Non-publication and suppression orders

The Hon Justice Peter Applegarth AM

Queensland Magistrates' State Conference 2024

Friday, 24 May 2024

This is a complex topic. I cannot do it justice in a short talk. First, I will discuss the principle of open justice, and attempt to position non-publication orders in that context. I will touch briefly on non-publication orders in bail cases and the recently enacted provisions of the *Criminal Law (Sexual Offences) Act 1978* that permit an application for a non-publication order.

Time permitting, I will touch on some common areas in which non-publication orders or pseudonym orders arise. One area is the identity of informants. And I hope to address some practical matters about the right of media organisations to be heard and to challenge non-publication orders, some problems with formulating a non-publication order, and the process by which the making of a non-publication order is made known to the media. That confronts the complex issue in an age of social media about who "the media" is and how courts deal with legacy and new media.

Open justice

The principle of open justice is one of the most fundamental aspects of the justice system in Australia. Exceptions to the principle are few and are strictly defined.[1]

Our judicial system is based on the notion that proceedings are conducted in open court. Justice must not just be done; it must be seen to be done.[2]

Information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment or distress.[3]

The courts have treated the right to report as an adjunct of the right to attend court.[4] In other words, the media acts as "the eyes and ears" of the general public.[5]

The purpose of the open justice principle

The principle of open justice is deeply entrenched and is said to pre-date the *Magna Carta*. It is reflected in modern human rights instruments like Articles 14 and 19 of the *International Covenant on Civil and Political Rights*.

---

1 *John Fairfax Publications Pty Ltd v District Court (NSW)* at [17]-[20]; *J v L & A Services Pty Ltd (No 2)* (1995) 2 Qd R 10 at 44-45.

2 *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495 at 520.

3 *J v L & A Services Pty Ltd (No 2)* (supra) at 45.

4 *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267 at 279.

5 *Attorney General v Guardian Newspapers No 2* [1990] 1 AC 109 at 183. See, for example, the *Protocol on Remote Hearings* endorsed by the NSW Chief Justice on 8 May 2020 at [18].

The justification for open justice is the benefit it confers on the administration of justice. It protects against the exercise of arbitrary power by a judge and provides a motivation for high judicial performance. The fact that a judge's rulings must be given in public reduces the opportunity for partiality and arbitrary decision-making.

Open justice also imposes a discipline on other participants in court proceedings, including lawyers and witnesses. It exposes all participants to public scrutiny and helps ensure that they conduct themselves in accordance with their duties.

Open justice also might be said to improve the veracity of witnesses on the basis that they are more likely to be truthful if they testify in public and appreciate the risk of rebuttal by witnesses or other evidence coming forward.

Open justice also benefits litigants in certain kinds of litigation to achieve public vindication. An associated justification for justice being seen to be done is the maintenance of public confidence in the administration of justice.

Corollaries of the principle

It follows from the principle of open justice that members of the public have a right to attend court proceedings that are held in open court, subject to them not being disruptive and there being capacity to accommodate them. Another corollary is that decisions should be pronounced in open court.

Fair and accurate reporting supports the principle of open justice. Therefore, fair and accurate reports of court proceedings are protected on the basis that nothing should be done to discourage them.

Open justice – superior and inferior courts

Superior courts like the Supreme Court have an inherent jurisdiction. Their inherent jurisdiction gives them powers to make orders for closed courts and to make non-publication orders when it is necessary to serve the administration of justice.

Inferior courts and tribunals do not have the same inherent power.[6] Instead, they have certain inherent powers. In *John Fairfax v Ryde Local Court*,[7] Chief Justice Spigelman stated that the Local Court is a statutory court and, as such, has powers that are expressly conferred or are necessarily implied from the express conferral. The test of implication is necessity. He added:

> "Where the principle of open justice is engaged, as it is when determining whether a court may sit in camera or prevent publication of its proceedings and orders, the test will be strictly applied."

One application of a strict test of necessity is the need "to determine that the objective of ensuring the fairness of a subsequent trial cannot be achieved in any other way".[8]

---

[6] *Grassby v R* (1989) 168 CLR 1 at 16-17. For example, they do not have an inherent power to punish summarily for contempt not committed in the face of the court.

