THE INJUSTICE OF OPEN JUSTICE

Colleen Davis*

On the injustice of open justice...

JUDGES....

"It is of the first importance that justice should be done openly in public: ... that any newspaper should be entitled to publish a fair and accurate report of the proceedings, without fear of libel action or proceedings for contempt of court. Even though the report may be most damaging to the reputation of individuals, even though it may be embarrassing ... nevertheless it can be published freely, so long as it is part of a fair and accurate report."

Lord Denning[1]

"It is demonstrably justifiable in a free and democratic society that the openness rule be restricted to protect the innocent when... nothing will be accomplished by publicising the identities of the persons ...In this case, public access to all the facts, except for the names, will be assured. The right of the public to assess the situation, and to be satisfied that justice has been done in a fair and public hearing by an independent and impartial tribunal, will be secure; and the sense that justice has been truly done will be sharpened by the knowledge that, at the same time, the innocent have been protected.

Macfarlane J[2]

MEDIA ...

"The (Australian Press) Council believes that, in the absence of exceptional circumstances, the public has the right to be informed as to the names of persons appearing before the courts, especially in criminal matters. This is, generally speaking, in the interest of the parties as well as the proper administration of justice. In the view of the Council, membership of a particular calling or profession does not in itself constitute an exceptional circumstance which would justify suppression of the name of a person appearing before a court. ....Where a discretion to suppress exists, there should always be a presumption that publication would be in the public interest. ... The justification for such a role for the

---

* MA (Clinical Psychology) cum laude, University of Pretoria, LLB (Hons) Associate Lecturer, James Cook University, Townsville, Queensland.

[1] *R v Horsham Justices; ex parte Farquharson* [1982] 2 All ER 269 at 288.

[2] *Hirt v College of Physicians and Surgeons (British Columbia)* [1985] 60 BCLR 283 at 286.

press is that it should be seen as a trustee of the public interest in these matters."

Australian Press Council[3]

"I started out my journalistic career believing all people involved in court cases should be named. .... Experience gained in over 30 years in the media has changed my view to the point where I think in some circumstances suppression of names should apply until the case is decided, while in others total suppression should be handed down with the decision. My reasons ? Society has become less tolerant, less caring, less forgiving; the media more driven and even less caring, ... when it suits their cause (ratings, sales). Competition has created a more aggressive media, which isn't bad when it comes to uncovering corruption, but becomes a misuse of power when the newspaper, radio station, television channel sets itself up as judge, jury and executioner. Too many people believe anything and everything they are told, or read, and quickly hand down their own 'guilty' verdicts without all the evidence. You can't assume today's readers are tomorrow's, hence the 'not guilty' decision goes unnoticed."

Warwick Wockner,
former editor *Townsville Bulletin*[4]

On the defendant victims...

"I was charged with 16 sexual offences, including indecent assault and sodomy. I was accused of having done everything possible to a boy aged about nine at the time. The publicity associated with the allegations caused me a tremendous amount of pain. It was hugely embarrassing. I was so humiliated. I thought of suicide twice. Had I not had so many people supporting me, I may well have done it. [One newspaper] had run several sensational stories - I was devastated by what they printed. I would have been pilloried in the press had the charges not been thrown out at committal. I thought I'd be on the front page. [The newspaper] didn't print anything about the charges being thrown out - they've run nothing, from that day to this. Months later people were coming up to me and saying "When's the trial coming up?" I was the victim in all of this. The guy who laid the allegations came out of it untouched. I have suffered enormous punishment - to my reputation, my family and my health."

Christian Brother[5]

"A woman who says she was sacked because her employer learnt she had been charged with stealing from a previous workplace...was last week acquitted of the stealing charge ....Ms Hodnett, 34, of Cranbrook, insists it was her pending court case that led to her sacking....all her trouble

[3] General Press Release No. 50 (August 1982), available at http://www.presscouncil.org.au/pcsite/guides/gpr50.html.
[4] Personal communication 15th October 1998.
[5] Personal communication 20th October 1998.

began when her manager learnt about the sacking charge. She said he joked and spread stories about her at work and warned other employees to stay away from her. "It was just awful," Ms Hodnett said ..."I felt terrible trying to work there, everybody was calling me a thief".

"Fight for job will go on",
Townsville Bulletin,
December 11 1997.

INTRODUCTION

The open justice principle is one that is defended vigorously, particularly when there is any suggestion it be curtailed. However, ensuring that court proceedings are open to the public, and that the media can report such proceedings, often comes at a high price: the embarrassment, humiliation, hurt, social and employment consequences suffered by those who become involved in litigation, unwillingly or by choice, directly or indirectly. Although publication of guilt by the media could be regarded as part of the penalty for wrongdoing, people who are not committed to stand trial, or who are acquitted of an offence, can suffer enormously because they are identified as part of the publicity given to the proceedings. Suppression of names until committal, and possibly also until judgment, might alleviate a great deal of these unfortunate by-products of our legal system, but there is opposition to identity suppression because this is said to infringe the principle of open justice and the public interest in media reporting of court proceedings.

The public interest in open courts is usually given priority over privacy and reputation of defendants and their innocent families. Although there are occasions, at common law and under statute, when judges may grant name suppression orders, this is usually linked to the administration of justice and an accused's right to a fair trial.

This paper will explore whether identity suppression orders do, in fact, impede open justice in practice, and whether they are an appropriate means of alleviating some of the injustice inherent in our legal system. It will be argued that name suppression achieves an acceptable balance between individual rights and public interest. Indeed, it is suggested that it is in the public interest for innocent people to be protected from the negative aspects of our legal system, including the consequences of trial by media.

The principle of open justice

McHugh J, in *John Fairfax & Sons v Police Tribunal of News South Wales*[6] echoed the words of Lord Denning when he explained the principle of open justice thus:

> The fundamental rule of our common law legal system is that the administration of justice must take place in open courts. A court can only

[6](1986) 5 NSWLR 465.

> depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.[7]

This principle is entrenched in common law legal systems, and is also part of international law. Article 10 of the *Universal Declaration of Human Rights*[8] provides for a "fair and public" hearing of criminal charges, and Article 14 (1) of the *International Covenant of Civil and Political Rights*[9] stipulates: "... In the determination of any criminal charge against him, ... everyone shall be entitled to a fair and public hearing...."

