

**JUSTICE SEEN TO BE DONE:  
SUPPRESSION ORDERS IN LAW AND PRACTICE**

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ABSTRACT

This paper reviews the law on suppression orders under common law and statutory provisions. It outlines reforms currently before the South Australian Legislative Council, explains notable aspects of suppression order practice, and reviews concerns about suppression orders that have been raised by commentators. It suggests that empirical research into the law and practice related to suppression orders – research combining the analysis of court files, transcripts, judgments and interviews with legal and media professionals – could substantially develop the understanding and operation of this central aspect of the administration of justice.

INTRODUCTION

Central to the Australian legal system is the principle that justice must be seen to be done.<sup>1</sup> The standard position is that legal proceedings are open, information is not concealed from those present at the proceedings, and the media can report what has occurred in open proceedings. Open justice is a basic aspect of what it means for a legal tribunal to operate. And yet, in some circumstances unrestricted reporting could frustrate the administration of justice.

In commenting on how Australian law deals with this tension, the paper moves through five sections. First, the common law position on suppression orders is outlined. Second, statutory approaches to suppressing publication are illustrated by considering some Victorian and South Australian provisions. Third, current South Australian reforms are noted. They seek to bring the statutory position on suppression closer to most other Australian jurisdictions. And they seek to improve practice, especially the flow of information to the media about orders. Fourth, some aspects of

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<sup>1</sup> The aphorism's possible formation by Hewart CJ or perhaps Lord Sankey are outlined in the Hon J J Spigelman AC, 'The Principle of Open Justice: A Comparative Perspective', address to Media Law Resource Center conference, London (September 2005); for information on the MLRC see <<http://www.medialaw.org>>.

practice are examined, related to the role of a court information officer, commentators' concerns about practice, and further elements of the South Australian reforms.

Fifth, what might be investigated by empirical research? There has been important work by legal researchers about juries and media publicity,<sup>2</sup> and some consideration by media academics of courts information officers.<sup>3</sup> But there has not been much substantial research centred on suppression orders. Some points about possible empirical research on this issue arise from work that I have undertaken in another area of media law: defamation law and litigation practice in Australia, England and the US. While seeking to avoid any error of self-quotation,<sup>4</sup> this type of work offers a valuable avenue for research into the law and the practice about suppression orders. There are many ways such research could go forward, but the better would involve judicial input, perhaps through the Judicial Conference of Australia. It is one issue in which 'the ancient and civilised discourse between judges and representatives of the media'<sup>5</sup> could be developed through research involving academics, legal professionals and the media.

#### I SUPPRESSING PUBLICATION AT COMMON LAW

In certain circumstances, orders can be made preventing media publications about one or more aspects of legal proceedings. The legal bases on which this can occur, and aspects of the practical operation of non-publication orders, appear to be contentious within the law and within the media. Barbs are thrown quite frequently; for example, the lawyer and media commentator Richard Ackland wrote early in 2006:

The courts are singularly happy to hand out suppression orders, like lollies to children. While chief justices bemoan the trend, others further down the judicial food chain are not holding back.<sup>6</sup>

Similarly, recent editorial comment in the Adelaide newspaper, *The Advertiser*, strongly criticised the apparent frequency of South Australian suppression orders.<sup>7</sup>

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<sup>2</sup> See eg Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Sydney: Law and Justice Foundation of NSW, 2001). Note also subsequent research about the effects, if any, of prejudicial information on jury room discussions, which is mentioned in Michael Chesterman, 'Criminal Trial Juries and Media Reporting' (2005) issue 85 *Reform* 23, 26.

<sup>3</sup> See eg Jane Johnston, 'Communicating Courts: A Decade of Practice in the Third Arm of Government' (2005) 32 *Australian Journal of Communication* 77.

<sup>4</sup> See eg Spigelman, above n 1, who notes such a 'sin'.

<sup>5</sup> The Hon Justice Ronald Sackville, 'Response to the Australian Press Council Annual Address – 31 March 2005', Australian Press Council; <[http://www.presscouncil.org.au/psite/activities/a\\_address/sackville.html](http://www.presscouncil.org.au/psite/activities/a_address/sackville.html)>.

<sup>6</sup> Richard Ackland, 'You Wouldn't Read About It – Not That You Can', *Sydney Morning Herald*, 27 January 2006.