[7] (2005) 62 NSWLR 512 at 522.

[8] *John Fairfax v District Court* (2004) 61 NSWLR 344 at 358 [51].

Legislation like s 14A of the *Magistrates Courts Act 1921* confirms that ordinarily courts must be conducted in open court.[9] Section 14A(2) provides that subject to any Act, a Magistrates Court may, if the public interest or the interests of justice require, by order limit the extent to which the business of the court is open to the public.

Derogations to the principle of open justice

Open justice is a principle, rather than a free-standing right. It is not inflexible or an absolute. Judges are expected to "strain to the utmost" to hear proceedings in public,[10] subject to strictly defined and rarely allowed exceptions.

In dealing with an application for a non-publication or similar order, it must be recalled that it is common for sensitive issues to be litigated and for information that is extremely personal or confidential to be disclosed. The Court of Appeal in *J v L & A Services Pty Ltd* observed:[11]

> "It is of obvious concern that such a paramount principle as the requirement of open justice should not be whittled away on a case by case basis according to individual judges' subjective views of the merits or demerits of the claims to privacy of individual litigants."

In *Ex parte McNamara*,[12] in discussing blackmail and analogous cases, Justice Glenn Williams observed:

> "The court should only depart from the basic principle that proceedings take place in public, and without any limitation thereon, if it is positively established to the Court that without such direction justice could not be done because of the grave difficulty in having the witnesses come forward in cases of that type."

The most significant departure from the principle of open justice is to order a proceeding to be heard in closed court. A hearing in closed court may be required by statute, such as part of a s 13A hearing under the *Penalties and Sentences Act 1992*. Absent a statutory command to conduct a proceeding in closed court, or what some statutes refer to as "in chambers", proceedings should be held in open court unless it is necessary (not simply desirable or reasonable) to do otherwise.

The cases recognise that there is a "significant distinction between holding proceedings in camera and holding proceedings in open court but with directions having the consequence of concealing the names of witnesses (with or without a further direction limiting publication of evidence)".[13]

---

[9] See *Supreme Court of Queensland Act 1991*, s 8(1)(b), *Magistrates Courts Act 1921* (Qld), s 14A.

[10] *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 300.

[11] (Supra) at 45.

[12] [1991] 2 Qd R 86 at 106.

[13] *R v His Honour Judge Noud; Ex parte MacNamara* (1991) 2 Qd R 86 at 104; *R v Socialist Worker Printers and Publishers Ltd* [1975] 1 QB 637 at 651-652.

Common law exceptions to the open justice principle

In camera hearings

It is not enough that the proceedings relate to a sensitive subject matter or could cause embarrassment to the parties.[14]

In exceptional cases, a case will be heard in camera:

- where there is an issue of accommodation or regulation of crowds in a court room, "to prevent disruption by rioters";[15]
- to protect a secret process (trade secrets, secret documents or communications) that is the subject of the litigation;[16]
- in cases concerning wards of the court or mentally ill persons.

While there are these well-settled common law exceptions to the principle of open justice, the categories are not closed. But any additional circumstances must be closely circumscribed and are subject to the strict test of necessity.

Therefore, a court may exclude the public generally or a specified member or members of the public if it is necessary to protect the administration of justice.

An in camera hearing does not mean that judgments or orders will be withheld.[17]

Closing the court statutes

Certain statutes provide for the court to exclude the public and to sit in private. The *Supreme Court of Queensland Act*, s 8(2), like s 14A of the *Magistrates Courts Act*, gives a power to limit the extent to which business of the court is open to the public if the public interest or the interests of justice "require" it. It is important to emphasise that those interests must require it, not simply make it convenient or reasonable.

Non-publication orders

A court may be asked to make a non-publication order in a variety of circumstances. One circumstance is to give effect to an order that proceedings be heard in camera. A closed court order may operate, by implication, to restrict the publication of what has taken place in the closed court. However, it may be useful or a counsel of prudence to also make a non-publication order. Another situation is where certain information is being concealed from some of those present in court, such as the identity of an informant.

