Reporting on terrorism cases
from open justice to closed courts

By Lawrence McNamara

The principles and practice of open justice mean that all of us should ordinarily be able to be present at court proceedings, but it is largely through media reporting that the public gets to know what happens in our courts.

Of course, what we get to know is mediated, and sometimes dictated, by any number of things that have little to do with open justice: editorial choices, deadlines, competing stories, resource limits and commercial concerns among them. Nevertheless, there is a crucial public interest in media access to the courts. It is in the courts that information is elicited, exposed and tested. That information cannot be controlled by spin doctors who craft and shape information for media and public consumption. The rules of evidence govern what is revealed, and these are applied by an independent judiciary. This is especially important when an arm of government is involved; court reporting is a crucial avenue for public knowledge about what governments do.

Terrorism cases invariably raise issues of public interest and will almost certainly have involved several agencies of government, including police and security authorities. As such, open justice considerations in these cases should be a very high priority. However, these same considerations are complicated by the fact that some evidence presented in court may affect national security if it is made public. This article looks at how the media is affected by the way that the legislature and the courts are presently balancing openness and secrecy in terrorism trials. Drawing on interviews with around 20 journalists, media lawyers and criminal lawyers, it outlines the ways in which reporting on terrorism cases has in the last few years been increasingly affected by national security legislation, and identifies some of the implications for open justice and security.

REPORTING TERRORISM CASES: THE LEGAL FRAMEWORK

A commitment to open justice does not mean that there is, or should be, unrestricted reporting. On the contrary, a wide range of laws limits reporting in different ways because there are other important commitments in the justice system.

The laws of *sub judice* contempt perhaps provide the main form of regulation. The basic facts associated with arrest and charge can be reported, but nothing can be published that may prejudice a trial. Some prejudice to the administration of justice may be permissible where a competing public interest outweighs it. But this public interest defence is limited.[1] This enables limited reporting of events and allegations at the time of arrest, but is still approached cautiously. Once a matter reaches trial, the media may report evidence given in court and may be able to access a wide range of documents associated with the case, including indictments, briefs of evidence and witness statements. During a trial, material cannot be published if it was not heard by a jury or if it has been suppressed by order of the court – and suppression orders are being used increasingly – but publication would usually be permitted once the trial has concluded.

However, while *sub judice* laws restrict publication, they do not limit access to proceedings. But where national security matters arise, the position may differ. Here, judges may close courts, and have done so in recent terrorism cases.[2] However, open justice must be considered and Bongiorno J in the Victorian Supreme Court recently stated that, 'The Court will maintain its vigilance to ensure ['protective orders'] are never unreasonably or unnecessarily applied and of course the press interests can always seek to be heard on any occasion on which [such orders] are sought to be invoked.'[3]

This established framework applies to terrorism cases as it does to any others, but reporting in these cases is also affected by the suite of counter-terrorism legislation that has been enacted since 2001.[4] Australian counter-terrorism laws have tended to place great importance on secrecy and control of information by the state. As several media organisations have argued, the laws have the potential to shield governments from public scrutiny in a wide range of ways.[5] Where court reporting is concerned, the most important statute is the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) (the NSI Act). This adds a further, and potentially very restrictive and chilling, layer of regulation to terrorism reporting. The rules and practices under the NSI Act are especially important, not only because

they are quite different from traditional *sub judice* contempt laws in their scope and rationale, but also because, among all the counter-terrorism laws, they have had the clearest and most direct effects on the media and open justice.[6]

THE *NATIONAL SECURITY INFORMATION ACT*

Defendants will ordinarily know all the evidence against them. In circumstances where a government does not want evidence revealed to the defendant, it may seek a ruling that the evidence will not be admissible on the grounds that it would prejudice national security.[7] However, without evidence the charges against an accused cannot be proved, or the trial may be unfair to the accused.[8] The unpalatable alternative would be to withdraw all or some of the charges. Rather than risk this, the Commonwealth enacted the NSI Act with the stated objects being 'to prevent the disclosure of information ... where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice'. The effect is that a trial can proceed even where the accused will not have access to all the evidence relied on by the prosecution.

