# Open Justice and Closed Courts: Media Access in Criminal Proceedings in NSW

Tim Dick, Solicitor, Children's Legal Service

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## Contents

1. Open justice, principles and exceptions……………………………………………..1
2. Media access to courtrooms, documents and filming………………………………...4
3. Suppression and contempt…………………………………………………………..... 9
4. Special rules for children…………………………………………………………….. 17
5. Special rules for sex offences……………………………………………………….. 18
6. Other notable restrictions…………………………………………………………….. 19

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## 1 Open justice: principles and exceptions

### *1.1 Open justice*

> Where there is no publicity, there is no justice. 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.
>
> *Scott v Scott*,[1] Lord Shaw quoting philosopher Jeremy Bentham.

The administration of justice must take place in courts to which the public, and the media, have access. It is a fundamental rule of the common law[2], and especially of criminal proceedings[3]. That courts of law operate openly and not in secret distinguishes their activities from administrative officials.[4] There is a legitimate concern that if courts are not on public view as far as possible, the administration of justice may be corrupted.[5]

A public hearing is a right enshrined in article 14(1) of the International Covenant on Civil and Political Rights. It is regarded as tending to improve the quality of courtroom testimony, makes the judicial system more comprehensible to the public, and reassures the accused and victims that a trial was conducted fairly and the accused treated justly.[6]

The open justice principle extends to the media being able to publish fair and accurate reports of proceedings.[7] Exposing judicial proceedings to public and

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[1] [1913] AC 417 (HL)

[2] *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, per McHugh JA at 476; see also *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 per Spigelman CJ at [17 to [21] and *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 per Spigelman CJ at [60] to [63]. *Attorney-General of NSW v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 345-350.

[3] *R v Tait* (1979) 24 ALR 473 at 487; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 58.

[4] *Russell v Russell* (1976) 134 CLR 495

[5] *Re Applications by Chief Commissioner of Police* [2004] VSCA 3; 9 VR 275, 286 [25]

[6] *Television New Zealand Ltd v The Queen* [2001] 1 NZLR 641; *Edmonton Journal v Attorney-General of Alberta* (1989) 64 DLR (4th) 577, 535-538 per Wilson J

[7] *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, per McHugh JA at 481

professional scrutiny and criticism is essential to maintaining confidence in the integrity and independence of the courts.[8]

In *R v Davis*,[9] the court said:

> Whatever [the media's] motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them.

It is the price of open justice that allegations about individuals are aired in open court, allegations to which such individuals can respond, while the media is obliged to ensure any report was fair.[10]

### *1.2 Exceptions*

The principle of open justice must yield to the more fundamental object of the courts to ensure that justice is done.[11] Departures from the principle, such as closing the court or permitting pseudonyms, are only valid in exceptional circumstances in which it is "really necessary to secure the proper administration of justice".[12]

The principal authority governing the inherent jurisdiction of courts to make non-publication orders in NSW is *John Fairfax & Sons Ltd v Police Tribunal (NSW)*:[13]

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court may 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. 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. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it.

The burden was on the party seeking to displace the open justice principle to justify to a strict standard that by "no other means" can justice be done, and merely that "the evidence is of an unsavoury character is not enough".[14]

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[8] *Russell v Russell* (1976) 134 CLR 495 at 520; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [99].

[9] (1995) 57 FCR 512 at 514, Full Bench of the Federal Court (per Wilcox, Burchett & Hill JJ) on appeal from the Supreme Court of the ACT

[10] *Reinhart v Welker* [2011] NSWCA 403 at [54], s29 *Defamation Act 2005*

[11] *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1 at 13.

[12] *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, per McHugh JA at 477.

[13] (1986) 5 NSWLR 465, per McHugh JA at 476

[14] *Scott v Scott* [1913] AC 417 (HL), per Viscount Haldine VC at 437.

Blackmail and extortion are accepted exceptions,[15] including the substitution of pseudonyms for the names of the complainant witnesses,[16] along with cases in which disclosure of information would seriously affect its commercial value,[17] and those involving police informants and issues of national security.

The administration of justice is a “multi-faceted” concept,[18] explained by Mahoney JA in *John Fairfax Group Pty Ltd v Local Court of NSW*:

> The basis of the implication is that if the kind of order proposed is not made, the result will be - or at least will be assumed to be - that particular consequences will flow, that those consequences are unacceptable, and that therefore the power to make orders which will prevent them is to be implied as necessary to the proper function of the court.”[19]

The courts do not exist merely to be a ready source of material for the media,

> [h]owever, for better or worse, the principle that courts be held in public, the principle of open justice, means that those who hear what was said in court are not restrained from publishing not only the material that the right thinking member of the public would appreciate knowing, but also the peripheral material which might titillate other readers.[20]

In *Australian Securities and Investment Commission v Rich*[21]*,* Austin J found eight qualifications to the principle of open justice:

1. Prematurity, or that evidence had not been tested or answered;
2. Trial by media, before material can be tested in open court;
3. Abuse of the privilege affored by the Defamation Act to fair reports of court proceedings;
4. Legitimate public interest weighed against “urges of purience”;
5. Ambush;
6. Risk of misleading reporting;
7. That evidence is hearsay should not dissuade a judge from making it available; and
8. Commercial confidentiality.

