent) reported that they spent five per cent of their time on such matters. However, the average estimate for time spent on media issues was two per cent.

[50] In relation to court takers in court the estimate of how much of their time was spent on media issues was one per cent (not including the time of Registry staff out of court).

[51] Eighty per cent of Judges considered that media representatives in court conducted themselves with courtesy and decorum. Of the 20 per cent who did not, most of the incidents reported related to matters of dress and courtesy, such as interrupting the Court, wearing jeans and sloppy clothes, the constant clicking of cameras, leaving equipment in awkward places and a failure to abide by directions. There were a significant number of occasions when media representatives did not understand the need to show courtesy to the court process, or were rude.

[52] Ninety-three per cent of Judges reported that there had been no instance where recording in court had resulted in a fair trial issue arising. Seven per cent (a total of 10) reported that a fair trial issue had arisen as a consequence of televising proceedings, but none said there had been an occasion when a trial had to be aborted as a consequence. Twelve per cent reported that recording in court had resulted in them considering disciplining the media. Most often this resulted in some form of verbal expression of concern by the Judge to the media representative involved.

[53] Four per cent of Judges had terminated media coverage during a particular hearing. Seven per cent had received applications to film or record by persons who were not members of accredited media organisations.

[54] Judges were asked if they had seen coverage of the case over which they presided and which they did not think was fair and balanced. Of those who gave a "yes" or "no" response, 33 answered "yes" and 64 answered "no". The general complaint was that the coverage was too short, and amounted to "sound bites" only.

However, there was a wide variety of differing views, many of which were positive in a qualified way.

In-court media coverage in other jurisdictions

[55] There is a wide array of differing approaches to in-court coverage of proceedings throughout the common law world.

[56] Until recently in the United Kingdom, any coverage by photograph, sketch, sound or television was prohibited by the Criminal Justice Act 1925 (UK). The position has changed with the passage of the Crimes and Courts Act 2013 (UK). Under that Act, the Lord Chancellor and Lord Chief Justice can exempt specific instances of coverage in court from the operation of the Criminal Justice Act. The Supreme Court of the United Kingdom has adopted the House of Lords' more open approach to media coverage, and has entered into an arrangement with British television broadcasters to allow for live, free streaming of proceedings on the internet.

[57] The Scottish judiciary has also recently reviewed its approach to in-court media coverage, and in January 2015 released a report to that effect. The Scottish courts have permitted filming in courts since 1992, when Lord Hope issued a notice allowing filming in courts when consented to by all parties. In 2012 filming without consent was permitted by Lord President Hamilton, in circumstances where broadcasters provided an undertaking that the final broadcast would not identify those who had not consented to filming. It would seem that as a matter of practice there has been only limited filming of trials. The January 2015 report made a series of recommendations and drew a distinction between appeals and legal debates in first instance civil proceedings (in which filming, including live transmission, is allowed), first instance criminal proceedings (in which the delivery of sentencing remarks and filming for documentary purposes only is allowed) and first instance civil proceedings generally (in which filming for documentary purposes only is allowed).

[58] The Australian Courts also continue to develop their approach to covering proceedings. With specific exceptions, such as the Federal Court and the Supreme Court of Victoria, the majority of Australian Courts only allow television coverage for

ceremonial sittings or for stock media footage. The High Court of Australia has maintained its prohibition, but has recently announced that it will begin posting audio-visual recordings of all proceedings on its website. Filming is permitted in special circumstances during proceedings in the Supreme Courts of New South Wales, Northern Territory, Western Australia and Tasmania, on application to either the Judge or registrar.

[59] Canadian Courts have also taken divergent approaches. Since 1994 the Supreme Court and Federal Court of Canada have permitted television coverage of their proceedings on Canada's public broadcast service. There is also coverage in the Courts of Appeal of a number of the provinces, including Ontario, Nova Scotia and British Columbia. However, coverage is restricted at first instance, with the Canadian Judicial Council continuing to oppose any television coverage of trial courts.

[60] The federal judiciary in the United States has recently announced the extension of a trial project to evaluate the effect of cameras in Federal District Court proceedings. The trial project is the first time since 1946 that the Federal Courts have permitted coverage in civil cases as a matter of policy. The Supreme Court of the United States continues its absolute prohibition of any television coverage. At the state level, approaches vary. California and New York now permit coverage by their rules of Court, with decisions made by trial judges on a discretionary basis.

[61] A fuller analysis is set out in Appendix B of the consultation paper. This analysis illustrates that New Zealand has gone considerably further than other jurisdictions in allowing television coverage of trial courts.

A changing landscape

New media

[62] It must be recognised that there are technological and other developments which affect in-court coverage. Traditional distinctions between print and television media are breaking down, as both forms of publication feature websites that report news and show video footage, including in-court video footage. Thus, both print and

film media wish to have access to in-court film. In recent years, new forms of digital communication have emerged that augment, and may eventually replace, aspects of traditional news media. The pace of change is great. While there is already a facility for courts to admit new media entities on an individual basis, there may be grounds for recognising new classes of media that have a legitimate right to stand alongside their traditional counterparts provided their accountability can be assured. For example, there are now stand-alone online news services such as scoop.co.nz that perform similar functions to those of the press, and private news agencies such as Businessdesk (and other elements of its parent, Content Ltd) that provide services previously undertaken by the defunct New Zealand Press Association. In addition, the emergence of stand-alone commentary websites, hybrid services in which reporting forms only part of a group's operations, and of services as yet unknown, will require regular reappraisal of what might be defined as civic communication.

[63] The Media and Courts Committee could undertake the process of extending and modifying the right to apply for permission to film/photograph. This should recognise new generic groups of media that have a right to be considered in the same light as their traditional counterparts, and that other parties (not covered by the present Guidelines) have the right to make a formal application for accreditation. If the Committee believes their presence could serve the interests of open justice (on whatever conditions the Committee imposes) such applications may be granted. A list of organisations that are members of the media as defined should be circulated. It should be noted that the Press Council and the Online Media Standards Authority (OMSA) are now admitting organisations that exist only online, including bloggers. OMSA is not a body as yet recognised as a member of the media under s 198(2) of the Criminal Procedure Act.

[64] Another development is the use by court reporters of smartphones for the purpose of photographing defendants and parties, and to photograph documents. This gives rise to new issues, such as the importance of there being fixed positions from which photographs can be taken, so that there are no unforeseen consequences, and protocols for when and how documents or exhibits can be photographed or filmed.

Social media

[65] The use of social media by the public must be recognised. There have been cases of misuse of video material legitimately placed on news media websites and then misappropriated by individuals on social media (for the purposes of parody, ridicule or, in extreme cases, forms of hate speech).

[66] The 2012 Guidelines make provision for the use of in-court camera footage on television, radio and on nominated websites, and allow for electronic communication by reporters in court. They do not specifically address the use of in-court footage on social media platforms. However, the standard conditions do limit use other than on the programme website, print media or online content nominated on the application form, which the trial continues.[40]

[67] It is not considered that any special rules are now required for social media sites. The existing rules are sufficient. Anyone seeking to film or record for social media sites has to apply in the usual way, and the prohibition against use will apply to publication on all other sites For the duration of the trial.

[68] Permission to film in court must not be seen as a licence for the public to download material from legitimate news sources and re-use it on social media. News sites do allow users to post news items on their own Facebook pages by clicking on an associated icon. There is nothing inherently wrong in this practice when it does no more than provide an electronic link back to the original news webpage. However, we recognise that software can be used to download the video footage itself and that the material might be manipulated or associated with incitement, degradation or ridicule. It must be recognised that there are often breaches of the Guidelines when footage is placed on social media sites. This may lead to enforcement action.