The NSI Act establishes a complex and cumbersome process. First, where the prosecutor or defendant intends to rely on evidence that they believe may 'relate to' or 'affect' national security, they must notify the Commonwealth attorney-general and the court. The attorney-general must then evaluate the extent to which the evidence 'is likely to prejudice national security', which is defined to mean that 'there is a real, and not merely a remote, possibility that the disclosure will prejudice national security'.[9] If the attorney-general's view is that the test is satisfied, s/he may issue a certificate under which the court will be asked to rely on a summarised form of the evidence, or a document with information deleted from it, or a witness who cannot be called.[10]

Following the attorney-general's decision, the court then hears argument about the extent to which the attorney-general's view (expressed in the certificate) should govern the extent and manner of disclosure of evidence in the court. Under s31, the court can decide to prohibit disclosure, permit some disclosure, or permit full disclosure. In making its determination, the court must consider:

(a) whether, having regard to the attorney-general's certificate, there would be a risk of prejudice to national security [if the information was disclosed in court]; [and]
(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing including, in particular, on the conduct of his or her defence; [and][11]
(c) any other matter that the court considers relevant.

The first of these factors must be given the greatest weight.[12] The court will be closed during these hearings.[13]

Media organisations face two significant problems in these circumstances. First, while the court may allow them to make submissions regarding the way that evidence should be dealt with, it will be almost impossible for those submissions to get to the heart of the issues (let alone be persuasive) because the media's lawyers are not allowed to be in court when argument is heard.[14] Only the prosecution, defence and attorney-general will be able to make informed submissions. In 2006, several media organisations argued unsuccessfully that their exclusion from the court breached the implied constitutional freedom of political communication.[15] While the constitutional issues have apparently been put to rest, it is still early days with regard to the interpretation and application of the law, and the willingness of courts to hear media submissions even in the absence of a right to make submissions. Secondly, even where submissions might be made effectively, the legislation does not identify open justice as a factor to be taken into account. It might be raised under the third element of s31(7) as 'any other matter', but the court is not compelled to consider it. Moreover, the scales are weighted in favour of the national security interest, which would make it more difficult still to persuade the court that open justice should prevail.

The NSI Act also provides an alternative path that potentially limits access to information even more. Under s22, the prosecutor and defendant 'may agree to an arrangement about any disclosure, in the proceeding, of information that relates to ... or ... may affect national security'. The court can make an order that gives effect to that agreement. An agreement may be far more restrictive than the court would order, were disclosure issues contested. However, the court may decide for any number of reasons >>

that the agreement is acceptable. Trial management could easily and rightly be among these reasons because of the complexity and time-consuming nature of the certificate procedures.[16]

By June 2008, the NSI Act had been invoked in proceedings involving 28 defendants, as well as in one application for a control order.[17]

THE MEDIA EXPERIENCE IN TERRORISM TRIALS

While the scope for restrictions is clearly wide, to what extent and in what ways do these restrictions play out in practice? Interviews with journalists and lawyers suggest, first, that formal restrictions are more prevalent and, secondly, that informal relationships are increasingly characterised by a lack of openness. Both affect the coverage of terrorism trials.

The closure of courts under both established powers and under the NSI Act has been a concern. No interviewees argued that exclusion of the media was necessarily inappropriate or always unjustified. On the contrary, it was accepted that 'there will be times when the media or a party even, shouldn't be able to be involved – it sort of defeats the purpose if they are'.[18] However, there was a clear feeling that applications for court closure were at times used strategically by police to ensure that no media were present at the hearing, thereby forcing the media to rely on police statements.