### *1.3 Media standing*

At common law, media interests had standing to be heard on orders affecting publication of court proceedings.[22]

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[15] *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of NSW* (1992) 26 NSWLR 131 at 141 per Kirby P

[16] *R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General* [1975] 1 QB 637, in which it was said the justification was not for the feelings of the blackmailed but that revealing the name would allow the blackmailer his or her way and discourage their prosecution

[17] *Australian Broadcasting Corporation v Parish* (1980) 43 FLR 129 at 133

[18] *Rinehart v Welker* [2011] NSWCA 403 at [39]

[19] (1991) 26 NSWLR 131 at 161

[20] Ibid, at [96]

[21] (2001) 51 NSWLR 643

[22] *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of NSW* (1992) 26 NSWLR 131

## 2. Media access

### *2.1 Open and closed courts*

Along with the fundamental principle that judicial proceedings should be open to the public, including the media, there are specific statutory requirements for committal proceedings, which are to be heard as if in open court: s56 *Criminal Procedure Act 1986* (**the *CPA***), and summary proceedings before a court, which are to be heard in open court: s191 *CPA*.

The common law power to close a court and hear proceedings in camera is usually founded in *Scott v Scott*[23] even though only two of the five lords justice positively there was such a power. Among the circumstances found to have justified closing a court are: the physical accommodations and order of the courtroom,[24] dealing with the mentally in and in proceedings for the care of children, along with cases of trade secrets, blackmail and extortion.

Court proceedings are still regarded as being in open court despite the preponderance of reliance on documents unseen by those in the public gallery, even if a stranger to the litigation who enters the court for interest alone has little chance of understanding the case, because what is read in court is available to the press and the public to read on request. "This is sufficient for the court still to qualify as an open court".[25]

Note statutory requirements to close courts for children[26] and when hearing the evidence of complainants in sexual offences.[27] In both situations provision is made for access by journalists.

### *2.2 The court file*

The move to documents has made access to the court file more significant for non-parties, including journalists, who wish to know the substance and detail of a case, and media interests argue that the ability to fairly and accurately report on court proceedings is constrained without access to the documents "read" in court. An effort to have the courts construe a right of access to documents tendered in court from legislation requiring the Magistrates' Court of Victoria to sit in open court failed in the Supreme Court of Victoria.[28]

The Court of Appeal agreed, but thought if the press is entitled to report on committal proceedings, it is desirable that reasonable access be granted to material handed up to enable fair and accurate reporting.[29]

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[23] [1913] AC 417 (HL)

[24] *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47

[25] *Reinhart v Welker* [2011] NSWCA 403, per Young JA at [80]

[26] s10 *Children (Criminal Proceedings) Act* 1987, and see paragraph 4, below.

[27] ss291, 291A, 291B *Criminal Procedure Act* 1986, and see paragraph 5, below.

[28] *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [1999] VSC 136; [1999] 3 VR 231

[29] *The Herald & Weekly Times Ltd & Ors v The Magistrates' Court of Victoria & Ors* (2000) 2 VR 346; [2000] VSC 242

Where material has been admitted into evidence, leave to inspect should generally be granted, unless there is evidence of particular harm: *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

### *2.2.1 Common law*

At common law, there was no general right of access to judicial records. Such records do not comprise a publicly available register but are files maintained by the court for the proper conduct of proceedings.[30]

That position has long been accepted in Australia, with a series of cases confirming there is no common law right for a non-party to a document, such as pleadings, filed and held as part of the court record.[31] "The 'principle' of open justice is a *principle*, it is not a freestanding right," per Spigelman CJ at [29].

That case was an application by various media organisations for access to the court file in apprehended personal violence order proceedings involving former magistrate Pat O'Shane, which fell outside the rules for access to the court file in criminal proceedings.

While not necessary to finding there was no right of access, Spigelman CJ went on to say the principle of open justice is not engaged at the time of the filing of the proceedings: "It is only when relevant material is used in court that it becomes relevant."

Applying a distinction between documents filed and those tendered to decide if access should nevertheless be granted, the court found the principle was served by the publication of the facts of the complaint, consent, and terms of the order. His Honour also found the first-instance judicial officer, Syme DCM, as she then was, was entitled to give weight to the respondent's privacy.