[69] **S**ocial media is rapidly evolving and the use of mobile devices for both the consumption of news and inter-active communication has grown exponentially. The PwC Global Entertainment and Media Outlook 2014-2018 reported that high-speed mobile data connections by the two largest mobile providers in New Zealand were

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[40] In-Court Media Guidelines 2012, schedule 2 at [15] and schedule 3 at [11].

expected to grow from 300,000 in 2013 to 2 million by 2018. Increasing numbers are sourcing news only on digital platforms, including smart phones and news organisations are meeting that need. For example, Nielsen CMI surveys between 2009 and 2014 show that the digital-only weekly audience of the *New Zealand Herald* has more than doubled – from 174,000 in 2009 to 485,000 this year – and is close to matching the audience that reads only the print newspaper. Television New Zealand's (TVNZ) annual report 2014 reported an annual increase of 63 per cent in One News video streams and signalled the introduction of an enhanced news site next year. Such statistics point to increased availability of in-court coverage on devices that are capable of sophisticated multi-media communication between individuals and groups. These devices are also capable of recording high definition video which can be live-streamed on social media, raising the possibility of clandestine filming in court by members of the public. The recent introduction of computer/video eyewear increases the difficulty in detecting such filming.

[70] We recommend that the Media and Courts Committee maintain a watching brief on social media developments to ensure that the misuse of legitimately recorded material is minimised as much as possible. We further recommend that signs be placed at the public entrances to all courtrooms warning members of the public that they must not use any devices, such as smart phones, to film or record proceedings (such signs are already in place in some courts).

Should there be fundamental change in televising and recording court proceedings?

Submissions

[71] Submissions received were entirely from those associated with either the media or the legal process. Most of the submissions did not support any fundamental change or reversion to the 1990s where there was no televising or recording of court proceedings. They either explicitly or implicitly accepted that in broad terms the status quo should continue. There was a submission from The Forensic Group, a group representing scientists who appear as experts in court. There were no submissions from any person who had appeared as a witness or defendant. There were no submissions which presented any data on the public needs in relation to the

publication of pictorial footage of court proceedings, or the public's perceptions. Such a submission would have involved empiric research.

[72] Christopher Stevenson, a barrister, was the only submitter who expressed his opposition to cameras in court. In his view there had been an experiment, the media had its chance, and the experiment had failed. He challenged whether the media act as surrogates of the public, submitting that the reality is that they are driven by commercial considerations and that the filming of trials had become sensationalised and decontextualised. He said that defendants are intimidated by media coverage and this can lead to them deciding against giving evidence or limiting their evidence, leading to injustices. In his experience counsel do not like the cameras as they are a distraction and a stress.

[73] Nevertheless, none of the bodies representing those who appear in Court supported fundamental reform. There was no majority view in the New Zealand Law Society, the Auckland District Law Society or the New Zealand Bar Association that there should be a significant change prohibiting filming in court. There was no majority view expressed by the Judges in their questionnaire answers that there should be a return to the pre-pilot situation. The media organisations that filed submissions all supported the continuation of the Guidelines, including some from the print media which had largely opposed television in courts in 1995.

[74] The Robson Hanan Trust made the specific suggestion that there should be no filming of the reading of victim impact statements, as doing so exacerbated negative judgments about criminals and fed the feeling of disgust in society. However, there was no suggestion that in general terms the televising or recording of court proceedings should stop.

Discussion

[75] There are criticisms of the actions of the media during various trials in the comments section in the Judges' questionnaire. At times the coverage is said to be too short to be meaningful. Sometimes the film is out of context so that the public will form an incorrect impression of what a defendant or witness was doing. There have

been occasions of discourtesy and disruption. Sometimes the Guidelines are breached as in the *R v Banks* case,[41] when the defendant was filmed in breach of the Guidelines without permission, and the film was published. Short, sensationlist excerpts have sometimes been shown out of context.

[76] The panel is not aware of any instance when in-court media coverage has led to a mistrial or aborted trial. Ninety-three per cent of Judges reported that there had been no instance where recording in court had resulted in a fair trial issue arising. Seven per cent (a total of 10) reported that a fair trial issue had arisen as a consequence of televising proceedings, but none indicated that a trial had to be aborted as a consequence. The New Zealand experience has not, as some predicted, led to miscarriages of justice and the need for re-trials. It has not been shown that filming, televising, or recording Court proceedings has resulted in unfair trials, mistrials or aborted trials.

[77] There is little evidence that sensationalist bad reporting on television or radio is widespread. We are not persuaded that there have been sufficient breaches of the Guidelines or inexcusably sensationalist reporting to warrant reversal of permitting cameras or recording in court.

[78] We are satisfied that having cameras in the courtroom has helped to open proceedings to the public gaze, and enabled the public to see and hear justice at work. When the reporting of a proceeding is informed and not too brief, cameras assist the public understanding of the way in which justice is delivered. It can assist in the public being better informed and educated about the legal process in individual cases.

[79] In our view the case for cameras in court has become stronger in the digital age. New Zealanders are now familiar with the concept of being filmed and recorded, in public and private places. Digital information of public interest is instantly shared in our community. We consider there is force in the proposition that the justice system runs the risk of becoming out of step with the expectations of the public, and therefore less meaningful to those who might otherwise engage with the court system,

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41 *R v Banks* [2014] NZHC 1155, [2014] 3 NZLR 121.

if the public cannot see the operation of the courtroom unless they go to court. We have the technology to transport members of the public into the courtroom.

[80] While the excerpts of what has happened in a day in court may be short, modern technology enables a collection of footage to be shown as part of a single media presentation, which in the hands of an experienced reporter can provide a quick and illuminating overview of the action of the court day.

[81] The most important practical reason for introducing cameras and recording in New Zealand courts is that it takes the pressure off parties when outside the court. If the media do not have the opportunity to record and take photographs in court, the "media scrum" frenzies outside the court seen in the 1980s and early 1990s, before extended coverage, might resume. Occasionally they have resumed, and have been checked by the proposed withdrawal of in-court privileges.

[82] We accept the submissions made by media organisations that much of the bad press about in-court media coverage is derived from the three criminal cases of *R v Bain*,[42] *R v Weatherston*[43] and *R v MacDonald*.[44] We also accept that in respect of the *Bain* retrial, the case was of extraordinary public interest long before the trial began and there had been a great deal of sensational publicity before the trial. It is not generally suggested that there was any troublesome coverage during the trial. In the *Weatherston* case the defendant consented to being filmed and the coverage provided a perspective on his personality and attitude to the offending. In the *MacDonald* trial a number of important witnesses did not object to being filmed. Some of the *MacDonald* coverage showed a tabloid bent in that there was at times a concentration on domestic subplots rather than trial issues. We will turn to this issue later.

[83] The former Lord Chief Justice of England, Lord Judge, has been reported as commenting that the presence of cameras in court in New Zealand has led to outbursts from the public gallery when jury verdicts are delivered.[45] This is not correct. There

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42 *R v Bain* HC Christchurch CRI-2007-412-14.
43 *R v Weatherston* HC Christchurch CRI-2008-012-137.
44 *R v MacDonald* HC Wellington CRI-2011-054-2466.
45 N Watt and O Bowcott "Television cameras may be allowed to film in crown courts" *The Guardian* (online ed, London, 1 July 2013).

is no evidence of members of the public gallery, or indeed juries, acting in any different way when there are cameras in court. While lawyers may behave differently on occasions, the Judges' questionnaire and the submissions do not show this to be a problem. There is provision in the Guidelines that there be no reporting of the jury or the public gallery. There is no incentive for anyone in a jury or the public gallery to take any steps designed to attract the attention of the cameras.

[84] We are conscious of the limited material we have on the public's perceptions and needs relating to filming and recording in court. We are left to draw inferences from the history, and the material available. Our views are derived from our own experiences and those of our colleagues, the submissions we have received, the insights we have been given by our independent advisors, and the history and overseas experiences of media in courts.

[85] It is our opinion that filming, photographing and recording in court assists in the fair administration of justice, as it improves the public's understanding of what is happening in a particular case, how the courts function and the role they play in New Zealand's constitutional structure. It provides the benefit of placing the member of the public in the courtroom, even if that is for brief periods only. Most members of the public are not able to go to court and listen to a case in which they have an interest. Film coverage of a trial, available through media outlets, is a substitute for sitting in the public gallery. It is a desirable goal.