There was discontent with the NSI Act procedure, which denies the media a place in the process and excludes them from hearings. This was seen as an unjustifiable and inappropriate impediment to the media's ability to argue effectively in the public interest. Media lawyers argued that while the exclusion of journalists was one thing, there was no good reason to exclude the legal representatives: 'We are officers of the court, we understand our obligations to the court, we are bound by them. The chances of us saying "We understand what the judge has said, we understand what the Act says, but we're just going to do the opposite" – that's just not likely.'[19]

The s22 provision enabling the prosecution and defence to agree on the way evidence will be managed was also criticised. Although there has been some defence support for the media's criticisms of the legislation,[20] media lawyers saw the parties as being 'completely preoccupied with the form in which evidence is to be presented to the other side and to the court.' For the parties, there is good reason to reach an agreement: it helps the prosecution keep information secret. Defence lawyers – while they 'don't like using it [and] don't want to have to sign up to it' – have 'clients who have been in custody for a year or two. [A refusal] to sign up or [a] challenge [to] the legislation means their trial is delayed and they're in custody for even longer.' In the interviews, the media criticisms were of the legislation rather than the lawyers; there was an acceptance that the parties' lawyers had obligations to act in their clients' interests but 'trying to put a blanket order over the whole proceedings' was not seen as being in the public interest.

It is difficult to predict how any particular evidence will be dealt with under the determination process, or whether courts will approve proposed agreements: 'It can be a bit of a lottery [as to how the judge decides]. It can depend on all manner of [their] prior experience and prior relationships with barristers, or with the media.'[21] Experience so far has varied, but most interviewees thought judges have not closed courts without seeking good justification, although none were sanguine:

> '[The judge] I thought was very, very robust in making the government explain why, if they wanted the court shut. [But] what if it was someone who hated the media and didn't give a toss about openness or accountability? … Personality becomes a very big factor.'[22]

The media experience in terrorism trials is affected not only by the formal operation of the laws but also by journalists' informal relationships with lawyers and court staff, as well as relationships between lawyers. Even at its most straightforward, court reporting has inherent challenges: it is 'a bit labour intensive …. You don't necessarily get people ringing you up with press releases. If they don't want to talk to you it can be hard to get them to talk to you.'[23] Access to information depends on good relationships, even where there are no technical restrictions on obtaining or publishing the information. Court staff and lawyers are busy, and lawyers will almost always exercise an innate caution that ensures as little information about their client as possible is made public, especially if they are uncertain how information will be used. Even journalists with good contacts found terrorism cases 'tougher than routine'.

A tension between lawyers has become apparent, observed even by the courts:

> 'Something of a hostile attitude has emerged between the Commonwealth and the respondents. The respondents consider that the Commonwealth overstates its position on national security matters. The Commonwealth suspects that the respondents do not have a sufficient regard for matters of national security.'[24]

The relationships between lawyers have become very important, as each side wants to ensure the other is aware of and comfortable with any media contact:

> 'There's a lot of sensitivity about making sure everyone's informed. … Normally [you] don't have to have a lot of argument about it when you are asking basic questions. But [in terrorism cases] everyone's gone very sensitive about it and making sure that they are seen to be doing the right thing. … There's a heightened awareness of making sure it's all done the right and proper and official way.'[25]

The problem is accentuated when prosecuting lawyers are from the Commonwealth DPP and (unlike their state counterparts) rarely have established relationships with regular reporters in the criminal courts. It is perhaps unsurprising, then, that lawyers are reluctant to speak. One journalist gave the example of a prosecution lawyer who:

> '…wouldn't even give me the first name of [the] barrister, saying that [s/he's] not allowed to talk to the media, and when I explained that "I'm not looking for comment – I'm just trying to get the spelling right", [s/he] said, "You're lucky I'm even talking to you".'[26]

Is open justice in terrorism trials in danger of disappearing? The overwhelming impression from the interviews is that this is indeed a genuine concern. One lawyer said that, 'The routine order being sought is … that all security-sensitive information be heard in closed court. That is now the default set of orders.' The substance and operation of the laws gave rise to the perception that whereas suppression is 'not meant to be the norm' and a case must be made for matters to be suppressed, 'the terror rules almost make a different assumption – you've almost got to say why it is we *should* be allowed to publish. It almost reverses the onus.'

IMPLICATIONS AND THE NEED FOR REFORM

A senior media lawyer summarised the effects of the NSI Act on court reporting: they have had 'a huge impact'. What lessons and implications can be drawn from the experience so far?