> When the media come before the court invoking high-minded principles of freedom of speech, freedom of the press or the principle of open justice, it is always salutary to bear in mind the commercial interest the media has in maximising its access to private information about individuals.[32]

The court found the implied constitutional right to freedom of political communication did not give non-parties a right to access documents.

Note, court orders are public documents to which there is a common law right of access but not to copy.[33]

Supreme Courts, as superior courts of record, have inherent powers which allow the court to grant access to non-parties even if the parties object: *Hammond v Scheinberg*.[34] In that case, Hamilton J also found he had the power to grant media access under s23 *Supreme Court Act 1970*, which reads in full: "The Court shall have

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[30] *Dobson v Hastings* [1992] Ch 391, 401

[31] *John Fairfax Publications Pty Ltd & Ors v Ryde Local Court & Ors* [2005] NSWCA 101; 62 NSWLR 512.

[32] Ibid, at [76]

[33] *Titelius v Public Service Appeal Board* [1999] WASCA 19; accepted in *John Fairfax Publications v Ryde Local Court*, above.

[34] [2001] NSWSC 568; (2001) 52 NSWLR 49

all jurisdiction which may be necessary for the administration of justice in New South Wales."

Other courts, including the District, Local and Children's courts, do not have inherent powers but do have implied powers such as are necessary to allow the court to act effectively within its jurisdiction.[35] However, the test of necessity may preclude that which may be thought desirable.[36]

### 2.2.2 *Legislation*

There are some statutory provisions giving the media the right to seek access to court documents, the most significant of which is s314 of the *Criminal Procedure Act*:

On application to the registrar, a media representative "is entitled to" inspect "any document relating to criminal proceedings" from the time of commencement until the expiry of two working days after they are finally disposed of, "for the purpose of compiling a fair report of the proceedings".

Subsection 2 restricts the meaning of "any document":

> The documents that a media representative is entitled to inspect under this section are copies of the indictment, court attendance notice or other document commencing the proceedings, witnesses' statements tendered as evidence, brief of evidence, police fact sheet (in the case of a guilty plea), transcripts of evidence and any record of a conviction or an order.

There is no express entitlement under s314 to see any background or psychological report, nor to any other subjective material tendered on sentence proceedings.

### 2.2.3 *Rules and practice notes*

The various criminal courts have rules governing access to court records.

(i) High Court of Australia

Any person can inspect and copy of any document filed in the registry, except affidavits not received in evidences and documents disclosing the identity where such disclosure is prohibited.[37]

(ii) Supreme Court of NSW, including the Court of Criminal Appeal

A person may not search or inspect documents filed in the proceedings except with the leave of the court.[38]

Leave, access and permission to copy will normally be granted to judgments in concluded proceedings, documents recording what was said or done, or information that would have been heard or seen, in open court, and material admitted into evidence.

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[35] *John Fairfax & Sons Pty Ltd v Police Tribunal*, above at note 1

[36] *John Fairfax Publications Pty Ltd v Ryde Local Court*, above at notes 1 and 31

[37] *High Court Rules 2004*, rule 4.07.4

[38] Practice Note SC Gen 2, "Access to Court Files".

Access to other material will not be allowed unless a registrar or judge is satisfied exceptional circumstances exist.
The court may, but does not have to, notify interested parties before dealing with the application.

The applicant must demonstrate that access should be granted to the particular documents sought and say why access is desired.

(iii) District Court of NSW

Access in the District Court is governed by s314 of the *Criminal Procedure Act* (see above) and by the *District Court Rules 1973* which bar a non-party from the file without the leave of the court.[39]

Note that the District Court has a practice note (11) for access to court files by non-parties, but it only applies to civil matters, not criminal matters.

(iv) Local Court of NSW

Access in the Local Court is governed by s314 of the *Criminal Procedure Act* (see above) and by the *Local Court Rules 2009.*

**8.10 Copies of court records**

(1) This rule applies to committal proceedings, summary proceedings and application proceedings.

(3) A person who is not a party to the proceedings may, with the leave of the Magistrate or registrar:
(a) have access to a copy of the court record or transcript of evidence taken at the proceedings, or
(b) on payment of the prescribed fee, obtain a copy of the court record or transcript of evidence taken at the proceedings.

(4) The Magistrate or registrar may grant leave for the purposes of subrule (3) if of the opinion that it is appropriate to do so in the circumstances.

(5) In determining whether it is appropriate to grant a person leave for the purposes of subrule (3), the Magistrate or registrar is to have regard to the following matters:
(a) the principle that proceedings are generally to be heard in open court,
(b) the impact of granting leave on the protected person or victim of crime,
(c) the connection that the person requesting access has to the proceedings,
(d) the reasons access is being sought,
(e) any other matter that the Magistrate or registrar considers relevant.

