CLOSING THE COURTS WITHOUT CLOSING THE DOORS – WHAT ARE SUPPRESSION ORDERS?

By Lisa Grindlay

The principle of open justice requires that courts conduct proceedings that are open to both the public and the media. Among other things, this ensures that fair and accurate reports of proceedings are available and disseminated.

But this important democratic principle does not necessarily safeguard the privacy of those involved in litigation. Courts do have the power to exclude the public and media, and also to suppress the publication of evidence; but under what circumstances do they exercise it? This article considers why and when courts depart from the principle of open justice to make a suppression order, some of the sources of power to make such orders and who may apply. It will also briefly consider the likelihood of reform to current practices, with particular regard to protecting the privacy of litigants.

WHAT IS A SUPPRESSION ORDER?

A suppression order prohibits the publication of details of evidence in proceedings. It is also referred to as a 'non-publication order'. The power to make such an order may be exercised by superior courts, inferior courts and non-curial bodies.[1] A suppression order may be made while a court is *in camera* (closed) or open to the public. A court's power to suppress the publication of evidence emerging from closed proceedings may be more readily assumed when the court is closed. So what happens when a court tries to suppress evidence from open proceedings? Aside from specific statutory power that may allow it, 'it is doubtful on the authorities that courts have the power to make an order, operating outside the court, which suppresses the publication of anything said in open court'.[2]

Before making a suppression order, a court must first decide whether it has the power to do so and delineate the extent of that power. This will not always be an easy process and it depends largely on the particular facts of each case and the relevant law and jurisdiction.

Generally, a non-publication order will *not* be made unless:[3]

(a) one is really necessary to secure the proper administration of justice;
(b) the terms of the order are clear and do *only* what is necessary to achieve the due administration of justice;
(c) it is reasonably necessary;
(d) there is material before the court supporting an order as opposed to a mere assertion that one is necessary; or
(e) the order, if made by an inferior court or statutory body, is within the tribunal's jurisdiction and is not an exercise of legislative power – for example, attempting to bind people generally and not just the parties/witnesses/those present in proceedings.

BREACH OF A SUPPRESSION ORDER

Once made, any breach of a suppression order will be regarded as a contempt of court. However, as contempt proceedings are criminal in nature, the court must be satisfied to a high degree that the offence was committed and that the person responsible for publication knew that an order had been made.[4] It is not sufficient that the person responsible for publication merely had the methods and resources to find out that an order was in place.

OPEN JUSTICE

Suppression orders are not readily made by courts for a number of reasons, primarily because making such an order derogates from the principle of open justice.

In *John Fairfax and Sons Ltd v Police Tribunal of New South Wales*, McHugh JA (as he then was) said:

> 'The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only 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.'[5]

Open justice is a mechanism that secures public confidence and respect in a system striving for the impartial and efficient administration of justice. It means that the judiciary is constantly exposed to public scrutiny, thereby avoiding clandestine proceedings and opaque decisions. Operating according to the dictates of open justice, the justice system is an important component of democracy that promotes basic human rights. Both civil and criminal proceedings are conducted in open courts. And with respect to criminal charges, international pronouncements on human rights recognise the right to a public hearing with media presence.[6]

The principle's importance cannot be underestimated, and is confirmed by a lengthy line of authorities in both the UK and Australia.[7] It is subject only to narrowly interpreted common-law exceptions and limited statutory derogations.

WHEN DO COURTS DEPART FROM THE PRINCIPLE AND MAKE AN ORDER?

To predict when a suppression order is likely to be made, it is instructive to note the types of cases in which courts have derogated from the principle of open justice and where they have not.

Courts have derogated from the principle of open justice in the following cases:

- Where the court assumes the role of *parens patriae* and cases involving the mentally ill.
- Hearings concerning trade secrets, secret documents, communications and processes, and where disclosure would defeat the object of the action; for example, where police informers are involved,[8] or in blackmail cases.[9]
- To keep order in the court.
- To properly deal with matters in chambers.
- Only in limited cases concerning national security.[10]

Unlike those cases above, courts have *not* departed from the general rule where evidence may be unsavoury[11] or its publication may cause embarrassment,[12] invasion of privacy, or inflict collateral disadvantage (for example, affecting a person's business affairs).[13]

There is no general common-law power that permits courts to suppress the publication of details (such as the name of a witness) or evidence from a particular case.[14] However, courts commonly order the use of a pseudonym for a witness or accused, but only if it is necessary to ensure the proper administration of justice.