More generally, courts are often asked to make a non-publication order in proceedings that are being conducted in open court.

---

14 *Scott* (supra) at 438. See also J*ohn Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47; *J v L & A Services Pty Ltd (No 2)* (supra).

15 *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254.

16 *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227.

17 *David Syme and Co v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 per Street CJ.

Again, it is important to distinguish between the power to make a non-publication order and the circumstances in which such a power is properly exercised.

There are numerous statutory provisions that give courts power to make non-publication orders. Absent such a statutory power, there is some uncertainty about the power to limit what might lawfully be published about proceedings held in open court. The implied powers possessed by inferior courts are more limited than inherent powers. Superior courts have an inherent power to regulate their proceedings. But it is uncertain whether that power can be used to forbid non-parties from publishing information that already has been disclosed in open court. There are authorities going both ways.[18]

The reach of non-publication/suppression orders

Some uncertainty surrounds the existence and nature of a common law power to make orders binding on persons outside the court. In some cases, courts have said that such a power exists.[19] In other cases, courts have denied the power exists.[20]

Rodrick and her co-authors state the most likely position, and one that reconciles divergent opinions on this matter, appears to be that courts do have power to make non-publication orders, but they only *directly* bind the parties, witnesses and those present in court at the time they are made.[21] They *indirectly* affect non-parties because a non-party, such as a media organisation that becomes aware of the order and acts in a way that frustrates its operation may be found to be in contempt.[22]

At common law, non-publication orders do not apply outside the jurisdiction in which they are made unless relevant legislation expressly provides for this.[23] This has obvious implications for social media entities and participants that are outside the jurisdiction.

When should the power to make a non-publication order be exercised?

Numerous authorities support the proposition that a court should only exercise a power to restrict publication of a report of proceedings if the restriction is necessary to secure the proper administration of justice in those proceedings. Cases such as *Rinehart v Welker*[24] confirm that

---

[18] Rodrick et al, *Australian Media Law* (6th Ed) 2021, Lawbook Co, [5.170].

[19] See *Ex parte Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 170; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 472 per Mahoney JA; *Attorney General New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 345 –347 per Mahoney JA; *John Fairfax Group Pty Ltd v Local Court of New South Wales* (supra) at 159-162.

[20] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 477 per McHugh JA with whom Glass JA agreed; *Attorney General New South Wales v Mayas Pty Ltd* (supra) per McHugh JA with whom Hope JA agreed; *John Fairfax Group Pty Ltd v Local Court of New South Wales* (supra) at 664-665 per Kirby P; cf *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506.

[21] Rodrick et al at [5.170] citing *Medical Board of Western Australia v A Medical Practitioner* [2011] WASCA 151 at [84]; *Collard v Western Australia (No 3)* [2013] WASC 70 at [19].

[22] Ibid citing *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at 363; *General Television Corporation Pty Ltd v Director of Public Prosecutions* (2008) 19 VR 68; *Herald & Weekly Times Pty Ltd v A* (2005) 160 A Crim R 299 at 305; *Medical Board of Western Australia v A Medical Practitioner* [2011] WASCA 151 at [84]; *Siemer v Solicitor-General (NZ)* [2013] NZSC 68 at [168]; *Herald and Weekly Times Pty Ltd v A* (2005) 160 A Crim R 299 at 305.

[23] *R v Nationwide News Pty Ltd* (2008) 22 VR 116 cf *R (On the application of the Prothonotary of the Supreme Court (Vic)) v Derryn Hinch* [2013] VSC 520.

[24] (2012) 83 NSWLR 347.

the power is to be used sparingly, mere embarrassment is not sufficient to warrant a non-publication order.[25]

One circumstance for making a non-publication order is that, if it is not made, the object of the proceedings would be defeated or the proceedings could not continue, or the administration of justice in that case would collapse.[26]

The leading authority, *John Fairfax Group v Local Court of New South Wales*, emphasised that the test is one of necessity.[27] It is not enough that the order will avoid some unacceptable consequence or serve some public interest. The court is not engaged in a balancing exercise. Ordinarily, there must be material before the court upon which it can reasonably conclude that the order is necessary.