History of open justice

The open justice principle has been a feature of the English judicial system for centuries. The concept emerged following the excesses of the Court of Star Chamber[10], and as early as the 16th century it was expounded as a major virtue of the English system.[11] Sir Thomas Smith, in *De Republica Anolorum* in 1583, said:

> All .. is done openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide.[12]

Sir Matthew Hale commended the practice of open courts as a means of acting as a check on the performance of judges.[13] Jeremy Bentham in 1843 also alluded to this: "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial". [14]

Bentham went on:

> "Nor is publicity less auspicious to the veracity of the witness, than to the probity of the judge. Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in

---

[7] *John Fairfax & Sons v Police Tribunal of News South Wales* (1986) 5 NSWLR 465 at 476.

[8] Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

[9] General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

[10] Report of the Publication Bans Committee, Criminal Law Section, Uniform Law Conference of Canada 1996, available at http://www.law.ualberta.ca/alri/ulc/95pro/95e.htm.

[11] See Garth Nettheim, "The Principle of Open Justice", (1987) 8 *University of Tasmania Law Review*, 1987, 25 at 27.

[12] Cited in Nettheim, *Ibid.*

[13] *Ibid.*

[14] *Works of Jeremy Bentham* Vol 4, Bowring ed. 1843, 316-317, cited in Nettheim, *supra* n.11.

> opposition to it from a thousand mouths.... Without publicity, all other checks are fruitless."[15]

Judicial exposition of the open justice principle dates back to the early 19th Century. In *Daubney v Cooper*[16], for example, it was held that any person had the right to be present in court. The seminal case on open justice and the foundation for the modern principle is the decision in *Scott v Scott*[17]. The case, which involved a woman's petition for a decree of nullity of marriage on the grounds of her husband's impotence, was heard in camera. When she sent copies of the transcript to various people in order to vindicate her reputation, she was charged with contempt. The House of Lords held that the order to hear in camera was made without jurisdiction. There was no valid reason for hearing the case in camera. The general principle is that courts must administer justice in public.[18] Lord Atkinson made the point that a public hearing often is painful and humiliating to parties and witnesses, and the details of criminal proceedings may offend public morals, but this is tolerated because a public trial is the best security for pure, impartial and efficient administration of justice.[19]*Scott v Scott* was followed a few months later by the High Court of Australia in *Dickason v Dickason*[20] and open justice is now a fundamental feature of our legal system.

Benefits of open justice

Public access to, and media reporting of, court proceedings have a number of beneficial effects. These include judges being more accountable in that they will act more fairly when they know their actions are in the public view,[21] enhancing fact finding; improving the quality of testimony; inducing unknown witnesses to come forward with relevant information;[22] and acting as a deterrent and a punishment. It has been suggested that publicity prompts judges to educate themselves in prevailing public morality and thereby avoid public criticism[23], and educates the public about the legal system[24] and about social problems such as AIDS.[25]

The key to the benefits listed above is not so much the openness of court proceedings, but the publicity accorded to them. Most people are totally disinterested in court proceedings - open or closed - unless and until such proceedings personally affect them. Few people attend courts out of interest or to

---

[15] *Supra* n 15.
[16] (1829) 10B & C 237 109 ER 438, cited in Nettheim, n 8, 30.
[17] [1913] AC 417.
[18] *Scott v Scott* [1913] AC 417 *per* Viscount Haldane LC at 487.
[19] *Scott v Scott* [1913] AC 417 *per* Lord Atkinson at 463.
[20] (1913) 17 CLR 50.
[21] Claire Baylis, "Justice done and justice seen to be done – the public administration of justice", (1991) 21 *University of Wellington Law Review* 177 at 185-6.
[22] *Gannett Co v De Pasquale* 443 U.S. 368 at 383.
[23] Morag McDowell, "The Principle of Open Justice in a Civil Context", (1995) 2 *New Zealand Law Review*, 214 at 220.
[24] McDowell, *supra* n 22 at 221.
[25] *J v L & A Services (No2)* [1995] 2 Qd R 10, *per* Fitzgerald P and Lee J at 46.

further their education. Without media coverage of court cases, few members of the public would have any knowledge at all of courts and criminal offences. What they do know is determined by what individual reporters and media outlets deem newsworthy enough to cover.

Role of the media

According to Lord Diplock, reporters are the public's representative in court and the press is a "useful tool in the open administration of justice as they disseminate reports of the proceedings to the wider community".[26]

One of the most enthusiastic advocates in Canada of an unfettered press, Cory J, elaborated on the critical function of the media, in *Edmonton Journal v Alberta (Attorney General)*:[27]

> It is only through the press that most individuals can really learn of what is transpiring in the courts. They as 'listeners' or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.[28]

For the media to fulfil this role as informer and educator of the public, the press should be able to report, and indeed make every effort to report, everything that happens in court. In reality however, print media report on only a small number of cases that come before the courts, and only on selected aspects of these cases. And, in many jurisdictions, television cameras and radio recorders are not allowed in courts - despite the strong endorsement by these courts of the open justice principle.

There are a number of common assumptions about the role of the media in open justice that require closer scrutiny. These include the public interest in open justice, the presumption of innocence, the role of the media in representing the public in court, the educative value of media reports, and the selective nature of media coverage of court proceedings.

Public interest or interesting to the public?

The media argue that they are entitled to report all court proceedings because this is in the public interest. However, while some aspects of media reporting clearly are in the public interest, for example punishment by publicity of the guilty, informing the public about crime, penalties and offenders, and ensuring judicial accountability, there are many court stories that better fit the description "for the interest of the public" or "interesting to the public" as opposed to "in the public interest".

---

[26] *Attorney-General v Leveller Magazine* [1979] AC 444 at 450.
[27] [1989] 2 SCR 1326 at 1340.
[28] *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326 at 1340.

Media lawyers, academics and journalists have recognised the distinction between "public interest" and "interest of (or to) the public". In his discussion of *Chappell v TCN Channel Nine Pty Ltd,*[29] Pearson points out that what might be interesting to the public and good for circulation and ratings is not necessarily in the public interest. Public interest connotes "legitimate public concern, rather than just satisfying people's natural interest in gossip."[30] According to White, while there is information that the public needs to know about, what they need to know and what they want to know are not always the same thing.[31] "Public interest" was defined by McMullin J in *Attorney-General (UK) v Wellington Newspapers Ltd*[32] as "something more than that which catches one's curiosity or merely raises the interest of the gossip. It is something which may be of real concern to the public".[33] Intimate details of sexual activity, gory details of homicides, for example, might add to the news value of a story but public interest can rarely be relied on to justify their inclusion in a story. The same applies to the identity of a person accused of wrongdoing, at least until the point of judgment. At this point identifying a person convicted would indeed be in the public interest. But in what way does public interest require identifying an alleged offender as an essential component of a story? The media can still report the story. If an accused person is considered potentially dangerous to the public, she or he is invariably detained in custody. And what about the presumption of innocence?

