Suppression Orders: a Balance of Justice and Access to the Media

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Over the last decade the increase of suppression orders, particularly in Victoria, has become evident. Whether the use of suppression orders undermines fair and accurate reporting by the media, is a contentious issue and more complex than simply freedom of speech being undermined. This essay will show how the courts have to balance between principles of open and natural justice whilst insuring access for the media and therefore the public. Focusing on Victoria and exploring the criticisms of suppression orders, this essay will look at what suppression orders are, outline the purposes and benefits of, as well as, the problems with them, the effect of information technology on the transparency of the courts, whilst examining the perspectives of open and natural justice from a legal and media perspective.

In 2008, a group called Australia's Right to Know coalition released the report 'The Review of Suppression Orders and Access to Court Documents in Australia' (Australia's Right to Know 2008). It was a damning report outlining inconsistencies across the jurisdictions in Australia, the amount made, the amount formally recorded, access and clarity of the orders (Australia's Right to Know 2008, p. 10). Since this report, a number of Acts have been passed, namely the *Court Suppression and Non-publication Orders Act* 2010 (NSW), the *Open Courts Act* 2013 (Vic) and the *Access to Justice (Federal Jurisdiction) Amendment Act* 2012 (Cth). These Acts in their own form have addressed issues raised in the 2008 report. However, a general definition of a suppression order is an order of the court that prevents information being published (Butt & Hamer, 2011). The grounds for a suppression order as outlined in the *Open Courts Act* 2013 (Vic) are to prevent real and substantial risks of prejudice to the administration of justice, to protect interests of the courts across all jurisdictions, ensure the safety of any person, as well as prevent undue distress or embarrassment in relation to a sexual offence against a child or for any other reason in the interests of justice. Although suppression orders have received a significant amount of criticism, which is outlined the Australia's Right to Know report, there is criticism of them by the media, who have described such orders a form of censorship that pervert the right to open justice.

Open justice is a term derived from English tradition and noted by English philosopher Jeremy Bentham, 'justice must be done and seen to be done' (Warren 2014, p. 46). In this regard, the aim of open justice is to have an open view between the courts and the public; this ensures a safeguard of court behaviour (Rodick 2014, p. 124). The ideal is in the accountability of the courts, if the courts are accountable for their decisions, then the public can maintain confidence in the integrity and independence in the doctrine of separation of powers and the third arm of government (Warren 2014, p. 46). As Rodick (2014) notes, the principle has three tenets. Firstly, the public has a right to know what is happening in the courts because they are the judicial arm of government. Secondly, open justice has an educational and confidence building function, if the public trust the courts then they acknowledge the courts authority, orders and outcomes. Finally, it has a free speech function, whereby the public has a right to receive information about the courts (Rodick 2014, p.124). When a suppression order is placed,

however, it is deemed to be a perversion of open justice. This perception of secrecy of the courts is pushed by the media (Barnfield 2011, p.18). However, the courts will only divert from the principle of open justice when it is important to do so; confidential information, identity, blackmail and national security are examples of how and when (Kenyon 2006, p.5). The courts though, view the use of suppression orders as a means to balance another principle, that of natural justice.

Natural justice, or the right to a fair trial, is a fundamental principle of the Australian court system (Burd & Horan 2012, p.103). The principle '(E)veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law' is embodied in the *International Covenant of Civil and Political Rights*, signed by Australia and enforced in 1976 (Burd & Horan 2012, p.103). This means not just the famous and wealthy, but also those who may present as being guilty of a serious offence of murder or sexual assault (King 2009, p. 3). Suppression orders are not the only approach to protect a jury's impartiality and the defendant's right to a fair trial. Contempt law and remedial approaches are other elements (Burd & Horan 2012, p.107). Further, the effects of the advancement of information technology have had a significant role in the access and accountability of open justice and the courts, the media and the public (Rodick 2014, p. 155)