[86] While in practice the publications are usually of relatively short extracts of the footage, chosen by members of the media, these extracts are available on the media websites, and can as a trial progresses provide a body of material. In our assessment the availability of in-court footage, even short extracts, promotes judicial accountability and public confidence in the judicial system. It gives the public some direct knowledge of the court event. If done properly it takes the viewer into the courtroom and provides a realistic picture of at least an aspect of what has happened. In this sense, the coverage that has been published since the inception of the pilot can be seen as having advanced public understanding of the courts.

[87] We do, however, recognise that the goals of the courts and the goals of the media are not always the same. The courts wish to see an objective and balanced presentation of the court proceedings which gives the public enough information to accurately assess the hearing. The mainstream media on the other hand, consists of organisations that are driven by commercial imperatives, and while accepting the need for standards, focus on coverage that will appeal to the target audience and maintain and attract customers and advertisers. The primary goal of media organisations is not directly to promote open justice, although that is commonly the incidental consequence of their business. The principle of open justice is not coincident with the wish of the media to maximise audiences and thereby profits. There is a need to try to ensure that media coverage is not trivial or sensationalised or limited to just sound bites, and is sufficiently comprehensive and accurate to improve public understanding and confidence. There is a need to continue to review the best procedural options for media coverage.

Conclusion on fundamental change

[88] We conclude that the presence of filming, photographing and recording in New Zealand courts assists in enabling the public to see and understand the court processes and why a particular decision is reached. Often the footage is shown as part of balanced presentations which give the public an insight into the courtroom day. Nevertheless, it must be recognised that there is a difference between the duty of the Courts to uphold the rule of law and ensure fair trials without fear or favour, and the need of media organisations to maximise audiences. The present system can result in the publication of short excerpts of stand-alone sensationalist footage which does little to promote public understanding of the court case.

[89] On our overview filming, photographing and recording in court provide a more open and accessible court system for the New Zealand public and improves the public confidence in the administration of justice. There have been procedural challenges but by and large the courts and the media have in the spirit of co-operation endeavoured to respond to those challenges. It has been recognised that a communicative working relationship between the courts and the media can improve

the provision of an open system of justice, and uphold the rule of law and the dignity of the court process.

[90] We do not recommend any reversal of the present coverage regime. We do not recommend any fundamental change to the 1995 reforms and the Guidelines. We do, however, recommend an ongoing examination of the best way to record and deliver court recordings and film to the public, and ongoing scrutiny of how cases are reported. We recommend an ongoing dialogue between the courts and the media to achieve more complete and accurate coverage, so that the public receives a full and balanced perspective of events in court.

[91] We proceed in the balance of this paper to make specific recommendations, which are summarised at the start of this paper.

Ensuring accurate reporting of the courts within the Guidelines

[92] We acknowledge there are many experienced journalists in New Zealand who daily provide accurate reporting of court cases. However, we are concerned there are breaches of the Guidelines without recognition or action. Media representatives can remain in court when the public is cleared. They are permitted to hear confidential material which if released could cause a mistrial. With those privileges comes great responsibility for accurate and fair coverage.

[93] An example often given of unfair coverage relates to the context of the television coverage where a witness is filmed giving particular evidence followed immediately by film of the defendant. Such coverage implies that the defendant's reaction is to the evidence of the witness shown immediately before. In fact, the defendant's reaction may have been filmed in another context and is not a reaction to that particular witness' evidence. Another example is where film has been made showing a defendant's reaction during a Judge's sentencing remarks, when the film of the defendant was not a reaction to the Judge's remarks, but in a different context. The public are being given an incorrect and unfair impression of the witness or defendant. There are frequent complaints by Judges of inaccuracies in media reports of cases. In our view there are many instances of media inaccuracies which are not

the subject of complaint at all. These inaccuracies extend beyond filming in court to all forms of in-court media coverage. The extent of knowledge of reporting inaccuracies and non-compliance with the rules is currently dependent on the Judge or counsel in any particular trial picking up on an error mid-trial or making a post-trial complaint.

[94] Inaccuracies and guideline breaches can be genuine errors, arising from a misunderstanding of what happened in court or because the journalist is not sufficiently knowledgeable. They are often not made by the in-court journalist, but in the course of subsequent editing.

[95] As we have noted neither counsel nor the Judge will usually have the time, mid-trial, to review coverage each night, unless there is an egregious error. Nor will they be likely to do so after the trial has ended.

[96] The present system does not provide for the structured review of compliance with the media rules, or for reporting inaccuracies. A complaint made and dealt with by a Judge during a trial is often a method of resolution. Post-trial the process for complaint might be to the Broadcasting Standards Authority, the Press Council, the Online Media Standards Authority or the Media and Courts Committee. These organisations (save the Media and Courts Committee) are not concerned with monitoring the Guidelines, other than when they equate with the review body's obligations, and we would not expect them to do so.

[97] In contrast, the Media and Courts Committee has the task of monitoring the Guidelines and keeping them up-to-date. However, it does not have a direct mandate to consider complaints, and the Guidelines do not identify the Committee as having this role. It is an informal body with no legal standing, although it has developed into an active co-operative forum where Court and media representatives can meet regularly. It has no powers, or ability to impose sanctions, and its informal and consultative processes do not suit the taking of public action, or the making of public statements. However, it does consider the actions of both the media and the courts that may be causing concern, and informally tries to ensure that the problem is addressed.

[98] A suitable person working in the courts could be given the role of carrying out a review of in-court media coverage during certain periods (we would recommend randomly chosen periods rather than continuous review), and noting any apparent breaches of the Guidelines.

[99] Such apparent breaches would be reported to the Media and Courts Committee. In our view the Committee could have an augmented role of reviewing possible instances of non-compliance with the Guidelines in the event of such a reference. "Accuracy" should be added to the requirements of fairness and balance.

[100] The intention of the Committee reviewing such instances would not be to formally sanction, but to provide an avenue for discussion including with the media organisation involved. The experience of the Committee has been that such an informal method of dealing with complaints has been effective. The Committee includes persons from or who work with the Media Freedom Committee, which represents most media organisations. It is envisaged that media organisations generally, and Judges, could be informed by the Committee if there have been serious breaches of the Guidelines by a media organisation. We see no reason why Judges should not take into account the history of media organisations in courts. An established propensity to breach the Guidelines might result in permission to film or record being denied.[46]

[101] If the present informal procedures adopted by the Committee become less effective with new developments (for example, bloggers) they may have to be reviewed, but we believe they can meet present challenges. We note that the mainstream media organisations remain subject to the jurisdiction and powers of the Press Council and the Broadcasting Standards Authority. The Press Council and OMSA are now admitting bloggers that meet their membership criteria.

[102] We consider Judges are entitled to expect that journalists covering the courts will know the Guidelines and be familiar with New Zealand's court system. A box could be inserted for completion on each extended coverage application form to the

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[46] For an example of where this was considered, see *R v Petricevic* HC Auckland CRI-2008-004-029179, 13 July 2011 minute re media coverage.

effect that the applicant undertakes that staff who will be involved in the in-court media coverage of the case have been trained in their obligations under the Guidelines and the Media Guide and will observe the requirements of the Guidelines. A failure or refusal to give the undertaking may mean such a media organisation will be declined permission to film.

[103] The Courts must work to assist the media to provide accurate and balanced reports of in-court proceedings. The Courts have not always been effective at providing timely access to decisions of public interest. The judiciary and Ministry of Justice have now developed a site on which decisions of particular public interest are intended to be speedily published.[47] More can be done. Sentencing decisions must be published on the site within a few hours of delivery or they will be of little use to the media. Not all Judges will be good at identifying which judgments or sentences are of sufficient public interest to warrant publication on the site. Judges should be encouraged to publish decisions of importance on the site within two to three hours of delivery. Judgments in particular categories of cases could always be published on the site, for example, all sentencings for manslaughter and murder.