Presumption of innocence

Baylis suggests that publication of names prior to verdict is an unjustified departure from the presumption of innocence[34]. South Australian Chief Justice King, in *G v The Queen,*[35] appeared to have been of like mind, holding that the presumption of innocence must be a basic consideration in the decision on every application for a name suppression order.[36] Kirby P, in *Rigby v John Fairfax Group Pty Ltd and Others*[37] points out that in many civilised countries, reports of arrests may be given but, until the accused is convicted, he or she is described only by initials. "Such societies put a greater store than we do upon defending the presumption of innocence and confining trials to courtrooms".[38]

---

[29] [1988] 14 NSWLR 153.

[30] Mark Pearson, *The Journalist's Guide to Media Law*, Sydney, Allen & Unwin, 1997, 124.

[31] Sally White, co-author of *Ethics and The Australian News Media,* interviewed in "What is public interest?", *The Media Report*, transcript February 13 1997, available at http://www.abc.net.au/rn/talks/8.30/mediarpt/mstories/mr970213.htm.

[32] [1988] 1 NZLR 129.

[33] *Id* at 178.

[34] Baylis, *supra* n 20, at 204.

[35] [1984] 35 SASR 349.

[36] *G v The Queen* [1984] 35 SASR 349 *per* King CJ at 351.

[37] Unreported NSW Court of Appeal, 1 February 1996.

[38] *Rigby v John Fairfax Group Pty Ltd and Others*, unreported NSW Court of Appeal No. 40686, 1 February 1996 at 4.

The presumption of innocence has not escaped criticism, however. Leader-Elliott suggests it is no more than a fiction, and there should be definite limits to occasions when "it is necessary to engage in willing suspension of disbelief and act on the salutary pretence of innocence".[39] Further, there is a public interest in knowing the identity of an accused because an acquittal does not amount to a finding of innocence. He argues it "would be a foolish parent who *presumed* innocence and engaged a child-minder recently acquitted of child manslaughter".[40] Leader-Elliott's viewpoint suggests a reversal of the presumption of innocence: that people are guilty, or suspect at very least, until proven innocent. Such an approach would seriously undermine our legal system.

In a more forceful argument, Leader-Elliott points out that the subjects of investigative journalism campaigns are not protected by the presumption of innocence from publicity designed to drive them from public life or cause economic ruin. This is a valid point but it cannot be used to detract from the merits of suppressing the names of defendants until conviction in a court of law. Innocent targets of investigative journalism campaigns have a powerful remedy in the law of defamation. The defendant in a criminal trial does not.

Do the media represent the public in court?

In *Edmonton Journal v Alberta (Attorney General),*[41] Cory J suggested the press attends courts on behalf of the public who are unable to attend judicial proceedings. The questionable basis of this assumption was highlighted by Taylor JA, in *Blackman v British Columbia Review Board:*[42]

> The media are not required to act responsibly, nor to serve what others may regard as the best interest either of individuals or the public ... While the media serve an important role in informing the public, they do not "represent" the public, in the sense of having any responsibility to the public, nor have they any obligation properly to inform the public on any particular matter; such public duties or responsibilities would be quite inconsistent with the concept of a 'free' press.[43]

It could be argued that media outlets are commercial organisations driven by commercial objectives – they are not non-profitable community bodies. The priority of many media companies is profit, not the welfare or education of the community. To suggest that the media represents the public in court is naive at best : the media, if it is in court, is there with its own interests in mind. When the media opposes an application for a name suppression order, it may be that the motivation for this is more likely to be related to its own vested commercial

---

[39] Ian Leader-Elliott, "Legislation comment: suppression orders in South Australia, the legislature steps in", (1990) 14 *Criminal Law Journal* 86 at 103.
[40] *Ibid.*
[41] *Supra* n 28.
[42] [1995] BCJ No 95 (CA) January 12 1995.
[43] *Blackman v British Columbia Review Board* [1995] BCJ No 95 (CA) January 12 1995, in *Report of the Publication Bans Committee*, (Criminal Law Section), Uniform Law Conference of Canada, 1996, p2 available at http://www.law.ualberta.ca/alri/ulc/95pro/95e.htm.

interests rather than reflect a desire to serve the public interest. Large media organizations are powerful opponents, partly because of the financial and legal resources available to them, and partly because of their ready access to a most effective tool – the press - for lobbying politicians and the public alike to support their cause, often based on the 'public interest of open justice' argument. In *Martin v M & Ors,*[44] Olsen J considered how "pressure from the media to establish their asserted, virtually untrammelled, right to publish whatever they choose concerning court proceedings, has unwittingly brought about a situation in which ... very considerable hardship, personal distress and probable irremedial damage can be occasioned to individuals and innocent organisations".[45]

Selective reporting

If the media were to truly fulfil its ascribed public-interest roles - representing and informing the public about court proceedings, and ensuring judicial officers and the legal profession are accountable – media outlets would have to report all court cases, and the full content of protracted cases. The reality is that media reporting of court cases is highly selective, firstly regarding which cases are covered, and secondly regarding which parts of what is said in court are included in a report.

News media will only allocate resources to cover cases that are deemed newsworthy according to the media's value.[46] Newsroom resources usually prevent several reporters from attending court, and newspaper space precludes reporting of all cases. It is the newsworthiness of a story that will determine whether it is covered, and to what extent. Because of limited resources, cases are often reported on a random basis, apart from major criminal cases or those involving prominent persons. The more prominent the person, the more trivial the allegations of misconduct that can be printed for public delectation.[47]

Canadian lawyer Jonathon Kroft portrayed an acute perception of the value of court stories to the media:

> "The odds are you will come across more dirty laundry at the courthouse than at the drycleaners. As the wheels of justice grind, litigants, witnesses and complainants are compelled to reveal intimate details of their business dealings, family situations, sex lives and medical histories."[48]

Few people would willingly disclose these intensely personal details with family or friends, let alone a reporter. The added bonus for the media is that a 'fair and

---

[44] (1991) 51 A Crim R 173.