A variant upon a non-publication order, but which still infringes with the open justice principle, is the use of a pseudonym. This can involve use of a pseudonym to conceal identity and can also involve concealing certain evidence.[28] For more recent examples see: *R v O'Dempsey (No 3)*[29] and *Dovedeen Pty Ltd v GK*[30] – the latter case involving a sex worker who brought an anti-discrimination claim.

There are well-established categories of cases that attract non-publication orders:

- police informer cases;[31]
- blackmail;[32]
- some extortion cases;[33]
- national security.[34]

On occasions, at least in other states, non-publication orders have been made where a defendant is facing successive trials, or there are associated, separate jury trials where the evidence in one trial is inadmissible in another, and reporting Trial A will prejudice the pending conduct of Trial B. This was encountered during the gangland murder trials in Victoria involving the notorious Carl Williams and others.

The challenge of successive trials arose in the successive prosecutions of the late Cardinal George Pell.

The digital environment presents a dilemma for courts when issuing suppression and non-publication orders. The trial of Cardinal George Pell demonstrates the limitations of suppression and non-publication orders. Two trials were to be held regarding two separate counts of child sexual abuse. In *DPP v Pell*[35] a suppression order was made to prevent

---

[25] See also *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125.
[26] *John Fairfax Group v Local Court of New South Wales* (1992) 26 NSWLR 131 at 161.
[27] (1992) 26 NSWLR 131; see also *AB v CD; EF v CD* [2019] HCA 6, [14].
[28] *David Syme and Co v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.
[29] [2017] QSC 338.
[30] [2013] QCA 116.
[31] *Cain v Glass (No 2)* (1985) 3 NSWLR 230; *Jarvie v Magistrates Court of Victoria* [1995] 1 VR 84.
[32] *R v Socialist Worker Printers and Publishers Ltd* [1975] 1 QB 637.
[33] *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131.
[34] *A v Hayden* (1984) 156 CLR 532 at 541; *Re a Former Officer of ASIO* [1987] VR 875 at 876; *Attorney General v Leveller Magazine Ltd* [1979] AC 440.
[35] [2018] VCC 905.

publication of the verdict in the first trial. In *DPP v Pell*[36] Chief Judge Kidd determined that the order was not futile despite the fact that multiple overseas publications had published the verdict.

Challenging an order

The cases recognise the legitimate interests of a media publisher or broadcaster in opposing orders to close a court or restrict reporting of it.[37]

Such standing may be based on the fact that the media hold a legitimate expectation of benefit arising from their enjoyment of the liberty of reporting and publishing court proceedings. The media may be directly affected by the making of non-publication or similar orders, in that:

- any failure to comply with an order of which they are bound or aware will result in serious consequences for them;
- their interests, which depend upon the free reporting of open court proceedings, will be detrimentally affected.

In addition, as representatives of the public, they have a sufficient interest as "guardian and watchdog of the public interest in the maintenance and preservation of open justice".[38]

Statutory Exceptions to the open justice principle

Specific Legislation

Legislation can operate to close proceedings to the public, forbid publication, or vest the court with discretion to make such orders. For example: s 12 *Bail Act* in bail proceedings; s 43 *Coroners Act 2003* (Qld) in coronial proceedings; s 45 *Adoption of Children Act 1964* in adoption proceedings; ss 97 and 121 *Family Law Act 1975* (Cth) in family law proceedings; s 20 *Childrens Court Act 1992* (Qld) in Childrens Court proceedings; *Criminal Law (Sexual Offences Act* (Qld) and s 15A *Children (Criminal Proceedings) Act 1987* (NSW)[39] in sexual offence cases; and ss 120 and 121 *Drugs Misuse Act 1986* in drug cases.

General provisions

Commonwealth

The *Crimes Act 1914* (Cth) allows exclusion orders, non-publication orders and orders restricting access to documents. Another example is the *Criminal Code Act 1995* (Cth), s 93.2.

---

[36] [2018] VCC 2125.