[39] Rule 52.3(2).

(v) Children's Court of NSW

The *Children's Court Act*, *Children's Court Rule* and the *Children (Criminal Proceedings) Act* and regulation are all silent on third-party and media access to the court file, as opposed to the explicit courtroom exclusion and non-publication rules.

The rule in s314 of the *Criminal Procedure Act 1987* applies by virtue of its application in children's criminal proceedings.[40]

### *2.3 Filming*

In the Supreme and District courts, there is now a legislative presumption in favour of recording and broadcasting of certain judgments given in open court after the amendment of both courts' governing legislation. Bail, forensic procedure, certain children's criminal appeals and proceedings under the *Crimes (High Risk Offenders) Act* 2006 are excluded.

The rules are in similar terms for both jurisdictions and say:

a. A person can apply to the court to record and broadcast "judgment remarks" (being delivery of the verdict in a criminal trial, sentencing remarks and a judgment determining proceedings).

b. If an application is made, the court is to permit recording and broadcast by a news media organisation unless the court is satisfied an "exclusionary ground" is present or measures are not reasonably practicable to prevent detriment to the orderly administration of the court.

c. Exclusionary grounds are:

    (i) if it would reveal a person's identity contrary to a non-publication or suppression order or to law;

    (ii) if it would contain material subject to a non-publication or suppression order or its disclosure is otherwise prohibited by law, or which is likely to be prejudicial to other criminal proceedings or to a current criminal investigation, or which is likely to reveal a covert operation;

    (iii) if it would pose a significant risk to the safety and security of anyone in the courtroom or involved in the proceedings.

d. No images identifying jurors, the accused, a victim, the immediate family of the accused or a victim, or a class of people identified by rules.

The District Court Rules provide that there can be only one cameraperson, one photographer, one sound recordist, no moving equipment, and no disruption to the proceedings of the court[41].

[40] Children (Criminal Proceedings) Act, s27(1)
[41] Rule 3.3

### *2.4 Court Information Act 2010*

All these piecemeal rules for access to the court file were to be replaced when the NSW Parliament approved an entirely new regime to govern all courts.

The *Court Information Act 2010* (the **CIA**) received the assent on 26 May 2010 but, six years on, it still has no commencement date. The spokesman for the Department of Justice told me on 18 March 2016 that there is "no set date for commencement" of the *CIA*. It appears there is no longer an intention to commence the act at all, or at least no time soon, and all parties are left relying on an untidy collection of legislation, rules and practice, which change depending on the court, judicial officer and registry concerned.

In criminal proceedings, the CIA defines as "open access information": an indictment or court attendance notice, written submissions, the fact sheet unless set down for trial by jury, transcripts of open court, statements and affidavits admitted into evidence, and judgements and orders[42].

Any other information on the court records is restricted access information, along with identified other material including identification details like dates of birth, phone numbers and home address, psychiatric and pre-sentence reports, criminal history, victim impact statements and letters of comfort, except as summarised in a judgement.[43]

The CIA grants access to open access information to any person, unless otherwise ordered by the court[44]. Restricted access information is permitted by leave of the court or the regulations[45].

News media organisations are entitled to see transcripts of closed court, voir dire material after the proceedings have finished, information during proceedings about non-publication orders, material to which access would not be granted only because of personal identification information (which must not be published), the brief of evidence and written documents.[46]

[42] *Court Information Act* 2010, s5(1)
[43] *Court Information Act* 2010, s6
[44] *Court Information Act* 2010, s8
[45] *Court Information Act* 2010, s9
[46] *Court Information Act* 2010, s10

### 2.5 *Other sources*

Trite to say, journalists often obtain information about proceedings from sources other than the court.

#### *2.5.1 Police*

NSW Police have a detailed policy[47] governing what should be released to the media and when. It notes:

(a) Police have an obligation to treat information acquired in their official capacity as strictly confidential to be divulged only with proper authority: Police Regulation 2015, cl 76.

(b) Once a person is in custody, care should be taken not to identify the suspect including not using ethnic descriptors;

(c) After charging, police can reveal the charges, the court location and date, whether bail was granted and “the bare facts of the crime”;

(d) Names of adults appearing at court can be released by the Police Media Unit on request by a media organisation on the day of the first appearance at court or afterwards if the name is on the public record, and not for publication;

(e) Requests for tendered fact sheets are to be referred to the court registry unless it has not be filed but read aloud by the prosecutor in open court or handed up in a bail application in which cases it may be made available to assist accurate reporting unless there are good reasons not to, including that it contains sensitive information that would not be in the public interest to release;

(f) The media should not be allowed access to those in custody and they should be provided the means to cover their faces.