[45] *Martin v M & Ors* (1991) 54 A Crim R 173 at 182.

[46] "The impact of television, radio and still photography of court proceedings: final report", (1998) Massey University at 210.

[47] Leader-Elliot, *supra* n 39 at 98.

[48] Jonathan Kroft, "Private Lives- Public Courts", Aikins, MacAuley and Thorvaldsen Report, Spring 1998. Winnipeg Canada, available at http://www.aikins.com/newsletter.spr98/3.htmRL:

accurate' report of court proceedings is privileged and the media therefore protected from defamation suits.[49]

Reporting is selective on a second level when a reporter decides which parts of a court hearing are newsworthy enough to warrant inclusion in a story. Only a small part of what is said in court makes it into a news report. Newspaper space, and time on radio or TV, are limited.

The media do not necessarily attend every session during a trial. Quinn points out that the media generally attend only the Crown opening and it is rare for the defence case to get equal reporting. "How, therefore, can there possibly be an accurate and balanced reporting of a court case? The public read these selective reports, form an opinion...."[50]

One area of particular concern in the media's coverage of court proceedings is the newsworthiness - or lack of newsworthiness - of acquittals. Kirby P, in a discussion of occasions in which the wrong person has been arrested for a crime, pointed out that acquittals rarely attract anything like the same attention as the elaborate, sometimes sensational reports, of the initial arrest and charge.[51] The experience of a Christian Brother bears this out. A news release issued by Christian Brothers after the case against the Brother was dismissed at committal said some media had "hovered gleefully during .. the two-day committal hearing. The first day's proceedings were covered as fulsomely as they were allowed by the court. And that, of course meant detailing the very unsavoury charges....I question the marked disinterest by many of the media representatives when the Brother, on the second day, was totally exonerated. If the untested allegations were newsworthy, why was the magistrate's searing, unprecedented dismissal of them not equally so? Just minutes after the not guilty verdict was given.. the media scrum had gone. Innocence was not a story".[52]

Educative value of media reports

The educative value of media reports is said to be one of the benefits of media coverage of court proceedings. However, there are a number of reasons why this is not necessarily so. The first is the selective nature of media coverage of court proceedings, discussed above. The second is that the primary focus of media stories is news value rather than informative or educative value. As Kirby J put it: "The lawyer's plea to the media for a heightened interest in *the Trade Practices Act* or the *Appropriation Act (No 4)* is, I am afraid, likely to fall on deaf ears".[53]

---

[49] See for example *Defamation Act* 1889 (Qld) section 13, *Defamation Act* 1994 (NT) section 5, *Defamation Act* 1975 (Tas) section 13, *Defamation Act* 1974 (NSW) section 24.

[50] Michael Quinn, "Trial by Media", *Proctor*, August 1988, 1.

[51] *Supra* n 38.

[52] "Christian Brothers responds to sex abuse allegations which a magistrate condemned as 'heinous and scurrilous' ", media release issued by AM Media, February 11 1998.

[53] Michael Kirby, "Televising Court Proceedings", (1995) 18 *University of New South Wales Law Journal* 485.

The educative value of televised court proceedings was one of the reasons put forward in favour of allowing cameras into the courtroom, before the recent New Zealand pilot study of televised coverage of court commenced.[54] However, the majority of people surveyed by Massey University researchers as part of this pilot indicated their awareness of how courts operate had not improved as a result of televised news coverage of cases from inside the courtroom.[55]

Role of the media in shaping public opinion - and the consequences for parties not found guilty of wrongdoing

Media reports of court cases can play a major role in shaping public opinion of the guilt or innocence of the parties involved. An accused can suffer, during a trial and even after acquittal, at the hand of the media and the public, who have determined on the basis of selective reporting that the person is guilty.

One notorious example is the Lindy Chamberlain case, in which the media had clearly judged Chamberlain as having murdered her baby Azaria on the basis of evidence which was at best inconclusive, long before the court convicted her in late 1982. Owens argues the Chamberlain case proves the media has a considerable effect on the public, and can control their thinking by creating a perception that the media is truthful and morally responsible. "This control is exerted by selectively editing what we see and hear, so that a picture is built up of what happened from the media's perspective, and assuming the person's guilt or innocence. In the public eye, justice rates as a second priority to showmanship..."[56] Public opinion is not always changed by a not guilty verdict, and acquittal is often not enough to clear a person's name.[57] Munday maintains that the suspicion that there is no smoke without a fire "is conveniently fuelled by a system where convictions are only returned following the highest measure of proof."[58] Walker points out that "it is a little paradoxical that a system of trial designed to give the accused the benefit of the doubt in court is almost bound to ensure that the public does the opposite".[59] Munday suggests that the pain inflicted by unaccustomed exposure to publicity, the unwelcome notoriety, and by rejection and ostracism consequent upon revelation of charges, can exceed the gravity of an offence, and

---

[54] Marie Dyhberg, "Television in the courts: the time has come", paper presented at the 6th International Criminal Law Congress, 1996, available at http://www.lawnet.com.au/journal/vol1/congress/dyhrberg.html, at 5.

[55] "Media Coverage of Court Proceedings", Discussion Document, Courts Consultative Committee, August 1998, 9.

[56] Andrew Owens, "Should Australian courts be televised? A brief discussion", Law scholarship essay 1995, available at http://www.psinet.net.au/~shuttle/work/televise.htm.

[57] Robin Corbett MP, H.C. debates (1976) Vol 911, in Roderick Munday, "Name suppression: an adjunct to the presumption of innocence and to mitigation of sentence - 2", (1991) *Criminal Law Review* 753 at 754.

[58] Roderick Munday, "Name Suppression: an adjunct to the presumption of innocence and to mitigation of sentence – 2", (1991) *Criminal Law Review* 753 at 755.

[59] Nigel Walker, Frank Mewsam Memorial Lecture 1975 *Curiosities of Criminal Justice* (1975) *XLVIII Police Journal*, 9, cited in Munday, n 58 at 760.

are grossly unfair to a person who is acquitted.[60] The end result is that an innocent person can end up being punished - by publicity.