[104] There has been a criticism that Judges may not always be familiar with the Guidelines. Some media representatives complain that judicial decisions on media coverage can be based not on the Guidelines but on the Judge's perception of what may or may not be good television and/or a dislike of cameras in court. The Institute of Judicial Studies already includes familiarisation with media issues as part of the judicial intensive programme for Judges, and runs media seminars. The Institute is now introducing more regular and detailed seminars, and the provision of information and material to Judges on the Guidelines and media coverage. We respectfully endorse this development.

[105] We note that over the last two years, members of the Media and Courts Committee have had informal meetings at the three main High Court registries between the judiciary and reporters who regularly attend court, to inform and discuss matters of mutual interest. These have led to a better understanding of the respective

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[47] Courts of New Zealand "Judicial Decisions of Public Interest" <https://www.courtsofnz.govt.nz/from/decisions/judgments>.

roles of the Court and the media, and been regarded as successful in assisting a smoother interface between the two.

[106] We recommend therefore:

(a) that "accuracy" be added to fairness and balance as a requirement of the Guidelines.

(b) when a media organisation applies for in-court media coverage it undertake that its staff have been properly trained to meet their obligations under the Guidelines and will do so;

(c) a review procedure be set up so that in-court media coverage is scrutinised, and any significant breaches of the Guidelines noted and reported to the Media and Courts Committee;

(d) the Media and Courts Committee to have an expanded role of considering any apparent breaches, and in appropriate cases informing Judges and media organisations of those breaches.

(e) the judiciary and Ministry of Justice in consultation with the media further develop timely access by the media to judicial decisions including posting decisions of public interest on the Courts of New Zealand website;

(f) the Institute of Judicial Studies continues to develop additional presentations for Judges which deal with the Guidelines and the relationship with and an understanding of the media;

(g) the informal meetings between Judges and reporters that now take place at the courts for a discussion of matters of mutual interest become regular events; and

Matters of process

Trials of intense media interest

[107] Most trials, criminal and civil, attract no media attention. Some will attract journalists only from the print and radio media, who in a long trial tend to be selective as to when they attend. The number of cases where there is television coverage are limited, and the number where there is television coverage through the whole trial more limited still. TVNZ alone estimates that on average it will film in court about 20 times a month. Unfortunately there are no statistics available as to exact frequency.

[108] High profile trials can attract numerous members of the media. There can be more than the press benches can accommodate, and there can be a need to clarify procedures, such as when and how filming will take place.

[109] We recommend Judges meet with members of the media in high profile trials well before the trial begins. We recognise that already this often happens. We propose a media guideline to this effect, while accepting that the decision whether to hold a conference will be up to the individual Judge. Where the advance publicity and interest at callovers seems to indicate a high degree of media interest, the Judge could have a conference with accredited media and counsel to discuss the issues that are likely to arise. This should be ideally two to three weeks before trial. This should enable most in-court media issues to be resolved well ahead of time. We would expect the media and counsel to raise with the Judge at such a meeting all issues that can be anticipated about the trial coverage. By this means the media issues that so often arise during the course of the trial can be dealt with pre-trial, and the Court process can operate more efficiently without delays.

[110] In trials of intense media interest the Ministry of Justice should nominate one or more media liaison persons who are members of the relevant court staff, who will be the exclusive contact point with the media before and during the trial. Such staff may need some training. There are substantial advantages to the media, to the courts,

and to the Judges in such an arrangement. We recognise that this has now occurred in some courts, but recommend that this become established practice in all courts.

Restricted pre-trial coverage

[111] Preliminary callovers in criminal trials after the first appearance are not well suited to being filmed or recorded. Generally nothing of substance is covered in such a callover. The public can have little interest in what happens as it is entirely routine. They may have an interest in the outcome insofar as further dates are allocated, but that can be reported without filming or recording.

[112] Similarly, filming or recording of callovers also may be limited. Those occasions are essentially what have been called "chambers" hearings where there is an element of informality, and an ability for the Judge and counsel to have a frank exchange. Judges will often wish to express themselves freely to counsel in an effort to obtain agreement on an issue. Counsel will often discuss matters with each other before the Judge in the same informal way. It places a constraint on the informal nature of these hearings, to have them filmed or recorded.

[113] There is generally limited demand for in-court media coverage prior to the trial. In civil cases, the Courts will be sympathetic to requests for a degree of privacy in the lead-up to trial, when the parties are often trying to settle the case, and issues are still being clarified. The position is more difficult in relation to criminal trials. Some such hearings may be significant public events, for example, the entry of a plea, where media coverage is properly allowed. However, many hearings prior to trial, such as case management hearings or hearings where challenged evidence is discussed and ruled on, should not be publicised for fair trial reasons. There is a danger also the defendant's who face the prospect of being filmed, will not appear.

[114] Short notice applications create a significant unwelcome pressure on Judges and court staff. Understandably Judges will not wish to compromise fair trial issues at this early point in the trial process. It may be that Judges will not have sufficient information on which to be sure that fair trial rights would not be compromised if

extended media coverage is allowed. For this reason it may be more common at this early stage for extended media coverage applications to be refused.

[115] For instance, at a first appearance the Judge may be told by counsel that identification might be an issue at the ultimate trial. The publication of a photo or film of a defendant may compromise identification evidence at trial. In those circumstances most Judges would refuse extended media coverage. By the second appearance, if counsel indicates that there are no longer identification issues and it is intended that the defendant enter a plea, then there may be no impediments to an application for in-court media coverage being granted.

[116] We recommend that there be caution in allowing pre-trial in-court media coverage in relation to:

(a) the case review hearing;

(b) the trial review hearing;

(c) the hearing of any pre-trial challenge or applications; and

(d) any hearing in court for chambers.

[117] This approach would reflect the current practice. We do not see a need for a guideline in this area as it is best left to the discretion of the Judges who are presiding over the hearings. We can see individual List Judges adopting particular practices for list courts in which in-court media recording or filming is not allowed.

Syndication

[118] Mainstream media may have arrangements with their counterparts in other parts of New Zealand and overseas with whom they routinely exchange news content (video, photographs, audio and text). This should be signalled in the application form. It is likely to be permitted providing it is to bona fide news organisations and news agencies who are accountable to the Broadcasting Standards Authority or Press

Council. If it is one of those rare cases where there is international interest in the record, that will have to be dealt with by application to the presiding Judge.

The application form and timing

[119] Currently an application for in-court extended coverage must be made at least 10 working days prior to the hearing.[48] Late applications must have an explanation.[49] A Judge may decline an application on the papers if it is late.[50]

[120] Problems arise with the 10 day rule. Late applications are relatively common. Applications may have been refused solely because of lateness. Some of the submissions from members of the media have sought a reduction of the time for filing. We accept that media organisations may not make the decision to commit resources to covering a hearing until relatively late in the piece.

[121] However, if the courts are to serve the applications on counsel or the parties, it is not possible to accommodate truncated time frames. As a matter of practicality the courts need the 10 days to ensure service in a reasonable time. a proposal in the draft report that the media take over the service function was not considered practicable by the Media Freedom Committee.

[122] We recommend that the 10 day period for making applications be reduced to five working days. This would require a response by counsel for the prosecution and defence as to whether they oppose trial coverage two days prior to the trial. Further, counsel would have to obtain instructions from each witness as to anonymity (although this need not be finally decided until shortly before the witness gives evidence).

[123] This reduction in time may place some pressure on counsel to get instructions from their clients within the three days. Where coverage is opposed and a hearing suggested there will be limited time before the trial for a hearing.[51] We propose that

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48 In Court Media Guidelines 2012, cl 6.2.
49 Clause 6.3.
50 Clause 9.1.
51 Clause 9.3.

all decisions may be made on the papers, although the Judge may direct a hearing if a party seeks it, and it is considered appropriate.

[124] In the original In-Court Media Guidelines there was a provision for a four day notification period. This was extended to 10 days because of practical difficulties arising from the short timeframe. Some counsel complain that applications for in-court media coverage are not served by the media on them or are served very late. The lateness restricts their ability to talk to their clients and witnesses.