(g) The media is not to be told of visits to crime scenes by accused people.

#### *2.5.2 Office of the Director of Public Prosecutions*

Guideline 32 of the *Prosecution Guidelines* issued by the NSW DPP governs media contact.

It says media contact “cannot and should not be avoided as the public have [sic] a right to (and should) know what is happening publicly in the criminal justice process.” This is limited by practitioners’ legal and professional obligations, and the guideline behoves staff to be sensitive in the way words and conduct may be reported.

Prosecutors and ODPP staff should not provide the media any information which may breach the legislation protecting children or victims of sexual offences.

It reminds practitioners of Bar Rule 59 of the Barristers’ Rules, which says no material should be supplied except for pleadings or court process, affidavits and statements as tendered or read in open court, transcript of evidence in open court, admitted exhibits and filed and served written submissions. The rule also allows, with the consent of the client (for ODPP solicitors, that is the DPP) to answer unsolicited questions from journalists in proceedings in which there is no possibility of a jury hearing the case and the answers are limited to the parties’ identities and of

[47] *Media Policy*, NSW Police Force, March 2016, available at http://www.police.nsw.gov.au/about_us/policies__and__procedures

witnesses already called, the nature of the issues, and orders or judgements already made. The answers must be accurate and "uncoloured by comment or unnecessary description" and do not express the practitioner's opinion.

The guideline allows prosecutors to provide information of an uncontroversial nature or routinely provided by prosecutors and already provided to the defence, like statements of facts admitted or handed up in bail applications, details of charges. It allows inspection of copies of open exhibits, and of criminal histories in the presences of an ODPP officer. It allows for the media to photograph admitted evidence.

The guideline does not allow prosecutors to reveal identities of witnesses who are at risk, to provided video or audio recordings or digital photographs, to discussed the likely result or possibility of appeal or ex-officio indictment, to provide medical and psychiatric reports, or to provide transcripts given copyright restrictions.

#### *2.5.3 Other parties*

Other parties may provide journalists with material, but note the bar rules referred to above and rule 28.1 of the Solicitors' Rules:

> A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.

Note also that documents produced on subpoena and statements served pursuant to a judicial direction cannot be used for any purpose other than for which it was given without leave of the court or unless it is received into evidence: *Hearne v Street*.[48] Although an implied undertaking, it is a substantive legal obligation and binds third parties who know of the documents' origin.

In *Hearne v Street*, an executive of Luna Park gave *The Daily Telegraph* copies of the pleadings and affidavits of resident plaintiffs in an action against it for nuisance. The High Court held that it was a contempt of court to breach an implied undertaking by parties in civil proceedings not to use documents produced during the discovery process for a purpose not connected with the proceedings.

#### *2.5.4 Freedom of information*

In NSW, as in most jurisdictions, freedom of information legislation prevents disclosure of material related to the judicial functions of a court: *Government Information (Public Access) Act* 2009, s43 and schedule 2

[48] (2008) 235 CLR 125

## 3. Suppression

### *3.1 Sub judice and contempt*

Sub judice[49] contempt of court acts as a significant restriction on reporting of criminal cases.

This form of contempt begins only when proceedings are pending in court. Imminent is not enough[50].

A publication must have a practical, objective tendency at the time of publication to interfere with the course of justice in a particular case. The tendency must be clear or "real and definite". There should be a substantial risk of serious interference.[51]

An intention to prejudice the administration of justice is not required[52], rather it needs to be established that there was an intention to do an act that has a clear objective tendency to interfere with the administration of justice.[53]

Factors relevant to determining the tendency are the nature and extent of the publication, whether the trial is by judge or jury, the time between publication and trial, and pre-existing publicity. Judges and magistrates are now taken not to be at substantial risk of influence by publication.[54]

The Judicial Commission's *Criminal Trial Courts Bench Book* notes some examples of contempt by publication:

- *Attorney General for NSW v Radio 2UE Sydney Pty Ltd* (unrep, 11/03/98, NSWCA) — On the third day of a murder trial, John Laws made comment on air about the trial, discussing the evidence, insisting that the accused was guilty of murder and criticising the way in which the prosecution had run the case. The jury was discharged and John Laws and Radio 2UE were each charged with contempt. They were ordered to pay costs and substantial fines.

- *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 — The appellant detailed the prior convictions of an accused person. The appellant and Macquarie Broadcasting Holdings Ltd were convicted of contempt. The appellant was sentenced to a term of imprisonment. Mason CJ held that the courts have always taken a serious view of any published disclosure of the prior conviction of a person accused of a criminal offence when proceedings for that offence are pending.