It may be wise for media organisations to commit further resources to court reporting, with a view to ensuring that there are regular journalists there with good contacts. However, it is clear that the problems do not principally flow from a lack of resources but, rather, from legislative and systemic limits on access to information. Among these, the nature of the trials and the sensitivity of lawyers may be very difficult to overcome. The natural caution of lawyers and the desire to ensure that everyone is informed about what information is provided to the media should not mean that information is unnecessarily restricted by tacit or express agreement.

While courts are alert to the ways in which the relationships between the parties' lawyers can affect the conduct of the case, they also need to be aware that those relationships can have consequences for the media coverage and the public's knowledge of what goes on in terrorism trials. In particular, the present state of relationships seems to limit information that is not formally restricted and that courts would not ordinarily restrict. Given this context, the courts should be willing to ensure that whatever information can be made available to journalists is in fact made available.

There is a strong case for legislative reform to the NSI Act. At the very least, open justice needs to become an express consideration in the management of evidence under s31 determinations, and in the approval of s22 agreements. ■

Notes: **1** *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242; Hinch v Attorney-General (Vic) (1987) 164 CLR 15. **2** *Crimes Act 1914* (Cth) s85B; *Criminal Code Act 1995* (Cth) s93.2; *R v Lohdi* [2006] NSWSC 596, affirmed in *R v Lohdi* (2006) 65 NSWLR 573, [2006] NSWCCA 101; *R v Benbrika, Abdul Nacer & Ors (Ruling No. 1)* [2007] VSC 141. See, generally, *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47. **3** *R v Benbrika, Abdul Nacer & Ors (Ruling No. 1)* [2007] VSC 141 at [18]; see also *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 24; *R v Lohdi* (2006) 65 NSWLR 573, [2006] NSWCCA 101, esp [10], [24], [27]-[28]. **4** See especially *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth); *Anti-Terrorism Act 2005* (Cth); *Anti-Terrorism Act (No. 2) 2005* (Cth); *ASIO Legislation Amendment (Terrorism) Act 2006* (Cth). **5** J Herman (ed), *State of the News Print Media in Australia 2007: Supplement to the 2006 Report*, Australian Press Council, Sydney, 2007), 59-64; Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, Australia's Right to Know, Sydney, 2007. See also C Nash, 'Freedom of the Press in the New Australian Security State' (2005), 28 *UNSW LJ*, 900. **6** For a more complete account, see L McNamara, 'Closure, Caution and the Question of Chilling: How Have Australian Counter-Terrorism Laws Affected the Media?' (2009) 14, *Media & Arts Law Review*, 1. **7** *Evidence Act 1995* (Cth) s130. **8** *R v Lappas & Dowling* [2001] ACTSC 115. **9** NSI Act, ss17, 26. **10** *Ibid*, ss26-7. **11** A 'substantial adverse effect' is defined in s7 as meaning an adverse effect that is 'not insubstantial, insignificant or trivial'. **12** *NSI Act*, ss31(8). **13** *Ibid*, s29(2). **14** *Ibid*, s29(2). **15** *R v Lodhi* [2006] NSWSC 571 at [61], [67]-[72]. It was also unsuccessfully argued that the Act was unconstitutional because it established procedures that disrupted a trial so much that the accused could not receive a fair trial: [56]-[57], [63]-[66]. **16** *R v Khazaal* [2006] NSWSC 1353 at [85] and generally at [83]-[95]. **17** *National Security Information (Civil and Criminal Proceedings) Act 2004 Practitioners' Guide*, Attorney-General's Department, Canberra, 2008, 5. **18** Undisclosed subject interviewed by author. **19** *Ibid*. **20** *R v Lodhi* [2006] NSWSC 571 at [62]. **21** Undisclosed subject interviewed by author. **22** *Ibid*. **23** *Ibid*. **24** *R v Khazaal* [2006] NSWSC 1353 at [121]. **25** Undisclosed subject interviewed by author. **26** *Ibid*.

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