[125] There is a simple solution to this problem. All counsel involved in the trial should file email addresses at the outset. Before media organisations can file an application for in-court coverage, they must certify that they have served electronically the prosecution and defence lawyers involved. They will be able to get their electronic addresses from the court. This should ensure appropriate service prior to filing, and will mean that the shorter filing time will not prejudice counsel. With this reduction in time to five days, the media will need to appreciate that Judges may be less inclined to allow late applications.

[126] We accept that the present two page form requires unnecessary detail and has other inadequacies. A re-drafted form is attached to the new draft guidelines.

Processing applications and hearing applications

[127] Concern is expressed by the media about the way in which courts and the Judges process applications for permission to film or record proceedings. The media say that all too often applications filed on time are either lost by the Court or referred to the Judge too late for adequate consideration (and so the application is refused out of hand).

[128] We consider that the requirement that the media serve the application before filing will speed up the application process. If the time for filing an application is reduced to five days and counsel have three days to respond, then the media application and any responses must be referred to the trial Judge on an urgent basis two working days prior to the trial.

[129] Some of the media have suggested that all applications for in-court media coverage in both the District Court and the High Court should be filed with a particular nominated Ministry of Justice employee for the whole of New Zealand. That person could then ensure that the application was sent to the relevant Judge for consideration and could be the liaison person for the media prior to the application being granted.

[130] We think there is considerable merit in this idea. We recommend the Ministry of Justice investigate such an arrangement, together with the suggestion that there be media liaison registry staff appointed for high profile trials.

[131] Some of the media have suggested that where there is an opposed application and a hearing a Judge should be required to give reasons for granting or refusing of the application. With a reduction from 10 days to five days for the in-court media application and with the response required two days before trial, there will likely be time pressure. While we would expect the Judges will usually endeavour to give reasons where there is dispute about coverage (although they may be short), this is a matter for individual Judges and we do not suggest any guideline.

[132] In summary, we recommend:

(a) the media application form be re-drafted as set out in the draft;

(b) the time to file the in-court media application for coverage of trials be reduced from 10 days to five days before trial with service of the application on affected parties prior to filing and a certificate provided to that effect; other affected times will also need to be shortened;

(c) an application for in-court media coverage for the first appearance of a defendant should be made as soon as reasonably practical;

(d) all applications for in-court media coverage be filed with one staff member who would be responsible for administratively processing such applications and should be the court liaison person for that trial (a

development which we understand has already occurred, at least in some registries); and

(e) consideration be given to designating a Ministry of Justice registry staff member or members to process all applications for media coverage.

Filming particular persons

Witnesses

[133] The submissions from the media have suggested that the idea that the judiciary or senior registry staff can control the filming of witnesses "feels uncomfortably like a form of censorship". The perception can be that the courts are hiding matters. It has been suggested that court coverage at its heart consists of human interest stories, and that "the reality is there would be no point in filming or photography at all if pictures of the people involved are prohibited".

[134] We note that the fact there was by and large no filming of witnesses in the *Pistorius* trial did not take away the human interest. Given that it is up to witnesses whether to elect protection, there can be no question of censorship. There is a real concern that witnesses facing the prospect of being filmed and their image being shown on television or in a still photograph, will be discouraged from giving evidence. Mr Roger Haines QC, Chairperson of the Human Rights Review Tribunal, captured this concern in his submission to the Panel when he said:

> The experience of the Human Rights Review Tribunal is that most witnesses find giving evidence nerve racking and the presence of a camera can be a dangerous distraction. Dangerous in that the ability to concentrate on the questions being asked and on the accurate recollection of events can be jeopardised. In addition, the giving of evidence is for most witnesses a very personal affair. The discomfort of being photographed or filmed while giving evidence and the later publication of those images is seen as a serious invasion of their "privacy". Taking these interests in to account is not inconsistent with open justice.

[135] It is crucial to a fair trial that both the prosecution and defence are able to call what witnesses they say are relevant to their case without the possibility of extended media coverage dissuading such witnesses.

[136] TVNZ suggested that there should be a threshold for seeking witness protection. They said in support of this submission:

> It should always be a balancing exercise for the Judge taking into account the concerns of the witness and whether they are sufficient in the circumstances to override open justice. This would be a fairer reflection of the rights and principles at stake than a simple election without cause.

[137] We are not prepared to recommend any easing of the current right to witness protection. There are two main reasons. First, we are conscious of the need to ensure a fair trial is held. As we have observed this can be compromised if witnesses are hesitant about giving evidence because of their concern about being photographed or filmed and viewed on publicly available media. Lay witnesses are typically at court not because they chose to be but because they have somehow become entangled in a court case. We consider they should be able to choose protection.

[138] Secondly, in longer trials there can be as many as 100 witnesses or more. Many can nominate anonymity. One submitter suggested some form of judicial interrogation of each witness seeking anonymity to see if, in the Judge's opinion, it is justified. We consider this is impractical and fails to address the critical point that if the witness feels in-court media coverage of their evidence will affect the giving of that evidence, then fair trial rights demand protection for them.

[139] We are satisfied the current arrangements relating to witness anonymity are the best balance between fair trial rights and open justice, being conscious that fair trial rights must be protected. As to a blanket prohibition we do not consider this is necessary. If a witness is fairly informed of their right to choose protection but elects not to exercise that right then we do not consider that it is for the courts to impose protection.

[140] This raises the allied question as to whether witnesses are adequately informed of their right to choose facial and voice protection as of right.

[141] We recommend that emphasis be placed on the need for counsel to advise witnesses of their ability to be protected from filming. Where an application has been granted, counsel or the party calling the witness should advise the Court that the

witness understands witness protection and has chosen whether or not to be filmed. This will only be necessary if there are cameras in court. Otherwise, we make no recommendation for any change to the current rules as to witness protection.

[142] Finally, thought must be given to the prospect of orders excluding witnesses being breached by the publication of witness footage. The same problem arises in written reporting of what witnesses say and we do no more than flag the point.

Victims

[143] There is no specific provision in the rules relating to coverage of victims who read their reports in court. We agree that there should be specific provision in the application form if a media outlet wishes to cover a victim reading out their victim impact report at sentencing. We consider the same rule that applies to witnesses should apply to victims. Victims should, as of right, be able to be protected from filming or photographing. But if they choose to allow filming or photographs we see no reason why the rules should restrict the coverage.

[144] We recommend that victims reading their victim impact statements in court at sentencing be covered by the in-court media witness rules.

Persons with name suppression

[145] The media note that where the courts have made orders suppressing the publication of the identity of a defendant, they have typically refused to allow any filming or photographs of the defendant. The media have asked if still photographs could be taken of a defendant in such circumstances on the understanding that while the defendant's identity is suppressed the photos cannot be published unless the order is rescinded. Then, if the suppression order is lifted (as is often the case at the end of a trial), the media will have film or photographs of the defendant that they can be used. They point out that refusing to allow photographs to be taken at the time of the suppression of identity often means when the suppression order is lifted they have no footage, and no opportunity to obtain it.

[146] We have sympathy for the submission, but are concerned at the consequences of an error being made. There must be a risk when photographs that should be suppressed are held by media entities, that there will be an inadvertent dissemination or publication. The Court must retain its discretion in this area to examine the issue in its particular context. A Court could require a written undertaking to the Court from the media representative that the digital record of the photograph is held at a particular place in the media organisation controlled by a person who is aware of the suppression order. But we do not think it desirable to set out any rule or guideline on the point.

Filming of sentencing and verdict

[147] Some of the media submitted that there is uncertainty about the guidelines which prohibit the filming of sentencing and the verdict. They ask if what is intended is to prohibit only the defendant's reaction when the actual sentence is imposed or the whole of the sentencing remarks, and whether the prohibition as to verdict is only the actual announcement of the verdict itself.