Courts have also recognised that the mere fact that a formal allegation of a heinous or revolting offence has been made will stigmatise an accused, and such stigma may never be erased, however innocent the accused person turns out to be.[61] In *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales,*[62] Kirby P and Mahoney JA acknowledged, in separate judgments, that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Kirby P's view was that, despite sympathy for people affected, their interests must be sacrificed to the greater public interest in an open system of justice.[63] Mahoney JA took a quite different view. His Honour opined that it is the function of the law, and the obligation of the courts in administering it, to avoid such pain and loss to the extent that it is possible to do so. "To the extent that this detriment to the individual is not avoided, the law is deficient and the courts have been less than fully effective". His Honour suggested that judges should consider how the open court principle can be maintained without unacceptable detriment to individuals and the proper administration of justice.[64] In this writer's opinion, the view espoused by Mahoney J has much to commend it. There are indeed ways of minimising the harm to people brought before a court, particularly those found not guilty, without impinging on the open justice principle. The most effective and acceptable of these is the use of identity suppression orders. Unfortunately, as Munday points out, attempts to restrict reporting of names is persistently mistaken for a direct onslaught on the openness of justice[65] and therefore vigorously opposed.

Leader-Elliott suggests that, if it is accepted that media publication of unproved allegations is tantamount to punishment without conviction, suppression should be the norm rather than the exception.[66] While this is not what he was advocating, this point of view makes sense and is worthy of closer consideration.

Exceptions to the open justice principle

Although Jeremy Bentham was a staunch advocate of open justice as a safeguard against judicial and witness impropriety, he recognised the need for exceptions : causes could be kept secret for the sake of peace and honour of families, for the sake of decency and out of tenderness to pecuniary reputation, and where it was

---

[60] Munday, *supra* n 58 at 755.
[61] *Miller v Samuels* (1979) 22 SASR 271.
[62] (1991) 26 NSWLR 131 at 140.
[63] *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131, *per* Kirby P, cited in *J v L & A Services (No 2)* [1995] 2 Qd R 10 at 34.
[64] *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131, *per* Mahoney J, cited in *J v L & A Services (No 2)* [1995] 2 Qd R 10 at 41.
[65] Munday, *supra* n 58 at 761.
[66] Leader-Elliott, *supra* n 39 at 86.

necessary to preserve the tranquillity and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour.[67]

The exceptions mooted by Bentham have not found favour. The House of Lords in *Scott v Scott* emphasised that any departure from the principle of openness should be confined to circumstances where the administration of justice would be affected. Unsavoury evidence or details that would affect delicate feelings, and the pain and humiliation caused to parties by public hearings, would not be enough to justify proceedings being held in camera. Lord Atkinson was of the view that this had to be tolerated and endured because public trials were the best security for the pure, impartial and efficient administration of justice.[68]

Sir John Donaldson MR in *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society*[69] said it was not sufficient that a public hearing would create embarrassment. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice.[70] It is also not relevant that publicity may cause embarrassment, distress or ridicule[71], or that a professional person may suffer damage to reputation or business.[72] Kirby P, in *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales,*[73] pointed out that, despite sympathy for those who suffer embarrassment, invasions of privacy, or even damage by publicity of their proceedings, such interests must be sacrificed to the greater public interest in adhering to an open court system.[74]

Today, despite the strong demand that our public institutions operate openly, there are recognised exceptions, but these relate by and large to the administration of justice. Common law exceptions involve specific categories of people, such as criminal defendants who are minors, sexual offence complainants,[75] police informers, in blackmail cases where national security is at issue,[76] and where the administration of justice is at risk. Statutes in several Australian jurisdictions either mandate or provide a judicial discretion to close courts or issue non-publications orders on similar grounds, the most important of which is "interests of justice" or "administration of justice".

---

[67] Jeremy Bentham, "Draught for the Organisation of Judicial Establishments Compared with that of the National Assembly, with a Commentary on the same", cited in Nettheim, n 11 at 29.

[68] *Scott v Scott* [1913] AC 417 at 463.

[69] [1984] 1 QB 227.

[70] *R v Chief Registrar of Friendly Societies, Ex parte NewCross Building* [1984] 1 QB 227 at 235.

[71] *J v L & A Services Pty Ltd* (No 2) [1995] 2 Qd R 10 at 45.

[72] *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 58, 61, 63.

[73] (1991) 26 NSWLR 131.

[74] *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131 at 143.

[75] *Discussion Paper 43(2000) – Contempt by publication*, New South Wales Law Reform Commission Publications, Chapter 10 Suppression Orders at 10.7.

[76] Per Kirby P, in *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131, cited in *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10 at 34.

Administration of justice

"Administration of justice" is a broad term that covers the detection, prosecution and punishment of offenders. This requires not only that trials be fair, but that people who can help in the process be encouraged to do so.[77] There are occasions when the proper administration of justice is interpreted in light of social stigma and embarrassment, but this tends to be related to factors such as deterring a victim from making a complaint or a witness from testifying. It is only on rare occasions that interests or administration of justice have been held to include privacy and reputation of an accused during trial, or hurt and hardship of other innocent parties, such as children. In *R v Hermes, ex parte V*[78], for example, it was held that "administration of justice" included consideration of injury to a defendant and the public perception that there is no smoke without a fire, and a suppression order was granted. In *John Fairfax v Local Court,*[79] Mahoney J opined that "proper administration of justice" referred to "unacceptable consequences" of an order not being made, and further, that courts have an obligation to administer justice so as to avoid pain and suffering to victims wherever possible.[80] It is argued that a victim can include not only a victim of a crime, but a person who is wrongly accused.

"Administration of justice" should be given an interpretation that is not confined to court processes: where embarrassment and distress, particularly of a victim, can be avoided, with minimal curtailment of the open-justice principle, the interests of justice would be better served. It is interesting to note that Article 14 (1) of the *International Convention on Civil and Political Rights* includes "the interests of the private lives of the parties" as a reason for excluding the press and the public.[81] Although Australia is a signatory to this convention, Article 14 is rarely, if ever, mentioned in the context of applications for name suppression orders. Current common law and statutory exceptions to open justice are by and large not interpreted with privacy considerations in mind.

The New South Wales Law Reform Commission recommended recently that there be a broad legislative power in NSW to restrict publicity, including the names, where publication would cause a *substantial risk* to the administration of justice.

---

[77] *Discussion Paper 42 (2000) – Contempt by publication,* New South Wales Law Reform Commission Publications, Chapter 10 Suppression Orders at 10.57.

[78] [1963] SASR 81.