Outside statute, it is not impossible to secure a suppression order, but courts are reluctant to expand the instances of non-publication orders made at common law. Even if they are made, such expansions do not always survive appeal.

To a degree, Parliament has legislated to ameliorate the rigidity of the common-law position, and the power to suppress publication is found in a multitude of statutes across all Australian jurisdictions. But the power is not unlimited and is recognised as an aspect of a court's inherent power to regulate its own proceedings so as to administer justice. It is usually an exclusive power insofar as any tests and procedures are expressly stipulated in the legislation and are not discretionary. No statutory provision allows the suppression of true and correct reports of proceedings conducted in open court unless there are exceptional circumstances. Exceptional circumstances will be a matter of fact or specifically set out by statute.

Relevant statutory powers touch disparate areas of law across all Australian jurisdictions, and the following snapshot >>

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of selected Commonwealth and NSW legislation gives only a very brief view of the different circumstances in which a non-publication order will be granted.

Commonwealth legislation

Section 50 *Federal Court of Australia Act* 1976 states:

> 'The Court may, at any time during or after the hearing of a proceeding in the Court, make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.'

The above provision was considered by Finn, Merkel and Stone JJ in *Herald & Weekly Times Ltd v Williams*.[15] The Justices heard an appeal against a suppression order that was made in the Administrative Appeals Tribunal under s35 *Administrative Appeals Tribunal Act* 1975. The appellant (Herald & Weekly Times Ltd) was not a party to proceedings in the tribunal, where the suppression order had been made to preserve the privacy of a prominent former footballer. The appeal was successful and the order lifted. It was held that the judge at first instance erred in relying upon the preservation of privacy and confidentiality as grounds for granting the order. The footballer's entitlement to privacy was irrelevant to the question of whether or not to make a suppression order under the *Federal Court of Australia Act* 1976. In this regard, only s50 of that Act applied strictly, and insofar as making the order appeared 'necessary in order to prevent prejudice to the administration of justice'. In this particular case, the statutory test in s50 (above) was held to be unlike that contained in s35(2) *Administrative Appeals Tribunal Act* 1975, which empowers the tribunal to make a suppression order if it is 'desirable to do so'. In s35(2) *Administrative Appeals Tribunal Act* 1975, the tribunal has a relatively wide power to close the court and/or suppress publication of material, provided that it has regard to the general principle of open justice as it is enunciated in s35(3).

A power under s121(1) *Family Law Act* 1975 prohibits the reporting of any part of proceedings that identifies a party, a party's relative, or a witness involved in family proceedings. Subsection 3 goes on to provide a list (which is not exhaustive) of specific identifying factors that must not be published.

In keeping with the notion that any power to suppress publication is a consequence of the court's power to regulate its proceedings and administer justice, royal commissions created under statute also have limited power via s6D(3) *Royal Commissions Act* 1902.

NSW legislation

A few examples of particular powers are set out below.

Section 578A *Crimes Act* 1900 allows a court to prohibit the publication of material that would identify victims of certain sexual offences. In the same Act, s562NB(1) prohibits the publication of names and identifying information about children under 16 involved in apprehended violence order (AVO) proceedings and s562NC relates generally to persons (who are not minors) involved in AVO proceedings.

It is particularly difficult for coroners to balance the need for hearings to be accessible to the general public against the rights of those involved in an inquest. However, coroners have power under s44 *Coroners Act* 1980 to prohibit publication of material relating to an inquest or inquiry. Within s44 there are specific examples of when a non-publication order (interim or final) may be made – s44(1) for witnesses and s44(2) where suicide is suspected – and a general power if 'it would be in the public interest to do so' (s44(5)). For the purposes of determining the public interest, a coroner may consider the administration of justice, national security and the personal security of the public or an individual (s44(6)(a)-(c)). (These three matters are not exhaustive of what a coroner may consider before making a decision.)

Children's courts are generally closed to the public, but the media may be present in criminal proceedings involving young persons – s10 *Children (Criminal Proceedings) Act* 1987. Section 11(1) of the same Act deals specifically with non-publication or broadcasting of names of certain protagonists in children's criminal proceedings.

Section 112 *Independent Commission Against Corruption Act* 1988 allows the Commission to restrict publication of evidence before it.

WHO MAY SEEK TO MAKE, MODIFY, OR QUASH A SUPPRESSION ORDER?