[148] The standard conditions presently require the consent of the defendant, and the absence of prohibition imposed by the Judge, before a defendant can be filmed when the verdict is being given. Thus, it will be up to a Judge to set out what parts of the verdict may be filmed, if filming is to be permitted. We would expect that if filming or photographing was prohibited, that would be for the whole of the verdict process, that is, from the time when the Court reconvenes to take the verdict.

[149] As to sentencing, given that leave must be granted, it will be up to the Judge to set out the terms. In some cases filming may be permitted of all aspects of sentencing, save for the actual delivery of the sentence by the Judge at the end of the Judge's remarks.

Should Judges and counsel be able to require protection as of right?

[150] Opposing views have been expressed on whether lawyers and Judges should be able to seek protection against filming or recording. Some lawyers have pointed

out the difficulties of being filmed where they represent an unpopular defendant including potentially compromised trial preparation and being the subject of threats. Some Judges in the past have prohibited filming of themselves.

[151] We do not consider either Judges or lawyers participating in an extended media coverage trial should have the right to protection on request. Both are working in the courts on a professional basis. Both play a pivotal role in the trial. This is a public function for both. While we appreciate counsel can feel vulnerable in high profile trials, that vulnerability is likely to exist whether the trial is covered by extended media coverage or print media alone. Unlike with witnesses, media coverage is unlikely to stop them doing their job. We see no compelling case for protection. We note there is some analogy to be drawn with expert witnesses in court who are also present as part of their professional work. Such witnesses do not have protection rights on request.

[152] Whether protection should be given to counsel or indeed to a Judge in any individual case, will ultimately be for the Judge to decide. There is always a discretion. However, we do not recommend any guideline that gives protection on request. We would expect that the occasions when such protection would be ordered will be rare. We would expect that a lawyer would be granted protection where this is shown to be necessary to prevent a significant risk of harm to the lawyer.

Filming members of the public

[153] The Guidelines prohibit filming or photographing of members of the public in court. The media point out that this rule creates particular difficulties for them. Often when filming or photographing a lawyer or a witness or a defendant there will be members of the public in the background and filming them is accordingly unavoidable. The media have suggested that rather than prohibiting filming or photographing the public the rule should prohibit the identification of members of the public in the film so that when the members of the public are filmed their faces are pixelated. We agree that if their entire bodies are pixelated, then photographs that include members of the public could be permissible. However, we consider that this is a matter best left to the discretion of the trial Judge on application.

Filming of children (under 18 year olds) and persons suffering from a mental disorder

[154] We received a number of submissions on the topic of coverage of children. While recognising that young persons required separate consideration, media organisations and the Crown Law Office were opposed to a uniform or blanket ban on filming young defendants. Organisations such as the New Zealand Bar Association and New Zealand Law Society submitted that such defendants should not be filmed.

[155] The issue of protecting children from publicity has been dealt with specifically by the United Nations in considering rules for the administration of youth justice. It has been said:[52]

> The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

[156] The International Covenant on Civil and Political Rights (ICCPR) provides at art 14(4):[53]

> 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and desirability of promoting their rehabilitation.

[157] The United Nations Convention on the Rights of the Child (UNCROC) also addresses the issue.[54] Article 3 requires that in all actions concerning children undertaken by courts of law "the best interests of the child should be a primary consideration". Article 40 provides:

> 1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner *consistent with the promotion of the child's sense of dignity and worth*, which reinforces the child's respect for the human rights and fundamental freedoms of others and which *takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*
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> ...

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52 *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, A/Res/40/33 (1985).

53 New Zealand ratified this on 28 December 1978.

54 The UNCROC was adopted by the United Nations General Assembly on 20 November 1989 and ratified by New Zealand on 6 April 1993.

> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
>
> ...
>
> (b) every child as or accused of having infringed the penal law has at least the following *guarantees*:
>
> ...
>
> (vii) *To have his or her privacy fully respected at all stages of the proceedings.*
>
> (emphasis added)

[158] Under the UNCROC a child is any person under the age of 18.[55]

[159] The Court of Appeal has endorsed the position of the European Court of Human Rights that children charged with an offence be dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacity during the jury trial process.[56] The added pressure of being filmed and subsequent publication of a young defendant's image is incompatible with those principles. The Court of Appeal has left open whether the absence of suitable measures to take youth into account could lead to an appeal being allowed.[57]

[160] Young people form a special category. The vast majority of young defendants appear in the Youth Court. There they have anonymity. Some submissions distinguished between the jury trial stage (pre-verdict) and sentencing following a finding of guilt. We do not support such a distinction being made. In our view the application of the principles identified above apply at all stages of the process for children.

[161] The ICCPR and UNCROC principles operate strongly against filming children under the age of 18. A young defendant should not be deterred from election of trial by jury (where that right exists) by the possibility of being filmed during the trial where such could not occur if the election was to be tried in the Youth Court. We

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55 Article 1.

56 *R v M [Youth Justice]* [2011] NZCA 673, [2012] NZAR 137 at [43]; *R v Te Wini* [2011] NZCA 405 at [22].

57 *R v M [Youth Justice]*, above n 55, at [47]; *R v Te Wini*, above n 55, at [28].

recommend a guideline that no person under the age of 18 (whether witness or defendant) be filmed without permission of the Judge. It would be an exceptional case where permission was granted.

[162] We did not receive any submissions on the position of defendants who suffer from serious mental health issues, and we do not address that issue in this report. It is an issue that the Media and Courts Committee should keep under review. It may be that media issues as they relate to persons suffering from a mental disorder are best left to the Judge's discretion.

Filming of Corrections officers and contractors

[163] The Department of Corrections pointed out that it is common for Corrections officers to be photographed or identified when a trial is filmed or still photographs taken. The Department observes that officers are not official witnesses and there is no obvious public interest in identifying the Corrections officers who are escorting a defendant. While the Department acknowledge there is a relatively low risk of harm to such Corrections officers arising from the coverage, the Department stated that "it seems preferable to avoid any such risk by requiring that they are not identifiable in any broadcast of the trial".

[164] We recommend that there be a guideline which could restrict the identification of prison officers who escort a defendant at a trial. It should apply not only to Corrections officers but to security contractors who are contracted to have a court role. We agree with the Department of Corrections that there is no public interest in identifying officers and contractors visually: they are not participants in the trial, and are simply there coincidentally as part of their employment. However, a prohibition can add to the burden on a media photographer. Given that officers and contractors are not at high risk and may not object, the onus should be on them to provide an objection in writing to the Court to them being filmed if that will lead to them being identified.

Exhibits

[165] Witnesses often refer to exhibits during the course of their evidence. The media may wish to photograph or film them. However, there is a prohibition on filming or photographing exhibits without the Judge's express permission to use the footage. Often the media will not know what exhibit is going to be produced and cannot apply beforehand for permission to film exhibits.

[166] We do not see that there needs to be any general prohibition on the filming of exhibits, but there must be an order from the Judge granting permission. There are specific rules of court that apply to access to documents and exhibits.

Camera operation

Pixelation

[167] No guideline is required for pixelation. We observe that pixelation of a face may not disguise identity. Identity may be revealed by gestures, body position, clothes, jewellery, voice and other features. Generally pixelation of the whole body and voice distortion is required to disguise identity or protect a witness who seeks protection but is filmed. We do not recommend a change to the guidelines on this issue.

Fixed cameras

[168] Some submitters have supported the introduction of fixed cameras in the courtroom. The proposal is for several cameras each showing a fixed view without changes of focus. For example, a fixed view may be shown of counsel, another of the Judge and another of the witness box. This would involve three cameras. Camera angles and focus would not be changed during the trial, and there would be no close-ups at all. The film would be made available to the public and all members of the media (subject to the 10 minute rule).

[169] An example of this particular form of coverage occurred recently in the trial of Oscar Pistorius in South Africa.[58] We understand that the coverage in that trial was organised and funded by the Court. It is not clear that such coverage is made available for all serious criminal trials in that country. There is already fixed camera coverage in our Supreme Court, and the United Kingdom Supreme Court and Court of Appeal.

