Publicity and Children in Queensland Courts

By David A. Anderson
(Senior Court Reporter for the Brisbane Telegraph. Mr. Anderson is a member of The Australian Crime Prevention Council.)

Impartiality need not imply indifference. The former is a quality expected of and demanded of all those concerned in the administration of justice.

The latter is an absence of concern for the plight of others, and, it is hoped, something which will not be found in those whose function it is to administer justice.

Although no official position and having no official or legal standing, the professional court observer (a journalist assigned to report court proceedings) performs an integral role in the administration of justice. To perform his role, he also must possess the quality of impartiality and in him also there should be found no indifference. For through this professional observer, publicity, an ingredient essential to justice, is given practical effect.

This ingredient has been hailed as a cornerstone since British justice moved our of the Dark Ages. Legal writers for centuries have rated the role of publicity highly in the administration of justice. In the Privy Council in 1913, Lord Shaw of Dunfirmline quoted freely from these sources in the case of Scott v Scott:

> "Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the spur to exertion and the surest of all safeguards against improbity."-

Courtroom doors were thrown open to the public so that proceedings could be taken into the light of openness out of the darkness of secrecy in which "sinister interest and evil in every shape have full swing", The case of Scott v Scott was seen by Lord Shaw, Earl Loreburn and Lord Atkinson as a retrogressive step threatening to undermine the whole system of justice and shift foundations of freedom from rock onto sand.

The petitioner in an undefended nullity suit had obtained and distributed to friends, copies of the transcript of the proceedings of the case which had been heard in camera, and judgment was passed on her for doing so. On appeal, the Privy Council held that there had been no jurisdiction in the first instance to hear the case in camera, and even assuming that there had been, it did not prevent the subsequent publication of the proceedings.

Lord Shaw said if the judgment were allowed to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence forever the voice of the critic, and hide the knowledge of the truth. The principles of this famous case have been adopted and followed in courts of justice since. Because of this well-established principle, courts have been unable lightly to prohibit the publication of proceedings.

At least, that did apply until Section 138 of the Children's Services Act was penned in 1971. Since then, this section has been debated in Parliament, criticised by judges and lawyers in open court and has been the subject of numerous submissions and the cause of many delegations to the appropriate authorities. Still it has defied attempts to have it amended.

Shortly put, the section states that in any case in which a child is concerned as a defendant or as a complainant, no report shall be made of the proceedings or of any part thereof, save on the order of the court. Section 138 (1)(b) states that even when a report is allowed to be made, it shall not contain any particular which is likely to lead to the identification of the child, unless there is a separate order from the court.

The expressed intention of this Section is an admirable one. It is the protection from publicity of innocent children involved in court cases. The intention, extended further to the protection of the perhaps not-so-innocent children involved in court cases, is understandable, and, it could be argued, is highly desirable.

If the practical result of the application of the Section were simply and soley to give effect to that intention, there could be no justification for dissatisfaction. But, no matter how admirable the intention of this section might be, its effect (particularly in view of the above stated principles of justice and publicity) is scandalous.

For not only does this piece of fairy-tale legislation protect the innocents, it protects the beasts who commit upon innocents, the gravest of crimes short of murder and manslaughter, (assuming, that is, that the body of a murdered

child is incapable of being further concerned). And if that were not serious enough, the protection is extended to those adults who commit crimes, no matter how grave, in the company of children.

In the Queensland Parliament on September 1, 1976, when the matter was raised at my request to a member, the then Minister for Community and Welfare Services, the Honourable, the late Mr. Herbert said:

> "The obvious intention of the section is to preserve the anonymity of a child involved in a case either as an offender or a complainant. It will be seen that the emphasis is upon protection of the child, and any incidental protection of an accused person is only because of that fundamental purpose."

So it appears to be an accepted situation that Section 138 does afford protection to an accused person, even though, perhapds it may be only an unfortunate, incidental and unintended by-product. But, though this "incidental protection" afforded to those who least deserve it is an unfortunate by-product of the Section's operation, it is not an unavoidable by-product. The injustices while result, can be none-the-less serious in that they can be said to stem from a most commendable "fundamental purpose" – particularly if they can be avoided.

In theory, reports may be published of all cases involving children, provided, of course, that courts permit such publication. The means of obtaining this permission in such cases, however, presents some rather complicated and embarrassing problems for those left with the responsibility of seeking it. On the practical effect of the Section Mr. Justice Hoare said in the Court of Criminal Appeal on February 2, this year:

> "No doubt the Legislature intended by amendments to Section 138 to enable reports to be made. But the practical effect of it has not changed very much. Unless the attention of the trial judge is drawn to the provisions of Section 138(1) and he gives proper consideration to the effect of this Section, there is still no report."

In the same case, Section 138 came under considerable scrutiny and it was the topic of a lengthy discussion as the appeal arose from a case in which a child was a complainant. The Chief Justice, Sir Charles Wanstall said:

> "Section 138 (1) has undesirable effects in the administration of justice . . . It is high time this Section was looked at."