[37] *Queensland Newspapers Pty Ltd v Acting Magistrate Sternqvist* [2007] 1 Qd R 171; [2006] QSC 200 at [8]; *Re Bromfield, Stipendiary Magistrate; Ex parte West Australian Newspapers Ltd* [1991] 6 WAR 153 at 168-170, 193; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* [1986] 5 NSWLR 465 at 477-479 and 482 and at 470; *Friedrich v Herald & Weekly Times Ltd* [1989] 1 ACSR 277; cf *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 (by majority) at 151-153, 167-169; *Nationwide News Pty Ltd v District Court of NSW* (1996) 40 NSWLR 486 at 490-492, 498 that the media may appear by leave at the trial rather than as a matter of right: see also *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 449-450 per Lord Diplock; *Re Her Honour Chief Judge Kennedy ex parte West Australian Newspapers Ltd* [2006] WASCA 172 at [24]; *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR267 at 296-7.

[38] *R v Felixstowe Justices Ex parte Leigh & Anor* [1987] 1 QB 582 at 597.

[39] See *R v AB* [2018] NSWCCA 113.

These powers are exercised in terrorism cases. For instance, an order suppressing publication of information concerning ASIO operatives and relationships with foreign intelligence agencies was upheld.[40]

Queensland

Relevant provisions of the *Justices Act 1886* (Qld) include, ss 70, 71 and 71B.

Bail Act, s 12

Section 12 of the *Bail Act* permits a non-publication order to be made in certain circumstances. In *Queensland Newspapers Pty Ltd v Acting Magistrate Stjernqvist*,[41] Douglas J stated that, "Although the power under s 12(1) is a statutory power influenced by the legislative context in which it appears, the general principles of open justice about the limited, necessary circumstances in which non-publication orders may be made should be kept in mind by any court exercising that jurisdiction". The order must be suitably confined and in that case the failure to limit the temporal effect of the order was found to be erroneous.

Criminal Law (Sexual Offences) Act 1978

You will be familiar with the amendments that were made to this Act in 2023 and the provisions of ss 7 and 7A for applying for a non-publication order. Section 7B permits the court to make a non-publication order if satisfied of one or more of the three grounds stated in it. These are:

(a) the order is necessary to prevent prejudice to the proper administration of justice;

(b) the order is necessary to prevent undue hardship or distress to a complainant or witness in relation to the charge;

(c) the order is necessary to protect the safety of any person.

As was conceded in the *Lehrmann* case,[42] the requirement of "necessity" in s 7B is not satisfied by embarrassment, inconvenience, loss of reputation or a belief that the order is necessary. In the judicial review proceeding, I referred to the consideration of Nettle J in *AB v CD*[43] that the third basis "is not one of necessity to prevent **harm** to a person but of necessity to protect the **safety** of a person".

Many authorities have established what is commonly described as the "calculus of risk" test. This requires the court to consider "the nature, imminence and degree of likelihood of harm occurring to the relevant person".[44] These words are drawn from authorities on comparable sections.[45]

---

40 *Lodhi v Regina* [2006] NSWCA 101.

41 [2006] QSC 200 at [33]; [2007] 1 Qd R 171.

42 *Lehrmann v Queensland Police Service* [2023] QSC 238.

43 [2019] 364 ALR 202 at [15].

44 *Lehrmann v Queensland Police Service* [2023] QSC 238 at [70].

45 *AB (A Pseudonym) v R (No 3)* (2019) 97 NSWLR 1046 at [56]-[58] in relation to s 8(1)(c) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW). See also *AB v CD* (2019) 364 ALR 202 at 206 [15] in which Nettle J referred to the Court having to be satisfied "of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable".

Section 7C provides matters that the court must consider. The first is the primacy of the principle of open justice.

The statutory discretion falls to be exercised against the background of the principle of open justice, which accepts that a price to be paid for adherence to open justice is the inevitability of harm, personal distress, and severe embarrassment for persons who are accused of criminal offences.

Three days' notice of an intention to make an application must be given to the court and an eligible person.

If an applicant fails to give the required notice, the court can still hear the application where good reason has been given for the lack of notice, or it is considered in the interests of justice that it be heard.