There are many similar comments. However, I should also note the more conciliatory comments from some media practitioners about the general relationship of courts and the media. For example, radio journalist and former lawyer Jon Faine began a discussion of how radio covers the law with: ‘Apologies, first of all, for the nonsense published about the legal system’.<sup>8</sup>

Judges also display a wide variety of views on the media’s role. One of the more notable recent examples comes from members of the High Court in *Australian Broadcasting Corporation v O’Neill*.<sup>9</sup> In a situation in which a potential media publication raised no issues of sub judice contempt, Gleeson CJ and Crennan J criticised any simple recourse to concepts of trial by media:

[I]t is not the fact that allegations of serious criminal conduct usually become known to the public only as a result of charges and subsequent conviction. On the contrary, the process often works in reverse: charges and subsequent conviction often result from the publication of allegations of serious criminal conduct ... The idea that the investigation and exposure of wrongdoing is, or ought to be, the exclusive province of the police and the criminal justice system, bears little relation to reality in Australia, or any other free society ...

... [A] complaint that what is going on is trial by media implies that there is some different, and better, way of dealing with the issues that have been raised.<sup>10</sup>

But other judgments – in that decision and elsewhere – suggest a different conception of the relations between law and the media.<sup>11</sup>

Suppression orders are one important aspect of that relationship. When can they be made at common law? The starting point must be open justice,<sup>12</sup> the aims of which media reporting generally assists. For example, in its 2004 decision, *Re Applications by Chief Commissioner of Police (Vic)*,<sup>13</sup> the Victorian Court of Appeal said:

The principle of open justice is deeply entrenched in our law. It rests upon a legitimate concern that, if the operations of the courts are not on public view as far as possible, the administration of justice may be corrupted. A court is ‘open’ when, at the least, members of the public have a right of admission. From this it

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<sup>7</sup> Editorial, ‘Fighting for the Freedom of Speech’, *The Advertiser*, 29 September 2006. The situation was described as ‘farcical’.

<sup>8</sup> Jon Faine, ‘The Role of Radio in Legal Reporting’ (2005) issue 85 *Reform* 12, 12.

<sup>9</sup> [2006] HCA 46 (28 September 2006).

<sup>10</sup> *Ibid* [26]–[29].

<sup>11</sup> One of the most prominent instances for comparison is provided by *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 725 (Mahoney JA). In the *O’Neill* itself, see eg [150]–[152], [155] (Kirby J), [179]–[180], [280] and [287] (Heydon J)

<sup>12</sup> See eg Garth Nettheim, ‘The Principle of Open Justice’ (1984) 8 *University of Tasmania Law Review* 25; the Hon J J Spigelman, ‘Seen to be Done: The Principles of Open Justice’ (2000) 74 *Australian Law Journal* 290 and 378.

<sup>13</sup> *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275.

may be thought ordinarily to follow that the media, in their various forms, are also entitled to communicate 'to the whole public what that public has a right to hear and see'.<sup>14</sup>

A frequent reference is to Jeremy Bentham writing that publicity is the 'soul of justice'.<sup>15</sup> Open justice is believed to offer many benefits, such as improving the conduct of those involved in proceedings and supporting public confidence in the legal system.<sup>16</sup>

But judgments also state that justice cannot always be *seen* if it is to be *done*. Sometimes, courts can be closed, information concealed within a hearing, or media publication suppressed. Classic authorities remain the House of Lords in *Scott v Scott*,<sup>17</sup> and the High Court in *Russell v Russell*.<sup>18</sup>

It is worth remembering the different approaches to the common law power to limit open justice that were expressed in *Scott v Scott*. The case arose after divorce proceedings which were based on the husband's impotence. Those proceedings were heard in camera and were not contested. After the divorce, the former wife sent copies of the proceedings to members of what had been her extended family, among others. She was held to be in contempt because the proceedings had been heard in camera. The House of Lords disagreed, with the majority holding that only where the subject matter of a case would be *destroyed* by it being heard publicly could a hearing be closed at common law. The majority held that *embarrassment* of parties or witnesses was not a sufficient ground to derogate from open justice. A potential litigant might be dissuaded by the possibility of embarrassing publicity, but that was not a sufficient reason in *Scott v Scott*.

The case stands for the principle that it must be *necessary* for the proper administration of justice in order for the principle of open justice to be departed from. The case concerned closing courts, but that principle can be seen across the other common law limitations on open justice, including suppressing publication. As Paul

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<sup>14</sup> Ibid [25] (internal citations omitted).

<sup>15</sup> Jeremy Bentham, *Works of Jeremy Bentham* (Edinburgh: William Tait, 1843) 305; eg *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 52 (Kirby P); *John Fairfax Publications v Ryde Local Court* (2005) 62 NSWLR 512, [61] (Spigelman CJ); NSW Law Reform Commission, *Contempt by Publication*, DP 43 (Sydney: NSW LRC, 2000) [10.3].