[170] There are likely to be logistical difficulties in organising and funding fixed cameras in New Zealand High Court and District Court trials. There would be an issue as to whether the recordings or film made available would be edited in the court in accordance with the guidelines and any directions, or whether all film was made available to the media organisations, for them to edit to reflect the guidelines and any directions.

[171] If fixed cameras were introduced a number of cameras would be required. There would have to be facilities for cameras in trial courts throughout New Zealand. There are many such courts. There may be practical difficulties in accommodating a number of static cameras in most New Zealand courtrooms, as well as funding and organisational challenges, particularly if the editing to meet the guidelines and directions was done by court staff. The task of filming would be more complex than in the Supreme Court because of the filming of witnesses or defendants in criminal trials, the fact that evidence and submissions often gives rise to fair trial issues, and because of the presence of juries. A question arises as to who would be responsible for the capital expenditure and operation and maintenance of the cameras through the trials.

[172] In terms of minimising court disruption, fixed cameras offer a non-intrusive solution. However, the judicial questionnaire did not reveal significant disruption arising from the present procedure of having a single swivelling camera funded and operated by a member of the media. We consider fixed cameras are not essential to ensure proper or fair media coverage or necessary to ensure a fair trial. The single

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[58] *The State v Pistorius* HC South Africa, Gauteng Division, Pretoria CC113-2013, 11–12 September 2014.

camera has been shown to be able to film all of the participants who are able to be filmed, and where necessary and appropriate adjust the focus.

[173] The submissions we have received have not addressed the detail of how fixed cameras would operate in court, and who would fund and operate them. We are unable to see any basis for objection to fixed cameras on open justice grounds provided the cameras show what any member of the public could see. The coverage may be as good or better than moveable media operated cameras. Protocols could be designed to control access to and the use of the footage. This would ensure that the 10 minute rule operated, and that when necessary footage could be withheld from publication. We see this as a possibility that warrants more investigation, with the prime difficulty being resources. We recommend that it receives ongoing consideration.

Live streaming

[174] Live streaming may be an available option, particularly if there are fixed cameras in court. Some media organisations support the concept of live streaming whereby there is film coverage of what is happening in court on a constant basis, subject to the 10 minute delay before it can be published. This was done during the Pike River Royal Commission.

[175] There was not widespread support in the submissions for live streaming. Live streaming will remain an option in certain major cases, and would be considered if an application is made. We note that in the *Bain* case, the original arrangement to live stream was cancelled early in the trial.[59] It would have to accommodate the 10 minute rule.

[176] There have been occasions when there has been continuous filming in a trial by a camera. Judges and counsel and parties need to be aware when cameras are operating, to avoid footage being broadcast which is prohibited or in breach of the Guidelines. An example of this occurred in *R v Banks* when the defendant was filmed

[59] See "Judge stops live streaming of Bain case" (10 March 2009) 3 News <www.3news.co.nz/nznews/judge-stops-live-streaming-of-bain-case-2009031014>.

in a private moment, when the camera was not being controlled by an operator, and it was assumed it was turned off. This illustrates a potential danger arising from live streaming, if the defendant was a person who could be filmed.

[177] We cannot see live streaming becoming the norm under the existing regime where there is a single camera in the care of a professional operator provided by a commercial media organisation. Save for the most high profile trials which only arise occasionally, it is unlikely that the media would be prepared to meet the costs of live streaming. If it was to be implemented in all trial courts, it is likely that it would have to be run and funded by the Courts.

[178] Therefore, the questions already discussed in relation to fixed cameras arise as to who would provide this service, how the costs of it would be met, how cases would be chosen for streaming and how the streamed material would be processed and edited. There would also be the risk that an order excluding witnesses could be defeated if witnesses were filmed continuously. The evidence those witnesses were prohibited from viewing would be available through the live streaming.

Court control of filming

[179] This is related to the previous issue. It would appear that in the trial of Oscar Pistorius the Court controlled the filming. This was from fixed cameras which we understand were controlled from another room. Given the possibility of recording and filming in all New Zealand courts, the costs and resources involved in controlling and editing footage would be considerable as we have previously observed. It is likely that a number of professional camera operators would have to be employed. In contrast, media organisations are experts at filming and reporting. Its operators are professional, and there is no evidence of a failure to maintain high filming quality. The media organisations organise and fund the filming. It is unlikely, however, that such organisations could be persuaded to co-operate and set up and operate fixed permanent cameras in New Zealand courts.

[180] There may also be a concern if the Courts took charge of filming in courts that this might smack of the court seeking to influence what is to be reported. Reporting

may be best seen to be done by representatives of independent news media organisations, and not through the filter of court officers.

Camera pooling

[181] In one submission it was suggested that there be more than one broadcasting camera in the courtroom to facilitate video coverage by, for example, online versions of print newspapers. The suggestion states that in addition to positions being made available for the print media (photographs) and one for broadcasters (video), the emergence and growth of digital media demands a third pool position for digital video. It is said that the video needs for digital media are different to the video needs of the broadcast media. Formats are different, deadlines are different and the ability to share pool content between the two mediums is problematic. A third pool position would resolve conflicts.

[182] We do not recommend a third pool position which would provide a third camera in court. Some courtrooms already struggle with available space where there is high media interest in a trial. Adding a third operated position would be an unwelcome addition to the in-court obligations of the trial Judge. In this electronic age, media organisations who wish to film a trial should be able to adapt their arrangements to fit in with one camera in court, even if they utilise a different medium. The media organisations co-operate at present, and this should continue.

[183] Media representatives will have the ability to take still and moving footage with their smartphones or other electronic devices, but only where that coverage is permitted by the Judge. It may be that technological developments will require more than one camera in court to enable different digital formats to be accommodated. We suggest an amendment to schedule 2 relating to film coverage to recognise a discretion to allow more than one camera in court, although the present expectation that members of the media should take all reasonable steps to cooperate in the fair sharing of a single camera will continue.

Disruption by cameras and camera operators

[184] The current single shared camera currently permitted in courts seems to work well if the camera operator and journalist are sensitive to courtroom etiquette. However, this is not always so. There are complaints of camera operators packing up and leaving and creating a distraction in court. Operators have been seen to act as if the priority of the courtroom process is to provide good footage for the media. It is not.

[185] There is also a need for media representatives to be better educated about the courtroom process. In one of the submissions there was a statement by a reporter expressing dismay at having been sent to the back of the court when the reporter had gone to counsel's bench and endeavoured to fix a microphone that a prosecutor had knocked over, while the prosecutor was addressing the Court. In fact this was a difficult high profile sentencing, and a time of great emotion and gravity. The reporter seemed to assume that the judicial reaction was because the action had been deliberate. It was not that at all. The judicial reaction was a result of the reporter not realising that the uninterrupted and dignified process of the Court in such a situation was far more important than maintaining microphone sound, and for that reason there should have been no interruption.

[186] The priority is the fair and dignified conduct of the Court processes, and media coverage takes second place to that. If a microphone fails while counsel is addressing the Judge, it must be left. The camera operator should not try to adjust it if it disrupts the court.

[187] We consider the problems with camera operators and others failing to understand court etiquette can be addressed. The undertaking provided by applicants may mean this issue is addressed. We recommend also that the statement setting out the requirement of courtroom courtesy at [4.4] of the Media Guide be re-drafted and added as a schedule to the Guidelines.

Facilities in courtrooms

[188] Some of the media complained about inadequate facilities in many courts. For example, only a limited number of courts are equipped with a plug-in central audio system. Television cameras often use the sole "port" and other media have to share. This can affect sound quality. Radio journalists seek more power points near the media bench so that equipment can be recharged without interrupting proceedings. The requirements of stand-alone digital news services may need to be recognised.

[189] We agree that reasonable facilities can be expected in modern courts. We consider the Ministry of Justice should consult with radio, television and print media in an effort to improve the facilities offered in each courtroom, and we are aware that this is starting to happen. The present move to appoint specialist media liaison registry staff could provide the media with a contact with whom to make suitable arrangements.