When the court receives a notice of intention to make an application under s 7A, it must take reasonable steps to notify accredited media entities of the application.

The new laws allow accredited media entities to make submissions at the court hearing about the application for the non-publication order. Accredited media entities may also apply to the court to review a non-publication order that has already been made.

Since 3 October 2023 to 30 April 2024, 13 applications for a non-publication order under s 7 of *Criminal Law (Sexual Offences) Act 1978* have been lodged at Queensland Magistrates Courts. Of these applications, eight were granted, three were dismissed, one was refused, and one was struck out.

The timely release of a non-publication order to accredited media entities can be affected by other matters being heard by the magistrate, the endorsement process of the order by the registry, and whether aspects of the order need to be clarified with the magistrate.

Identity of informants

This issue confronted me in *R v O'Dempsey (No 3)*[46] in the case of a prison informant. It also arises in other contexts such as the sentencing of persons who have cooperated with authorities by providing information to them that is taken into account in reduction of sentences.

This is a challenging area. The media obviously cannot publish the submissions and evidence that are given in closed court, such as parts of a proceeding that are conducted in accordance with s 13A. Even reporting the fact that the court went into closed session is apt to suggest to readers and viewers that an apparently lenient sentence was the result of cooperation and informing on others.

If, in order to avoid adverse consequences for informants, no reference is made to this fact, then our sentences appear excessively lenient and the public is misled. I do not have an answer for this problem. In bygone eras, responsible court reporters would simply not report the matter, lest their readers be misled. We cannot rely upon that to occur anymore. There is a

[46] [2017] QSC 338.

temptation to simply hear the entire proceeding in closed court. However, to do so, would be exceptional and probably contrary to the principle of open justice.

Framing of Non-Publication Orders

There is an important interest in ensuring that responsible media organisations and the public more generally are informed of the fact that a non-publication order has been made and of the terms of that order. In the Supreme Court we adopt the practice of ensuring that all non-publication orders are communicated to the Principal Information Officer who then can provide them to accredited media organisations.

That does not mean that they are conveyed to freelance journalists, so-called "citizen journalists", and groups that are inclined to report or misreport proceedings. There is an obvious danger in providing certain forms of non-publication orders to irresponsible individuals. If the order, in effect, says "you shall not publish the fact that Robert James Bridge is the prison informant who gave evidence against the defendant in today's proceeding", then general publication of a copy of the order that named him would be self-defeating. The world will be told the name of the informant.

Therefore, consideration should be given to a form of order that does not do so being made available in any widely-published reasons or form of order.

I attach the possible forms of order that I canvased being made in *R v O'Dempsey (No 3)*,[47] along with some other forms of order that I have made in criminal and civil cases (see **ANNEXURE**). I do not claim that these are perfect. However, they may be of some assistance to you in framing orders to suit the circumstances that you may confront, often on short notice.

Untrained interns, social media and the decline of legacy media

We operate in a completely different media and legal environment to the one in which I practised as a junior barrister before the advent of social media. Large newspapers had more than one court reporter. They knew what they were doing.

If there was a suppression order in prospect, the reporters would tell their editor who would engage a solicitor to brief counsel to appear. That still may occur on occasions. However, often a judge or a magistrate will be asked by a party to make a non-publication order and the prosecution may not oppose it. The judge or magistrate is left to consider whether the order should be made and its terms.

In *R v O'Dempsey (No 3)*, I pointed out the unnecessary breadth of the non-publication order that I had made on the day, and left it open to the media to apply for a more limited order. I even made some suggestions. No such application was made. They simply were not interested. Court reporters used to be trained by more experienced reporters, by lawyers retained by their employers, and as part of their professional development about what they could or could not report.

[47] [2017] QSC 338.

Increasingly courts and governments are involved in educating untrained or undertrained reporters about prohibitions on reporting. For example:

- The Queensland Government *Sexual violence media guide* was published in September 2023. "Reporting on sexual violence: the legalities" starts on page 16;

- The Queensland Government *Domestic and family violence media guide* was updated in September 2023. "Reporting on domestic and family violence: the legalities" is on pages 6-7."