- *R v The Age Co Ltd* [2006] VSC 479 — *The Age* published an article detailing the accused's driving antecedents during committal proceedings for alleged dangerous driving offences. The respondent was convicted of contempt: see also *R v The Age Company Ltd* [2008] VSC 305.

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[49] The literal translation from Latin to English is "under a judge", usually interpreted to mean "under judicial consideration".

[50] *James v Robinson* (1963) 109 CLR 593

[51] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15; *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616

[52] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351

[53] *Principal Registrar, Supreme Court of NSW v Katelaris* [2001] NSWSC 506

[54] *Attorney-General v John Fairfax & Sons Ltd and Bacon* (1985) 6 NSWLR 695

### *3.2 Court Suppression and Non-publication Orders Act 2010*

The uncertainty of the common law and desire for uniformity across Australia prompted the Standing Committee of Attorneys-General to formulate a model law. NSW was the first to enact laws based on it, with the *Court Suppression and Non-publication Orders Act 2010 (the **Suppression Act**).*

The *Suppression Act* does not limit or "otherwise affect" a court's inherent powers to regulate proceedings and deal with contempt: s4. The common law remains relevant to its interpretation. Publication online is a continuing act; access is provided to the public as long as the material is available on the web.

A court is defined, and includes the Supreme, District, Local and Children's courts, and tribunals in future prescribed by regulation (there are none yet). The act applies to both civil and criminal proceedings.

The two types or orders are:

(a) **suppression orders**, those which prohibit or restrict the disclosure of information by publication or otherwise; and

(b) **non-publication orders**, those which only prohibit or restrict publication of information rather than any disclosure at all.

To "publish" means to:

> 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 publication by means of the Internet.

#### *3.2.1 Power to make order*

Section 7 is the primary operative provision:

> A court may, by making a suppression order or non-publication order on grounds permitted by this Act, prohibit or restrict the publication or other disclosure of:
>
> (a) information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court, or
>
> (b) information that comprises evidence, or information about evidence, given in proceedings before the court.

#### *3.2.3 Grounds for order*

The court is required to specify one or more of the grounds listed in s8(1) for making an order, being that it is necessary:

> (a) to prevent prejudice to the proper administration of justice,
>
> (b) to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,

> (c) to protect the safety of any person,
>
> (d) to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency), or
>
> (e) in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

Section 6 requires the court, when deciding whether to make an order, to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The principle of legality favours a construction of s8 which has “the least adverse impact upon the open justice principle and common law freedom of speech”.

In *Matthews v R* (No 2),[55] the Court of Criminal Appeal refused Mr Matthews’ application for a non-publication order as to his criminal record, which included aggravated indecent assault and disseminating child pornography. His submissions read in part:

> Prior charges are of a sensitive nature, and *will* have further consequences on appellants [sic] safety, specifically in custody resulting in a more onerous time in prison. Further influence may be had on his standing within the community should be judgement be available to the public.

The court dismissed that submission:

> The fact that such material reflects poorly on the appellant and his reputation or standing is not a reason to warrant its publication being restricted.

### *3.2.4 Standing to seek and be heard*

An order can be made on the court’s own initiative or on the application of a party to proceedings or anyone else “considered by the court to have a sufficient interest in the making of the order”: s9(1).

Those who have a right to be heard on the application include the applicant, any party to the proceedings, the Commonwealth or a state or territory government, a news media organisation and any other person with sufficient interest: s9(2).

A news media organisation is “a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination or new through a public news medium.”

The usual media companies, the ABC and SBS all would have standing. Query whether bloggers would have standing

### *3.2.5 Duration and application*

The time for making an order extends to after proceedings have concluded: s9(3).

[55] [2013] NSWCCA 194

Orders can be interim (s10) or operational for a period decided by the court (s12(1)). It is not specified if an order can be forever, but s12(2) requires the court "to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made".

Orders are not limited to applying only in NSW can can apply anywhere in Australia (s11), but is not to apply outside NSW unless the court is satisfied it is reasonably necessary to achieve the purpose for which it is made: s11(3).

Note, the Court of Criminal Appeal has observed of an order purported to prevent access in other states: "Whether a judge of the DIstrict Court had power to control the access of parties and citizens so broadly might itself raise a serious question for consideration."

An order would not be "necessary" if it would be ineffective given the content of websites throughout the world controlled by unknown parties and where enforcement in NSW was either impractical or impossible. An cannot be made under the *Suppression Act* which obliges an internet host to remove or restrict access to content of which it is not aware, or to inquire of or monitor the content on its websites of which it was not aware, as that would be inconsistent with the *Broadcasting Services Act* (Cth).