Close-ups

[190] The use of close-up coverage of witnesses in court cases has been the subject of some criticism. The complaint is that close-ups have been used to emphasise features of in-court events when they are of no relevance to the trial. The close-ups can have a sensationalist purpose, not connected with informing the public of what is happening in the hearing. An example was the footage in the *MacDonald* trial of the hands of a witness in court to show the absence of a wedding ring.[60] This had nothing to do with the issues being traversed in the courtroom, and it was not the type of coverage intended by the reforms. There are other occasions when the camera will focus on certain actions or the particular features of a witness. These may unfairly emphasise these features or an occurrence contrasting a witness's demeanour with their conduct. We can see no legitimate purpose in such selective close-up footage, which goes further than what would be seen by the eye of a member of the public from the back of the court. In extreme situations it can create an unfair impression.

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60 *R v MacDonald*, above n 43.

[191] We recommend restrictions on the filming of close-ups. We accept that there is little point in approving extended media coverage if the accompanying guidelines make the coverage so uninteresting that there is little public interest. But like all coverage, any use of close-ups must be consistent with fair trial rights (fair to both the prosecution and defence)[61] and the goal of informing the public of the court process. The object of allowing in-court coverage is not to entertain, but to inform the public of the Court process.

[192] We accept that within reason close-ups are a legitimate part of television coverage in that they show what is happening in court. For example, a close up head and shoulders shot of a reaction to a question or a reply may be unobjectionable. The witness can be seen, and an overall perspective gained from the combination of head, torso, arms and hands. The viewer's eye can settle on any point of interest, as would happen if the viewer was at the back of the court. We recommend that subject to the Court's general discretion video close-ups should be no closer than of the head and shoulders. For still shots which can more easily be cropped to any shape and are not subject to the constraints of aspect ratio, photographs of the head and neck would be permissible. Filming of particular features such as fingers, hands, mouth and eyes would not be permitted. The Guidelines should be amended to reflect this.

Obscuring faces

[193] The media have asked if Judges could take action to prevent defendants from obscuring their faces in court when extended media coverage has been granted. We do not consider that this form of general direction to Judges is appropriate. Individual Judges will deal with such issues as they think fit. This falls within the general discretion of Judges to control the conduct of their courtroom.

Summary of recommendations as to how cameras are used

[194] In summary we propose:

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61 In-Court Media Guidelines 2012, cl 14.2(b).

(a) camera to be turned off during adjournments and when camera operators are not present;

(b) a restriction or formula to restrict close-ups in court;

(c) only one video camera in a courtroom from which any accredited media may take moving footage, unless in exceptional circumstances a Judge orders an additional camera;

(d) moving footage to be taken only by that camera, and not by photographers in the media benches unless permitted by the Judge; and

(e) further consideration of fixed cameras and live streaming.

Pre-appearance footage

[195] The Auckland District Law Society expressed concern about what it called pre-appearance footage; that is, footage being taken of a defendant prior to their first appearance in court (for example, leaving the police station after arrest walking into the courthouse). This, the Auckland District Law Society said, renders most suppression applications worthless and jeopardises the defendant's right to a fair trial.

[196] We do not make any recommendation to control this conduct given it is out of the courtroom. We agree that this conduct must be stopped if it results in publication in breach of suppression orders.

[197] Unreasonable behaviour by a media representative outside the courtroom can result in the representative or organisation being barred from the courtroom. This is on the basis that a central reason for allowing filming in the courtroom is to prevent persons being placed under pressure by the media outside the courtroom. If a media organisation is not respecting that goal, it may lose the concomitant right to film or record in Court.[62] It may also amount to contempt of Court.

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62 *R v Petricevic* HC Auckland CRI-2008-004-29179, 13 July 2011.

Radio in courts

[198] There is anecdotal evidence indicating that perhaps because of the lower costs of production, radio coverage of court cases is more detailed and can present more extensive recordings than film. To the Panel's knowledge many of the problems that arise from filming in courts do not arise when there is recording for radio purposes.

[199] If fixed cameras or live streaming became a feature of New Zealand courts, it might be the rules relating to radio recording may be changed. In the absence of such a development, we do not consider that there is a need for any particular change to the rules in relation to in-court recording for radio, save for those that arise incidentally from these recommendations. Undoubtedly some recommendations such as a more limited role for filming or recording pre-trial matters could affect radio recording.

Constraints on use of footage: The 10 minute rule delaying coverage

[200] Some of the media criticised the 10 minute rule, and suggested that the rule is unnecessary.

[201] In our view the rule is important. A meaningful check on actual publication gives Judges and counsel the opportunity to consider evidence as it is adduced, and decide on whether suppression is appropriate in a measured way. We are aware of numerous instances when that delay has been critical to give a Judge time to stop an otherwise potentially disastrous publication. A short delay is a small price to pay for in-court coverage. We recommend that the rule be maintained.

A rule requiring coverage for at least two minutes

[202] When the In-Court Media Guidelines were first introduced they required at least two minutes coverage of any audio or television film item. Subsequently that rule was abandoned. We invited feedback on whether the rule or a variation of the rule should be reintroduced. There was limited support amongst responders for reintroduction. There were two reasons primarily suggested to support re-introduction, first, it might avoid short segments of coverage which could give a

misleading impression and, second, it might encourage more balanced coverage on each day of the trial.

[203] We do not consider a two minute rule will achieve either of these outcomes. Requiring two minute coverage would not prevent a series of short segments of film being shown of the trial on any particular day, which might well show the case of the particular party calling evidence on that day. It is simply not possible to achieve a balance between the two sides in litigation on any particular day in a long trial. In a criminal trial days may be taken up by prosecution or defence evidence. Daily coverage in such circumstances will not be balanced in the sense for presenting both sides. Balance in a trial should be assessed by considering the overall coverage of the trial. It could not sensibly be a day by day assessment.

[204] Currently average video coverage per news item is somewhere between one and a half and two minutes. Some days there will be more interest to what has gone on in the courtroom than others. We do not see that the two minute rule is likely to improve media coverage when assessed against the reality of the courtroom process. If the coverage is misleading then this would be in breach of the Guidelines and action could be taken by the trial Judge, or subsequently by the monitoring group.

Historic footage

[205] At present the standard conditions provide that film must not be used other than in the programme or website nominated in the application form while the trial continues.[63] The Guidelines provide also that the media must maintain a copy of all film and audio recordings taken at a hearing, and must supply a copy of them to the Court if requested by the Judge.[64] The present practice is that media organisations must not make film, photographs or recordings available to third parties without specific permission from the Court. For the avoidance of doubt we propose making express provision for this in the schedules.[65]

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63 In-Court Media Guidelines 2012, sch 2, [15]; sch 3, [11]; sch 4, [8].
64 Schedule 2, [14]; sch 4, [7].
65 See proposed draft sch 2, [16]; sch 3, [12]; sch 4, [8].

Other courts and tribunals

Courts

[206] The Guidelines have provided for a particular procedure for non-jury criminal trials and hearings in the District Court. There is a truncated and different procedure for those trials and hearings. It is proposed that this remain in place.

[207] We do not address whether the Supreme Court Media Guidelines 2004 and the Environment Court In-Court Media Coverage Guidelines 2011 should be changed as the focus of our review has been the High Court and District Court. We would recommend that where possible there be consistency on dealings with the media in New Zealand courts.

Application of the Guidelines to other tribunals

[208] Roger Haines QC pointed out that the existing Guidelines make no reference to administrative tribunals, save for the Waitangi Tribunal. Mr Haines suggested that it be made clear that the Guidelines apply equally to administrative tribunals (to the degree allowed by the particular statutes), and that they can be suitably adapted by the particular tribunal or presiding officer. We agree, although we think it should be left to the particular tribunal to make the decision to adopt the Guidelines. They may not suit all tribunals. We would propose that it be stated that tribunals are invited to consider whether they wish to adopt them in the interests of conformity.

[209] **Media Review Panel**
Justice Raynor Asher, Chair
Justice Ron Young
Judge Russell Collins