The future

During the COVID-19 pandemic many courts moved to virtual hearings and this affected the principle of open justice. We permitted lawyers, witnesses and parties to appear online. On occasions media organisations would request the ability to access the audio-visual link. This presents challenges in terms of who might be listening in and reporting.

Courts in high-profile matters seek to enhance open justice by permitting the recording and broadcasting of sentencing remarks. As we saw with the *Djokovic* deportation case in the Full Federal Court and in the *Lehrmann v Network Ten* defamation case, some courts provide live or near-simultaneous feeds. This is a wonderful development in many respects. In my view, the sentencing of Cardinal Pell by Chief Judge Kidd did more to educate the public about the practice of sentencing than just about anything I have seen or read. However, live feeds come with their obvious problems and if something has been published to the world, a non-publication order made a few hours later or even a few minutes later may come too late.

Pending legislation

The Queensland Community Safety Bill 2024 is currently before the Community Safety and Legal Affairs Committee for consideration. The Committee's report is due on 14 June and I understand the parliamentary debate is likely to be in the August sittings.

Sources of information

- Media Relations Guide

- Texts: Sharon Rodrick et al, *Australian Media Law* (6th Ed) 2021, Lawbook Co; David Rolph, *Contempt*, 2023, Federation Press.

ANNEXURE

POSSIBLE FORMS OF NON-PUBLICATION ORDER

Canvassed in *R v O'Dempsey (No 3)* [2017] QSC 338

VERSION I

Until further order, the name of the witness who gave evidence in the trial of *R v O'Dempsey* on 16 May 2017 and any matter which is likely to lead to the identification of the witness not be published, save for ***…[include exceptions as in Version III , para 2 or similar, so as to permit legitimate publication in the course of the proceedings etc]***

VERSION II

Until further order, the name of the witness who gave evidence in the trial of *R v O'Dempsey* on 16 May 2017 and any matter which is likely to lead to the identification of the witness not be published **to the public** [**or a section of the public]** by any means, including publication in a book, newspaper, magazine or other written publication, by being broadcast by radio or television or any other form of electronic means of communication or by being disseminated by social media.

OR

Until further order, the name of the witness who gave evidence in the trial of *R v O'Dempsey* on 16 May 2017 and any matter which is likely to lead to the identification of the witness not be published.

For the purpose of this order, ***publish*** means disseminate or provide access to the public or a section of the public by any means, including by:

(a) publication in a book, newspaper, magazine or other written publication; or
(b) broadcast by radio or television; or
(c) public exhibition; or
(d) broadcast or electronic communication; or
(e) dissemination by social media.

VERSION III

1. Until further order, any report made or published concerning the examination of the witness who gave evidence in the trial of *R v O'Dempsey* on 16 May 2017, and any report of the said trial, shall not reveal the name, address, place of employment or any other matter which is likely to lead to the identification of the witness.

2. Order 1 does not apply to:

   (a) a report of the proceeding in the form of a transcript of the proceedings or of a proceeding on appeal arising from the trial;
   (b) a report of the proceeding to a party to the proceeding;

(c) a report made by legal representatives or court officers for the purpose of the conduct of trial or of a proceeding on appeal arising from the trial;
(d) a report made by or to a law enforcement authority or police officer for the purpose of securing the attendance of the witness at a court or providing for the security and safety of the witness;
(e) any other report expressly permitted by order of a judge of this Court.

VERSION IV

1. Until further order, the name of the witness who gave evidence in the trial of *R v O'Dempsey* on 16 May 2017, and any other matter which is likely to lead to the identification of the witness, not be published.

2. For the purpose of this Order, *publish* means disseminate or provide access to the public or a section of the public by any means, including by:

    a. publication in a book, newspaper, magazine or other written publication; or
    b. broadcast by radio or television; or
    c. public exhibition; or
    d. broadcast or electronic communication; or
    e. social media.