> An order … should be in a form which would be appropriate in the inherent jurisdiction in the Supreme Court, to prevent an apprehended breach of the sub judice principle. Further, the test of necessity will not usually be satisfied unless a request has been made to the parties thought to be in breach to remove the offending material and who, after a reasonable opportunity, have failed, or have indicated they do not intend, to take that step.

#### *3.2.6 Review and appeals*

The court which made the order may review it on its own initiative or application by the applicant, a party to the proceedings, the Commonwealth or a state or territory government, including an agency, a news media organisation or anyone with sufficient interest: s13. On review, the court can confirm, vary or revoke or make any other order available under the *Suppression Act*: s13(3).

Appeals from a decision to make or not make an order, to review or not review, an order, go to the court to which go appeals from final judgements or orders of the court: s14(2). If there is no such court, it is to the Supreme Court. Thus, for matters in the Local Court, the appeal will lie to the District Court and for criminal matters on indictment in the District Court, the appeal is to the Court of Criminal Appeal.

An appeal requires the leave of the appellate court: s14(1) and further material may be tendered (s14(5)). The same parties have the right to be heard.

Note, orders do not prevent a court telling the media of the existence of an order.

#### *3.2.7 Penalties*

A person commits an offence if he or she contravenes an order and is reckless as to whether his or her conduct contravenes the order: s16(1). Penalty is 1000 penalty units and 12 months' imprisonment for individuals or 5000 penalty units for a body corporate.

The same conduct can make a person liable for contempt, but is not liable to be punished twice: s16(4).

### *3.3 Commonwealth offences*

A court exercising federal jurisdiction can close a court, make a non-publication order, and decline access to the court record:

(a) “if satisfied that such a course is expedient in the interest of the defence of the Commonwealth” under s85B *Crimes Act* 1914 (Cth); or

(b) if satisfied that it is in the interest of the security or defence of the Commonwealth: s93.2 *Criminal Code 1995 (Cth).*

Note the significant procedure afforded to the Attorney-General to intervene to protect national security information in criminal proceedings, provided under the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth).

# 4. Special rules for children

## *4.1 Closed Court*

While hearing criminal proceedings against children (that is, those under 18), s10 *Children (Criminal Proceedings) Act* 1987 requires the Children's Court to exclude everyone except:

a. Those directly interested in the proceedings, unless the court otherwise orders;
b. A "person who is engaged in preparing a report on the proceedings for dissemination through a public news medium" unless the court otherwise orders;
c. The immediate family of a dead victim.

Note, that requirement for a closed court does not apply to traffic offences against children old enough to get their driver's licence which are usually heard in the Local Court, unless they are connected to criminal proceedings in the Children's Court.

While hearing AVO proceedings involving a child in need of protection or a child witness, the court is to exclude the public unless it otherwise orders: s41, *Crimes (Domestic and Personal Violence) Act* 2007.

## *4.2 Non-publication orders*

There are blanket prohibitions on identifying children involved in criminal proceedings which are not restricted to either child accused or proceedings in the Children's Court.

> **15A Publishing and broadcasting of names prohibited**
> (1) The name of a person must not be published or broadcast in a way that connects the person with criminal proceedings if:
> (a) the proceedings relate to the person and the person was a child when the offence to which the proceedings relate was committed, or
> (b) the person appears as a witness in the proceedings and was a child when the offence to which the proceedings relate was committed (whether or not the person was a child when appearing as a witness), or
> (c) the person is mentioned in the proceedings in relation to something that occurred when the person was a child, or
> (d) the person is otherwise involved in the proceedings and was a child when so involved, or
> (e) the person is a brother or sister of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed.

It applies even if the child is no longer a child or is dead, and the "name of a person" extends to "any information, picture or other material that identifies the person or is likely to lead to the identification of the person".

A court which convicts a child of a serious children's indictable offence may, with reasons, authorise the publication or broadcast of the child's name having regard to the seriousness of the offence, effect on the victim and or a dead victim's family, general deterrence, subjective features of the offender, his or her prospects of rehabilitation, and any other matter the court considers relevant.

A child covered by s15A over 16 can in the presence of a lawyer consent to having his or her name published or broadcast, and a court may consent to publication or broadcast for a child under 16 if it is in the public interest to consent. Where a child is dead, a parent or person with parental responsibility may give consent if no other parent objects, unless that parent has been charged in connection with the proceedings.

### *4.3 Young Offenders Act 1997*

Any information or other material likely to lead to the identification of a child dealt with under the act must not be published or broadcast: s65.

A person cannot divulge information acquired in the exercise of functions under the act subject to specified exceptions, which do not include providing information to journalists: s66(1).

Query the relationship between this provision and s314 of the *Criminal Procedure Act* for children dealt with under the YOA in the Children's Court.