Mr. Justice Hoare expressed his agreement and added:

> "As the Chief Justice pointed out the actual operation of this Section is such that the public just doesn't know what goes on."

In this particular case, although these and other remarks concerning Section 138 were made in open court, and in my presence, no report could be made to bring them to the attention of the public. At least, not then, for judgment was reserved and no order had been made. So notes were retained and the day of the court's judgment was awaited.

Both the Chief Justice and Mr. Justice Hoare had expressed opinions that the operation of the Section often had undesirable results . . . one of them being that the public just didn't know what went on. When judgment was handed down in the appeal, the court unwittingly provided practical support for that opinion, for the public still doesn't know what went on. For no order was made under Section 138 and in obedience to that law, no report was made and so the public will never know.

Section 138 (1)(a) places a blanket prohibition on publication in cases where children are concerned. This prohibition remains in force until or unless the court lifts it by a specific order. As Mr. Justice Hoare said, unless the court's attention is drawn to the Section, the prohibition is not lifted. Obviously, it is not in the interest of a defence counsel or his client to draw the court's attention to this Section, and it rarely occurs to a prosecutor that such an order may be required before publicity may result.

The journalists, who are little more than the eyes and ears of the public which is unable to attend, are left with the task of drawing the attention of the court to this Section. They have no legal standing in the eyes of the court and are unable to draw the court's attention, by direct means, to anything. By what means then, is the court's attention drawn to Section 138? On occasions before a court has commenced to sit, and when a journalist is aware that a child is involved in a case about to be heard, he may approach the judge or magistrate in his chambers, (time and circumstances permitting) or he may approach the prosecutor or defence counsel (if they are not too busy). If he is successful, this becomes an effective means of drawing attention to the matter, but it is hardly a convenient or satisfactory one.

When a journalist does not know before hand that a child is involved in a case, problems arise. There is usually very little he can do in these not uncommon circumstances. Often he can spend days following a case only to find in the dying moments that the complainant is a child or that one of the accused is a child. If no order is made then no report can be made and the journalist will have wasted his time once more.

Even though the attention of the court can be drawn to Section 138, there may still be no order, especially if the judge does not give proper consideration to the Section's effects. In some instances, it is sad to report, lawyers and even judges and magistrates appear not to understand its effects. Journalists have approached prosecutors and asked them to draw the court's attention to the Section. Some have been heard to ask:

> "Would Your Honour consider Section 138 of the Children's Services Act in relation to the publication of the name of the child." . . .
> or . . . "Without an order under Section 138 of the Children's Services Act the Press will be unable to publish the name of the child."

Needless to say the court makes no order and there is no publicity, for no-one wants to identify the child . . . not even the journalist. Once the court's attention has been drawn to the Section, the journalist can do no more. In cases like the above, he is powerless and unable to interrupt or address the court to argue that it would, perhaps, be in the public interest for a report, which does not identify the child, to be made.

In some cases, judges have evidenced misunderstanding of the Section's effect by the making of orders to prohibit publication of the proceedings. On other occasions judges have made orders in terms such as:

> "I make an order under Section 138 (1) of the Children's Services Act in relation to publicity in this case."

Such orders do not help at all, for on its face, knowing the effect of the Section, it would appear that publication has been permitted. However, journalists have often discovered on an approach to the judge in chambers, that such orders were made in the belief that publication of the proceedings was being prohibited.

Often when prosecutors are asked to draw the court's attention to Section 138, they draw attention to Section 138 (1)(a) which related to the publication of reports of the proceedings or any part thereof. If the judge or magistrate is unfamiliar with the Section, and he is not appraised of the provisions of Section 138 (1)(b), he may feel that the only way to protect the child's identity is by a total blackout of publicity.

Such a situation arose in a recent Criminal Court case in which a child of 14 was sentenced on a charge of manslaughter. After section 138 (1)(a) was read to the court, His Honour asked defence counsel if he had any submissions to make. No doubt having his client's interest at heart, he then argued persuasively that no order should be made, and no order was made.

As one of three journalists present, with notebooks full of notes on a case which we believed should have received some publicity in the public interest, I could but wonder, would the situation as to publicity have been any different, had His Honour been informed that the child's identity would have been protected by Section 138 (1)(b), even if he had allowed a report to be made of the proceedings?

It was also a situation where Section 138 was protecting other provisions of this ill-conceived act from public criticism. For the case highlighted the inadequacies of penalties which could be imposed on children convicted of crimes as serious as manslaughter. Because the result could not be published, there could be no public pressure brought to bear on the Attorney-General to appeal against the sentence, or on the Minister for Welfare Services to amend the Act, at least in respect to penalties.

That to me seems to be a prime example of what Lord Shaw described in 1913 as:

> "A violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundation of public and private security."

Its effect could have been no worse had the situation arisen out of an intention to silence forever the voice of the critic, and not as a by-product of this piece of ill-begotten legislation.