3. Order 1 does not apply to:

    a. a report of the proceeding in the form of a transcript of the proceedings or of a proceeding on appeal arising from the trial;
    b. a report of the proceeding to a party to the proceeding;
    c. a report made by legal representatives or court officers for the purpose of the conduct of trial or of a proceeding on appeal arising from the trial;
    d. a report made by or to a law enforcement authority or police officer for the purpose of securing the attendance of the witness at a court or providing for the security and safety of the witness; and
    e. any other report expressly permitted by order of a judge of this Court.

R v Wagner … identity of prison informant

SUPREME COURT OF QUEENSLAND

Registry: Brisbane
Number: ………….

Plaintiff: **R**

v

Defendant: **ROBERT JAMES WAGNER**

ORDERS

Before: Applegarth J

Date: 27 February 2019

Initiating document:

THE ORDERS OF THE COURT ARE:

1. Until further order, any report made or published concerning the pre-trial examination of the witness, **[name deleted]…………………,** and any report of his evidence at the trial of Robert James Wagner, shall not reveal the name, address, place of employment or any other matter which is likely to lead to the identification of the witness.

2. Order 1 does not apply to:

   (a) a report of the proceeding in the form of a transcript of the proceedings or of a proceeding on appeal arising from the trial;

   (b) a report of the proceeding to a party to the proceeding;

   (c) a report made by legal representatives or court officers for the purpose of the conduct of the trial or of a proceeding on appeal arising from the trial;

   (d) a report made by or to a law enforcement authority or police officer for the purpose of securing the attendance of the witness at a court or providing for the security and safety of the witness;

   (e) any other report expressly permitted by order of a judge of this Court.

Closed Court sentencing under s *Drugs Misuse Act* 1986 (Qld)

SUPREME COURT OF QUEENSLAND

CITATION:	*In re an application for orders pursuant to ss 121 and 122 of the Drugs Misuse Act 1986*
PARTIES:	**R** **v** **NKZ** (defendant)
DIVISION:	Trial Division
PROCEEDING:	Application for non-publication and closed court orders
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2020
JUDGE:	Applegarth J
ORDERS:	

1. **Pursuant to s 122 of the *Drugs Misuse Act 1986* (Qld) the proceedings be adjourned to chambers so as to determine the question of sentence.**

2. **No transcript shall be made of the proceedings in chambers on 6 May 2020 unless directed by the Court.**

3. **The recording of the proceedings remain confidential and not be released other than to a legal representative of a party except by direction of a Judge of this Court.**

4. **Further, and pursuant to s 121 of the *Drugs Misuse Act 1986* (Qld) or the inherent jurisdiction of the Court, until further order, the whole of the sentencing proceedings on 6 May 2020 not be published.**

5. **Order 4 does not apply to:**
   (a) a report of the proceedings in the form of an authorised transcript of the proceedings or of a proceeding on appeal;
   (b) a report of the proceedings to a party to the proceedings;
   (c) a report made by legal representatives or court officers for the purpose of the conduct of the

hearing or of a proceeding on appeal arising from it;

(d) the official recording of the order as to the sentence imposed and the making of these orders;

(e) a report made by or to a law enforcement authority or police officer for the purpose of securing the attendance of a person at court or providing for the security and safety of a person;

(f) any other report expressly permitted by order of a Judge of this Court.

Statutory Will Hearing

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BS1668/17

In the matter of — An application by Peter J Sheehy pursuant to Part 2 (sections 21 to 28 of the *Succession Act* 1981 (Qld) for the authorisation of the making of a Will on behalf of LWA

ORDER

Before: Justice Applegarth

Date: 22 August 2017

THE COURT ORDERS THAT:

1. Until further order, no person shall publish information about this proceeding to the public, or a section of the public, if the publication is likely to lead to the identification of the adult described in this proceeding as LWA by a member of the public, or by a member of the section of the public to whom the information is published.

2. Paragraph 1 of this order does not prevent:

   (a) the applicant;

   (b) the parties served with the Originating Application;

   (c) the respondents in this proceeding;

   (d) the legal representatives of the persons referred to in (a), (b) and (c);

   (e) witnesses who gave evidence in these proceedings

   (f) court staff

   from publishing information to the extent necessary for these proceedings.

Signed: ………………………………………