[79] *John Fairfax Group Pty Ltd (receivers and managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131.

[80] *John Fairfax Group Pty Ltd (receivers and managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131 at 159, cited in *J v L & a Services Ptd Ltd I(No 2)* [1995] 2 Qd R 10 at 38-39.

[81] " ....The press and public may be excluded from all or part of a trial for reasons of morals, public order, or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

In the interests of justice would not be an acceptable basis for the making of such an order.[82] The Commission did not consider that hardship or embarrassment to an individual would be sufficient cause for a suppression order. Although situations such as those involving hardship or embarrassment to sexual assault victims were compelling, "the general rule should be that justice is administered in public view and that derogations from the principle of open justice should only be permissible under exceptional circumstances".[83] The Commission unfortunately didn't consider in any detail the effect of identity suppression orders on open justice and media coverage of court proceedings.

The Effect Of Closed Courts And Identity Suppression Orders On Freedom Of The Press

There can be no doubt that widespread closing of courts would seriously impinge on the ability of the media to report court cases, and would lead to some of the abuses the open justice principle is designed to prevent. Despite the problems with selective reporting highlighted above, it is not disputed that regular attempts to bar the media or the public from court proceedings, because of parties' individual privacy issues, should be vigorously opposed. However, it is suggested that name suppression orders are an acceptable compromise between the rights of the media and the rights of individuals. Name suppression orders do not affect the ability of the media to publish or air their story, including those juicy facts their readers or listeners want to know about. The press still report sexual assault cases fully, for example, despite statutory restrictions on naming an accused where this could identify the victim.

The focus in many cases where distress, privacy and similar factors have been considered has been the effect of court closure on open justice. Suppression orders, as an alternative to restricting media access to court proceedings, are seldom considered.[84] Do identity suppression orders really affect the ability of the media to report what has happened in court in terms of public interest, or do such orders merely affect the newsworthiness of a story and its appeal to public curiosity? Spender J, in *Case 960460,*[85] correctly pointed out that name suppression orders or pseudonym orders involve far less infringement on the open justice ideal that an order for proceedings in camera.[86] Williams J, in *R v His Honour Judge Noud; Ex Parte McNamara,*[87] also recognised the significant distinction between closing courts and suppression orders. According to King CJ, orders have been made regularly suppressing names of alleged victims and others

[82] *Discussion Paper 43 (2000) – Contempt by publication,* Chapter 10 Suppression Orders at par10.93.
[83] *Supra* n 75 at 10.91.
[84] In *Scott v Scott* [1913] AC 47, for example, name suppression orders were not considered.
[85] Unreported Industrial Relations Court of Australia 25 August 1995.
[86] *Id* at 7.
[87] [1991] 2 Qd R 86.

in court proceedings, without thought that any fundamental principle of the administration of justice was being infringed.[88]

British MP Robin Corbett, principal sponsor of the *Sexual Offences (Amendment) Act* (UK) 1976, which granted pre-conviction anonymity to defendants charged with rape offences, firmly believed the naming of a defendant is not crucial to the exercise of justice in the open. He opined: "It would be a good idea in our changed society to review the whole principle of the automatic naming of defendants in criminal charges".[89]

These views have much to commend them. It is suggested that suppressing the names of defendants until conviction would not impose an unacceptable restriction on open justice. Identity suppression orders may affect the newsworthiness of a story and its appeal to public curiosity but would not really affect the ability of the media to report what has happened in court, in terms either of media commercial interest or the broader public interest.

The South Australian experience

The *Evidence Act* (SA) 1929 is of particular interest because it has been the subject of several amendments that initially broadened and later restricted judicial discretion to make name suppression orders in criminal cases.

In *Hermes; Ex Part V*[90] in 1963, the 'in the interests of justice' requirement was given generous interpretation, and was not limited to cases where publicity might imperil the fairness of the trial.[91] Six years later, Bray CJ, in *Wilson; Ex Parte Jones*,[92] opined that one of the purposes of s69 of the Evidence Act 1929 was to prevent punishment by publicity attendant on conviction from antedating conviction.[93]

This section provided for three possible grounds for suppression orders: undue hardship, undue prejudice or in the interests of the administration of justice. Under this legislation, defendants succeeded in obtaining identity suppression orders on the following grounds, for example:

- on a charge of minor drug offences, to avoid shock to the accused's mother who was recovering from open heart surgery: *D v Sweatman*[94]
- to protect an innocent business associate: *R v Silk*[95]

---

[88] *Heading v M* (1987) 49 SASR 168 at 170.

[89] Mr Robin Corbett MP,H.C. debates (1976) Vol 911, in Roderick Munday, op cit, p754.

[90] [1963] SASR 81.

[91] Leader-Elliot, *supra* n 39 at 88.

[92] [1969] SASR 405.

[93] *Wilson; ex parte Jones* [1969] SASR 405 *per* Bray CJ at 412-413.

[94] (1984) 35 SASR 597.

[95] (1981) 26 SASR 360.

- to protect the medical practitioner defendant until committal because he practised in a small community and would suffer undue hardship if his livelihood was damaged: *Advertiser Newspapers Ltd v F*[96]
- to prevent undue hardship to handicapped people who living in a boarding house operated by the appellant, and because of the presumption of innocence: *K v Bates*[97]
- a person committed for trial on a charge of sexual assault, but who had at all times denied the charges and the case rested on uncorroborated evidence: *J v Holmes*[98]

Hardship caused by publicity was considered 'undue hardship' if it prejudiced the business, profession, employment of a witness or victim,[99] or where it could cause lasting social stigma.[100] It was likely to be exacerbated where the conduct alleged is repellent or morally disgusting,[101] and where the subject was a prominent person. In *G v The Queen*, King CJ pointed out the word 'undue' indicates that something more than the ordinary degree of hardship is required, and cases where media publicity caused significant additional distress or physical or mental harm would be rare. His Honour was of the view that damage to a person's livelihood is the most common form of undue hardship by publicity, and that odium and embarrassment after acquittal are the two most important examples of undue hardship by publicity.[102] In *B v Tuncks,*[103] it was held that in may be enough simply to show that the applicant has a substantial business, dependent upon reputation and public custom.

The *Evidence Act* was amended in 1984 to include two new sections: 69a and 69b. The main changes related to procedures for hearing applications for suppression, standing of the media, and rights of appeal, and the ground of "undue prejudice" in s69 (1) was deleted.