## 5. Special rules for sexual offences

### *5.1 Non-publication*

The *Crimes Act* makes it an offence to publish any matter which does or is likely to identify a complainant in a sexual offence (s578A(2)), unless authorised by the judge or justice presiding, or with the consent of a complainant 14 or older at publication, or after the complainant's death.

A court cannot authorise publication without seeking and considering the complainant's views and without being satisfied publication is in the public interest.

### *5.2 In camera*

Evidence given by a complainant in proceedings for a prescribed sexual offence is to be in camera, unless a court otherwise directs.[56] The court can direct any other part of such proceedings be held in camera,[57] while incest offences must be held in camera.[58]

Media representatives may, unless the court otherwise directs, be in the courtroom when evidence is given via CCTV by a complainant in another place.[59]

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[56] *Criminal Procedure Act 1987*, s291
[57] *Criminal Procedure Act 1987*, s291A
[58] *Criminal Procedure Act 1987*, s291B
[59] *Criminal Procedure Act 1987*, s291C; incest offences are excluded from this.

## 6. Notable other restrictions

6.1 *Bail Act 2013*

S89 - A person must not publish or broadcast the fact a named person is a prohibited associate of an accused person, or any information calculated to identify a person as a prohibited associate of an accused person.

6.2 *Child Protection (Offenders Prohibition Orders) Act* 2004

Section 18 prohibits publication of information reasonably likely to enable identification of a person the subject of an order, any victim, or a person at risk.

6.3 *Child Protection (Offenders Registration) Act* 2000

Section 21E prohibits the disclosure of "any information relating to a registrable person obtained in connection with the administration or execution of this act."

6.4 *Crimes (Appeal and Review) Act* 2001

Section 111 prohibits publishing any matter having the effect of identifying an acquitted person the subject of an application or order for a retrial or a police investigation pending a possible retrial, unless authorised by the court.

6.5 *Crimes (Forensic Procedures) Act* 2000

S43 - a person must not publish in a report of a proceeding under the act the name of a suspect or information likely to enable indentificaiton of the suspect.

6.6 *Crimes (Sentencing Procedure) Act*

There is a prohibition on publishing or broadcasting the fact a named person other than the offender is specified in a non-association order or a non-association condition of parole: ss51B(1), 100H(1).

6.7 *Criminal Records Act* 1991

Section 13 prohibits a person with access to records of convictions disclosing any information concerning a spent conviction.

6.8 *Evidence Act 1995*

Section 195 prohibits publication without the court's express permission of a question disallowed as improper under s41, disallowed as an any answer is likely to contravene the credibility rule, and any question for which the court refused leave to ask under the credibility rule.

6.9 *Jury Act 1977*
Section 68A says a person "must not solicit information from, or harass, a juror or former juror for the purpose of obtaining information about" jury deliberations or how a juror or jury formed an opinion or conclusion in a trial.

6.10 *Law Enforcement (Controlled Operations) Act* 1997 No 136

Section 28 requires a court, unless it considers the interests of justice otherwise require, to hold proceedings "in private" as far as the related to the indentity of a participant in an authorise controlled operation and make orders to suppress evidence to ensure the identity is not disclosed.

6.11 *Mental Health Act* 2007

**162 Publication of names**

(1) A person must not, except with the consent of the Tribunal, publish or broadcast the name of any person:
(a) to whom a matter before the Tribunal relates, or
(b) who appears as a witness before the Tribunal in any proceedings, or
(c) who is mentioned or otherwise involved in any proceedings under this Act or the *Mental Health (Forensic Provisions) Act 1990*, whether before or after the hearing is completed.

Maximum penalty:
(a) in the case of an individual—50 penalty units or imprisonment for 12 months, or both, or
(b) in the case of a corporation—100 penalty units.

(2) This section does not prohibit the publication or broadcasting of an official report of the proceedings of the Tribunal that includes the name of any person the publication or broadcasting of which would otherwise be prohibited by this section.

(3) For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or material that identifies the person or is likely to lead to the identification of the person.

6.12 *Terrorism (Police Powers) Act* 2002

**26P Closure of Court and restriction on publication of proceedings**
(1) This section applies to proceedings before the Supreme Court in connection with an application for the making or revocation of a preventative detention order or prohibited contact order.
(2) Any such proceedings must be heard in the absence of the public.
(3) The Supreme Court may, in connection with any such proceedings, make such orders relating to the suppression of publication of the whole or any part of the proceedings or of the evidence given in the proceedings as, in its opinion, are necessary to secure the object of this Part.
(4) A person must not disclose information knowing that the disclosure contravenes an order under subsection (3).
Maximum penalty: Imprisonment for 5 years.

6.13 *Witness Protection Act* 1995

Section 32 prohibits a person from disclosing information about the identity or location of a person on a witness protection program.