The courts and the media have a symbiotic relationship (Rodick 2014, p. 133). However, dwindling newspaper circulation has led to a decline in specialised court reporters, affecting media access of information to the public (Rodick 2014, p. 154). *The Age*, for example, had 197,000 newspaper subscriptions in 2011, it was down to 142,000 in 2014 (Warren J 2014, p.48); technical advancements of television, the internet and social media have attributed to this and it is argued that, as a result, the role of open justice will rely more on the courts (Rodick 2014, p. 154). Another issue with technological advances for the courts and the balance between open and natural justice is exposure. YouTube, Facebook, Twitter and podcasts allow images and opinions of individuals to be easily exposed at large, not just locally but worldwide. There are no limits as to who or what is exposed and information can be accessed by anyone with the click of a button (Burd & Horan 2012, p.105). These elements present different perspectives of open justice in the media and the courts.

The media is quick to criticise the courts for hiding the truth (King 2009, p. 23). Other criticisms include that suppression orders are being misused by people of prominent status, they are being overused and they are not viable in the age of communication technology (Baer Arnold 2013). The quote upon which this essay is based is from the 2014 Press Freedom Australia address. In this speech Baker and McKenzie are not criticising suppression orders made by the courts. Rather, their speech focuses on the use of litigation and defamation suits to stop publication and the use of legal tactics (Baker & McKenzie 2014). WikiLeaks and its founder, Julian Assange, have also been critical of the courts and government intervention, citing it as a suppression of press freedom for the 'sake of politics' (Dorling 2014). The courts, in return, also criticise the media.

In her honours speech to The Melbourne Club, King J argued that although the media achieves good things - for example covering the children overboard scandal in the Howard years and the loans scandal in the Whitlam years - for every article published that is worthy, there is equally one of inaccurate, salacious or immoral material (King 2009, p. 4). Her honour discussed other difficulties brought about by trial complexities and the transparency of information to the media, referring to the advent of technology, giving the example of a recent trial in which 9000 pages of depositions included telephone intercepts, interviews and DNA evidence (King 2009, p. 5). King J agreed that the media are the eyes and ears of open justice for the public; however, she said they should also play their part in ensuring a fair trial, publishing facts rather than assertions. This led to the courts having to make suppression orders, highlighting issues of disclosing information or material to the media because of sheer volume and then being criticised for hiding the truth (King 2009, p. 23). Cunliffe (2012, p. 386 and 390) argues that the public has a right to knowledge and that knowledge should be protected, although there are issues with the media sensationalising information and there should be careful limits on the 'trial as a public spectacle'. The media, however, are not the only ones to criticise the use of suppression orders.

Justice Phillip Cummins has advocated restriction of the use of suppression orders. His honour has been highlighted by the media for campaigning for open justice in the courts has published a report, 'Protecting Victoria's Vulnerable Children' (Quill 2012). Cummins J has also presented a paper 'Justice open and shut: Suppression Orders sand Open Justice in Australia and the United Kingdom' (Cummins 2014). In his paper, he commends the introduction of the *Open Courts Act* 2013 (Vic) for providing legislation on the details and clarity of an order, its duration and the terms and information of an order. In this paper, some of Cummin J's major criticisms were reserved for suppression orders (Cummins 2014). Critics agree that an order has to be based on clear evidence and be direct in its terms (Bosland & Bagnall 2013, p. 676) and that there should be guidance and leadership in the approach to orders and legislation (Kenyon 2006, p.13).

The increase of suppression orders in Australia, and particularly Victoria, is a well-documented fact, by both the media and the courts themselves. It is difficult to distinguish whether the principle of open justice is being diminished because the media has a tendency to sensationalise the issue and high-profile cases. Conversely, the courts are obliged to address the principles of open and natural justice. The advent of information technology has helped the degree of difficulty of access for the public and media while assisting open justice. It is a delicate balance and more complex than suppression orders which have in the past led to unfair and inaccurate reporting. Ultimately, suppression orders must be clear in their intent, presentation and continue to be based on sufficient grounds and evidence, while adequate access to the media, as the eyes and ears of the public, is given and not restricted by power and money.

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