In 1989, the *Evidence Act* was amended yet again so that the identity of a defendant could only be suppressed where publication would prejudice the proper administration of justice. The *Evidence Act Amendment Act* 1989 (SA) appears to have been prompted by political backlash following a notorious case in which even the reasons given for making the suppression order were suppressed. In this case, a doctor charged with manslaughter of a patient was acquitted after trial by a judge alone. The evidence, accused's identity, identities of the victim and her family, and the reasons for the suppression orders were all subject to a publication ban.[104] Attorney-General C J Sumner, in his Second Reading explanation of the *Evidence Act Amendment Bill* said: "To the Government, this is quite unacceptable

---

[96] (1985) 38 SASR 367.
[97] (1988) 48 SASR 316.
[98] (1981) 28 SASR 114.
[99] *G* (1984) 35 SASR 349 at 352.
[100] *X v Ford* (1983) 33 SASR 155.
[101] *G* (1984) 35 SASR 349 at 352-353.
[102] *Ibid.*
[103] (1980) 24 SASR 532.
[104] Leader- Elliott, *supra* n 39 at 102.

and inconsistent with the notions of open justice".[105] The Attorney-General conceded later, however, that the Government had "erred on the side of freedom of speech and publication".[106]

The public outcry following the case mentioned by Leader-Elliott is understandable: people are extremely suspicious of this level of secrecy and the many abuses it could conceal. However the media, as a lobby group, is a powerful force: it has the ability to put forward an argument, one-sided or otherwise, to a large sector of the public, to influence public opinion, and to put pressure on politicians to respond. Opponents of the amendment, such as the South Australian Law Society, argued that the identity of an accused person should be suppressed until the issue of guilt is determined. Section 71B of the *Evidence Act* requires the media to publish a fair and accurate report of proceedings where an accused is not convicted, but it is suggested this cannot undue the harm caused by naming a defendant in earlier reports. As Baylis points out, some people may think the accused is guilty but somehow managed to get off on a 'technicality' – there is "no smoke without a fire".[107]

The amended legislation was considered in *Martin v M and Others,*[108] which involved fraud and tax avoidance charges against a solicitor, his client, an associate and the chairman of a charitable trust. The Full Court of the Supreme Court held the trial judge had erred in considering the odium, embarrassment and stigma that would be suffered by the accused if their names were published. In March 1998, Bleby J refused an application by a witness for suppression of the name of the accused facing 31 counts of fraudulent conversion.[109] The appellant was a solicitor, the accused his employee, the victims his clients. Although His Honour accepted that publication of the accused's name may have some adverse effect on the appellant's business, and that regrettably some people might associate some sort of guilt with the appellant, the appellant could take, and would be well advised to take, "emergency measures to reassure innocent clients of the innocence of those associated with an accused person".[110] With respect, this suggestion is naïve. What sort of "emergency measures" did His Honour envisage? An accused person does not possess unlimited access to publicity.

It is considered unfortunate that South Australian courts no longer have the discretion to consider hardship to a defendant as grounds for a name suppression order. Concerns about abuse of the discretion are justified, but, in light of the presumption of innocence, and the enormity of harm that can be caused to an accused acquitted at trial, suppression orders would appear to be the lesser evil.

---

[105] *Parliamentary Debates* S.A, Legislative Council, 15 March 1989, cited in Leader-Elliott, n 39 at 87.

[106] *Parliamentary Debates* S.A, Legislative Council, 15 March 1989, cited in Leader-Elliott, *supra* n 39 at 89.

[107] Claire Baylis, *supra* n 21 at 203.

[108] (1991) 54 A Crim R 173.

[109] *H v Director of Public Prosecutions*, unreported Supreme Court of SA, SCGRG-98-322, 11 March 1998.

[110] *Ibid.*

SOME ANOMALIES

Sexual offences

Although there has been little desire to shield an accused from pre-judgment publicity, protection of victims of sexual offences has become increasingly important in recent years.[111] Legislation in several states specifically provides for anonymity for victims of sexual assault, but the degree of protection varies. The usual justification for suppressing the names of victims is to encourage them to make a complaint and to testify in court, rather than social stigma per se. There is seldom provision for anonymity of people accused of sexual offences, with the exception of those circumstances where identification of an accused might lead to identification of a victim.

The unfairness of naming one party and not another was expressly referred to by Spender J in *Case 950460:*[112] "where a person is accused of sexual harassment, even-handed justice required his detractors should also be identified".[113] It seems inherently unfair that a victim of sexual assault is protected from media exposure, so too a person whose allegation of sexual assault is proven to be unfounded, yet a person charged with the offence, even if later acquitted, has to run the gauntlet of media attention and negative public opinion. Furthermore, people who abuse family members escape this humiliation, those who interfere with strangers do not.

People in some professions, such as doctors and teachers, can suffer great harm through publicity, even if allegations of sexual misconduct are thrown out in court. The New South Wales Teachers Federation 1997 annual conference was told that hundreds of experienced teachers were being driven out of the public school system by fear that allegations of sexual abuse would be levelled at them. Teachers had been subjected to suspension on the flimsiest of allegations, with legal formalities swept aside.[114]

Juveniles

Juvenile witnesses, victims and offenders are generally protected from publicity by a variety of state laws that provide for in camera proceedings and non-publication orders. The interests of even guilty juveniles often prevail over those of innocent victims of crime. In *H (a Child),*[115] for example, Scott J of the Western Australian Supreme Court held that the interests of a child, 14, convicted of murdering his cousin, outweighed the public interest in naming him publicly and the interests of the victim's family.[116] The parents of the deceased child

---

[111] Leader-Elliott, n 39 at 89.
[112] *Supra* n 85.
[113] *Ibid.*
[114] "No union action on NSW 'paedophile' witchhunt", *CDPE Information Bulletin,* Vol 3 No 2 Sept 1997, available at http://www.workersnews.flex.com.au./cdpe/vol3-2/3nsw.html.
[115] (1995) 83 A Crim R 350.
[116] *H (a child)* (1995) 83 A Crim R 350, per Scott J. at 357.

wanted to tell their full story to the media, and this would have entailed revealing the identity of the child.