It is not solely the parties to proceedings who have standing to make applications in relation to suppression orders. By examining some of the case law in this area, it quickly becomes apparent that many of those wishing to be heard by the court are members of the media and not parties to any substantive proceedings. On this point, McHugh JA (as he then was) stated rather pragmatically:

> 'It is often said that the media proprietors and reporters have no greater rights or privileges in respect of news gathering than other citizens. But we live in an era where almost everybody depends on the media for information concerning matters which affect the public interest. The time may have arrived where it is necessary to recognise that the media does have special rights to gather and disseminate news and information over and above that held by the ordinary citizen.'[16]

As to the making, modifying or varying of a suppression order, it has been held that the media may seek leave to be heard but do not have an absolute right in this regard – it is, ultimately, a matter for the court's discretion.[17] On the question of appeal – or prerogative relief from a superior court – the publisher of a newspaper has standing where the suppression order was an excess of jurisdiction (outside the authority of the court to make it). There is authority to suggest that where there is discretion to grant or refuse relief, relief should be favoured.[18]

CONCLUSION

Where a suppression order is sought, the facts of the case need to outweigh the countervailing public interest of open justice for an order to be made. This is a difficult hurdle for an applicant to overcome unless, factually, the case falls neatly within an exception to the general rule, or strongly lends itself to the creation of another exception. Otherwise, the power of the court will need to be clear and exercised within specific legislative parameters to withstand an appeal.

The balancing act may not always seem fair to those seeking a suppression order, and there may be pain and loss as a result. But, as Kirby P said when he was president of the Court of Appeal:

> '...interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.'[19]

As far as the balancing act between suppression of evidence and privacy is concerned, a recent Australian Law Reform Commission issue paper[20] focuses holistically on whether the *Privacy Act* 1988 (Cth) and related laws provide an effective framework for protecting privacy in Australia. Among other things, the paper examines access to court records by the public, media, researchers, non-parties, parties and witnesses. It also discusses the relevance of suppression orders in children's proceedings. Despite affirming the principle of open justice, the ALRC paper invites discussion about whether the particular issues relevant to children's proceedings and privacy should extend more broadly, especially given the current 'electronic environment'. Despite the ALRC's ongoing review, significant reforms aimed at protecting privacy (by use of suppression orders) are unlikely, given the weight of authorities, the importance of the principle of open justice, and the limited common law and statutory exceptions to it. Some minimal changes may be implemented in view of the electronic environment, but the open justice principle, which is so firmly entrenched, is unlikely to be revised. ■

Notes: **1** For ease of reference, the word 'court' will be used throughout the article to refer to all types of courts, tribunals, commissions, etc, unless otherwise specified. **2** Per Kirby P in *Raybos Australia Pty Ltd and Anor v Jones* (1985) 2 NSWLR 47. It is an issue with which the House of Lords grappled in *Scott v Scott* [1913] AC 417, but it did not produce a unanimous answer. The case is an oft-cited and leading authority on the principle of open justice. **3** *John Fairfax & Sons Ltd v Police Tribunal of New South Wales and Anor* (1986) 5 NSWLR 465. **4** *Attorney-General for New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342. **5** See Note 3 above, at 476. **6** Art. 14(1) *International Covenant on Civil and Political Rights* 1980. **7** For an informative and comprehensive examination of the history of open proceedings and the line of authority supporting it, consider Kirby P (as he then was) in *Raybos* (Note 2 above) at 51 and 53. Equally comprehensive and later in time is the judgment of Spigelman CJ, in *John Fairfax Publications Pty Ltd and Anor v District Court of New South Wales and Others* (2004) 61 NSWLR 344. **8** *Cain v Glass (No. 2)* (1985) 3 NSWLR 230. **9** *R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General* [1975] QB 637. **10** *A v Hayden* (1984) 156 CLR 532. **11** *R v Hamilton* (1930) 30 SR (NSW) 277. **12** *R v Chief Registrar of Friendly Societies* [1984] QB 227. **13** *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294. **14** See Note 2 above. **15** [2003] 130 FCR 435. **16** *Attorney-General for New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 356. **17** *Nationwide News Pty Ltd v District Court of NSW* (1996) 40 NSWLR 486. **18** Per Mahoney JA in *John Fairfax & Sons Ltd v Police Tribunal* (Note 3 above) at 469-470. Also see *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) and another v Local Court of New South Wales* (1991) 26 NSWLR 131 per Kirby P at 151-154. **19** See *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) and another v Local Court of New South Wales* (Note 18 above). **20** IP 31 *Review of Privacy*, October 2006.

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