In cases in which publicity is prohibited, the deterrent aspect of a sentence loses all relevance. Often the only persons capable of being deterred by a sentence in cases in which children are concerned, are those who happen to be present. On many occasions judges have imposed sentences on child molesters and have referred to the need to deter others who might be like-minded, but have overlooked Section 138. In 1974 Judge B.M. McLoughlin placed a man on probation on an indecent dealing charge saying that:

> "Any term of imprisonment imposed upon him would not act as a deterrent to others because of the provisions of Section 138."

At the hearing of a Crown appeal against sentence, the present Chief Justice, Sir Charles Wanstall said:

> "It cannot be doubted that in such a case a judge is, by an appropriate order, able to have publicity given to a sentence which he intends should operate as a deterrent to others. That can be achieved without revealing the identity of the child directly or indirectly."

He said otherwise the operation of Section 138 could result in a situation in which the most atrocious acts of indecency committed on children, would go free of such punishment as was calculated to deter other like-minded potential offenders. Unfortunately, by the very existence of Section 138 in its current form, that situation in the past eight years has become more the norm than the exception.

The spectrum of cases to which Section 138 applies is wide indeed and the result is often the protection of the anonymity of adults. Because of it, the modern-day Dickensian Fagan has a better chance of preserving his anonymity if he takes a child with him in the commission of an offence. And by the selection of a child victim, a robber or rapist stands a better chance of avoiding embarrassing publicity.

This is a wholly intolerable situation, which is not unlike a foolish gardener shading his whole garden, because one of his prize plants has to be protected from the harsh rays of the sun. Effectively he protects the well-being of his prize specimen, but other valuable plants wilt and the whole garden suffers for want of sunlight.

Section 138 (1)(b) of the Children's Services Act provides the necessary shading for the sensitive child, protecting it from the harsh light of publicity. But the blanket prohibition on the light of publicity on all cases involving children, cast by Section 138 (1)(a), is an intolerable abuse and must lead only to undesirable results in the administration of justice. It is cumbersome, stifling and totally unnecessary. At best, it arose out of what must have been a total misconception as to the role of publicity in the administration of justice.

It is cumbersome, because it places an onus on the public, or on its representatives, to look after its own interest and seek orders which they clearly cannot directly seek. It is stifling, because its practical operation inhibits the basic role of publicity in the administration of justice. And it is unncessary, because the protection of the child's anonymity which it seeks to give is already clearly provided by Section 138 (1)(b).

Again, not unlike our gardener, the admirable objectives may be attained by the exercise of other options clearly open. In this case, children, especially the innocent victims of criminal and sexual assaults, must have their anonymity respected and protected, just as the Criminal Law (Sexual Offences) Act of 1977 in Queensland protects the anonymity of females who are victims of sexual attacks. The protection afforded children in this regard by Section 138 (1)(b) is no less than the protection afforded the victims of sexual offences by the Sexual Offences Act. This latter Act, however, does not place a blanket prohibition on publicity on all cases concerning offences of a sexual nature.

To conform with the principles of publicity and with the commendable intention of the Section, (namely the protection of the anonymity of children) Section 138 (1)(a) could easily be amended, and Section 138 (1)(b) left untouched. An amendment, along the lines suggested in the schedule attached hereto, would remove the present restriction when the child is a complainant, or a defendant jointly charged with an adult. The court could be left with the power to prohibit publication by a positive order, if the circumstances of a particular case merits such a course.

If this were done, children would receive no less protection than they now receive, and adults would not benefit because they chose child victims or accomplices; Defence counsel, who are able to address a court, would have the interest in raising the matter in court, and there would be no automatic prohibitions; Judges would be more confident that their sentencing remarks and deterrent sentences would receive publicity calculated to deter like-minded potential offenders; Journalists, whose duties include the reporting of the public admin-

istration of justice, would be more effectively able to perform their appointed functions unhindered; Members of the public would be informed of the proceedings of such cases as though they themselves were present; and justice, administered in Queensland courts in which children are concerned, would once more be also seen to be done.

SCHEDULE

Section 138 of the Children's Services Act in the language of the layman:

Section 138: *Report of proceedings concerning children prohibited.*

(1) When in a proceeding before any court a child is concerned as a defendant, a witness or compainant –
  (a) a report shall not be made save on the order of the court unless –
    (i) it is an official report; or
    (ii) the child is a witness only;
  (b) a report
    (i) made on the order of the court; or
    (ii) of a proceeding in which a child is a witness only; shall not reveal the child's identity or any identifying particular, save on the order of the court;
  (c) no picture of or including the child shall be published save on the order of the court.

Section 138 as it could be, in the language of the layman:

Section 138: *Prohibition of certain matter in proceeding concerning child.*

(1) When in a proceeding before any court a child is concerned –
  (a) as a complainant, the court may direct that a report shall not be made;
  (b) as a defendant, a report shall not be made save on the order of the court, unless the proceeding is one which an adult is also concerned as a defendant;
  (c) as a complainant, witness or defendant–
    (i) a report shall not reveal the child's identity or any identifying particular save on the order of the court;
    (ii) there shall not be published any picture of the child save on the order of the court:

(2) The provisions of subsection (1) shall not apply when it is an official report.