The children of people involved in litigation can suffer enormously because of publicity given to court proceedings. In some cases, there is a marked disparity in the protection accorded by the law to an innocent child relative of an accused and a child convicted of a heinous offence, such as in *H (a Child)*, referred to above. It seems incongruous that, in some areas of the law, courts go to great lengths to consider the best interests of child offenders, yet the interests of children whose parents and relatives have been charged with criminal offences are rarely considered. Is their humiliation and hurt less deserving of legal protection, and therefore to be consigned to the "unfortunate but unavoidable consequences of open justice" basket?

In *Strelec v Nelson and others,*[117] a medical negligence action after an infant was injured during birth, the plaintiff sought an identity suppression order because she was particularly concerned about the effect of publication on her children. Smart J agreed there was appreciable potential for harm. "Taunts or teasing, based upon the intimate details published, directed at the children could be hurtful and harmful".[118] His Honour also recognised that the children could be harmed if details of proceedings were published in newspapers, but not if they were only given in open court. Judges had often been troubled in reconciling justice being administered in public and the general desirability of the fair reporting of such proceedings with the harm which such reporting may cause to innocent people, particularly children. His Honour pointed out that none of the Law Lords in *Scott v Scott*[119] addressed the situation where children were affected other than in wardship situations. However, as a non-publication order could not be said to be necessary for the administration of justice, His Honour declined to make such an order.

Reform

Although the open justice principle is fundamental to our legal systems, it is suggested the theoretical basis of the principle and general perception of role of the media in its implementation are flawed. The educative value of court reports must be questioned in light of recent New Zealand research, as must claims that the media represents the public in court. Public interest, including publication of the names of parties before a court, has prevailed over private interests. However, it is doubtful in most cases whether there is a public interest in knowing the identities of parties before a court, although these are undoubtedly of interest to the public. The very important public interest in protecting innocent parties is often overlooked by courts.

There is no reason why innocent parties before courts should not be protected - or at very least, be given the benefit of doubt, or presumed innocent - until judgment.

---

[117] New South Wales Supreme Court unreported No 012401 of 1990, 15 March 1996.

[118] *Strelec v Nelson and others* New South Wales Supreme Court unreported No 012401 of 1990, 15 March 1996 at 2.

[119] [1913] AC 417.

Suppression orders are an acceptable way of sparing parties punishment by publicity until guilt or liability is determined by the court, without a corresponding major impact on the freedom of the press. As Munday points out: "It is not an essential prerequisite of a criminal justice system that suspects be always identified publicly. Nor need anonymity (before conviction) herald the end of a civilised and publicly accountable criminal justice system".[120]

In light of the above, it is suggested that arguments based on public interest in allowing the media to report court proceedings should be reconsidered. Suppression orders until conviction or judgment appear to be an acceptable compromise between open justice, the media and the interests of parties before the court, yet they are not widely used, and are rarely, if ever granted on the basis of personal hardship or distress considerations. Judges have shown a marked reluctance to use their inherent jurisdiction to make name suppression orders. Many have suggested that this is a legislative role. In *Heading v M,*[121] King CJ opined that Parliament, if it saw fit, could adopt a policy that no names of accused persons be published before committal for trial or conviction and that, if it did, no fundamental principles of justice would be infringed. Even where statutes provide for discretionary exceptions to the open justice principle, judges are disinclined to grant suppression orders unless naming parties would prejudice a fair trial.

Comments by Fitzgerald P and Lee J in *J v L & a Services (No 2)*[122] that the media should be trusted to report court cases with sensitivity are considered simplistic and unrealistic. While some journalists will try to do this, there will always be those who do not. Sometimes simply being named in a story, no matter how sensitively it is written, is enough to cause a person great personal anguish and to have social or employment repercussions. Court reports are ready-made good copy, replete with details few people would divulge voluntarily, and carry little risk of defamation. The pursuit by some reporters for sensational copy and the consequential harm to innocent parties cannot be shrugged off as the price that must be paid for a free press.

It has been said that retaining fully open courts is an essential prerequisite to public confidence in the judicial system. However, it is suggested that, if trust in our legal system is flagging, it is not because our courts are occasionally closed to the public, or the media are prevented from publishing all the details. Many people are disenchanted with the injustice of a legal system that is complex, costly and inaccessible; not concerned with truth; and disinterested in protecting the interests of innocent parties. Name suppression orders would help rectify the latter.

It is suggested that it is not the public that wants open courts and open-slather reporting of proceedings: most people would not care one way or the other. Instead, it is the media that is using the 'public interest' argument to lobby for its own gain. Politicians respond to media demands for open justice, not because this is what their constituents necessarily want, but because this is the picture

[120] Munday, *supra,* n 58 at 757.
[121] (1987) 49 SASR 168.
[122] [1995] 2 Qd R 10 at 47.

portrayed by the media. Politicians who have fallen fall of local media outlets can find themselves in a very difficult position come the next election.

Any argument that the open justice principle should continue in its present form, because it has done so for so long, is suspect. Just because the public and/or the press has been included in or excluded from courts in the past, does not mean this should continue. Traditions should not be perpetuated just because they are traditions. Society has changed a great deal in recent decades, yet in some respects the judicial system, and the need to protect innocent parties from punishment by publicity, has lagged behind. These innocent parties include not only defendants in criminal proceedings, but also their immediate families and business associates.

In *Hirt v College of Physicians and Surgeons (British Columbia),*[123] Macfarlane J recognised that true justice must have respect for the rights or reputations of innocent persons.

> "It is demonstrably justifiable in a free and democratic society that the openness rule be restricted to protect the innocent when... nothing will be accomplished by publicising the identities of the persons who have complained ...In this case, public access to all the facts, except for the names, will be assured. The right of the public to assess the situation, and to be satisfied that justice has been done in a fair and public hearing by an independent and impartial tribunal, will be secure; and *the sense that justice has been truly done will be sharpened by the knowledge that, at the same time, the innocent have been protected"* (Emphasis added)[124]

There are compelling reasons for name suppression orders for the accused in criminal proceedings. Publicity can be a severe punishment, and one that is imposed not by courts or parliaments, but by the media. It is time that our criminal justice system do justice to all parties - defendants, complainants, and their families, as well as to the media and the public at large - and that justice can only truly be done when the innocent are protected, and their interests become part of the balancing equation between open justice and justice. This is not only the role of the judiciary, but of the legislature as well. Reform in this area of the law is long overdue.

---

[123] [1985] 3 WWR 350.

[124] *Hirt v College of Physicians and Surgeons (British Columbia), supra* n 2.