<sup>16</sup> See eg Sackville, above n 5:

The scrutiny of a free press, aided by the principles of open justice developed and safeguarded by the courts, far from being inimical to the work of judges, fosters high standards of judicial conduct and performance. It also encourages informed community debate about the policy issues that must be confronted by the third arm of government.

<sup>17</sup> [1913] AC 417.

<sup>18</sup> (1976) 134 CLR 495.

Mallam, Sophie Dawson and Jaclyn Moriarty note: ‘In general, courts may only depart from the principle of open justice *where and to the extent that it is necessary to do so*’ for the administration of justice.<sup>19</sup>

There are various categories in which it is accepted that common law power exists to limit open justice: for example, cases about trade secrets or confidential information;<sup>20</sup> cases involving police informers;<sup>21</sup> and cases about blackmail.<sup>22</sup> A trade secret hearing is relatively straightforward – derogation from open justice is *necessary* if a trade secret claim is to be litigated justly. The administration of justice in the case at hand requires some limitation on open justice. In *Scott v Scott* itself this example was given to illustrate a class in which ‘justice could not be done at all if it had to be done in public’.<sup>23</sup> Police informers are another example of the recognised common law categories. One might well say that the ‘proper administration of justice’ requires their protection, but that would appear to raise a point about justice *more generally* than justice as regards the very subject matter of the action in question. Police informers are one of a few recognised instances in which suppression is possible when publicity would dissuade victims or witnesses becoming involved. A third illustration concerns blackmail. It involves a secret, but one that is not the subject matter of the action as such, and this class is perhaps best seen as being ‘in a category of its own’.<sup>24</sup> While in NSW the approach to concealing information in a blackmail case has been extended by majority to the situation of extortion, in Victoria it has not been extended to a case involving allegations of stalking.<sup>25</sup>

As Des Butler and Sharon Rodrick note:

Not all the cases in which publicity has been restricted can be convincingly explained on the basis that the order was necessary for the proper administration of justice *in those proceedings*. More liberal views as to the circumstances in which the principle of open justice can be curtailed have been expressed.<sup>26</sup>

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<sup>19</sup> Paul Mallam, Sophie Dawson and Jaclyn Moriarty, *Media and Internet Law and Practice* (Pymont: Thomson Lawbook, 2005–) [15.60] (emphasis added).

<sup>20</sup> Eg *David Syme & Co v General Motors-Holden’s* [1984] 2 NSWLR 294.

<sup>21</sup> See also *Witness v Marsden* (2000) 49 NSWLR 429.

<sup>22</sup> Eg *R v Socialist Worker Printers and Publishers* [1975] 1 QB 637. The common law also provides for the suppression of publication on bases such as national security, and for the protection of people such as the mentally ill and wards of the court.

<sup>23</sup> [1913] AC 417, 438.

<sup>24</sup> *Herald & Weekly Times v Magistrates’ Court of Victoria* [1999] 2 VR 672, [38] (Beach J).

<sup>25</sup> Cf *John Fairfax Group v Local Court of NSW* (1991) 26 NSWLR 131; *Herald & Weekly Times v Magistrates’ Court of Victoria* [1999] 2 VR 672.

<sup>26</sup> Des Butler and Sharon Rodrick, *Australian Media Law* (Sydney: LBC Information Services, 2nd ed 2004) [4.105] (emphasis added).

In the words of Justice Hedigan, the cases ‘do not speak with one voice’ about limitations on open justice.<sup>27</sup>

For example, in *John Fairfax Group v Local Court of NSW*, Kirby P suggested departure from open justice can be made for the administration of justice in the case at hand, the administration of justice more generally, or for some other public interests like national security.<sup>28</sup> Mahoney JA provided a wider view: departure from open justice would be possible where unacceptable consequences would follow from publicity, such as hardship, reducing the future supply of information, and so forth.<sup>29</sup> That said, the bases for derogation are limited, hardship is not recognised as a basis at common law,<sup>30</sup> and the principle is well described as ‘astringent’.<sup>31</sup> Notably, in its 2004 decision in *John Fairfax Publications v District Court of NSW*, the NSW Court of Appeal said it is ‘well established that the exceptions to the principle of open justice are few and strictly defined ... It is now accepted that the courts will not add to the list of exceptions’.<sup>32</sup> Thus, the common law power should be seen as existing where it is necessary *for justice in the case at hand*, such as a trade secret case, and *in certain recognised categories* related to the administration of justice more generally, such as police informers.

Some points about common law suppression orders have been left to one side here, but three are noted in passing.<sup>33</sup> First, orders directly *solely* at the media (when it is not a party to the litigation and is not present in court) are best seen as beyond a court’s power at common law. For example, in *John Fairfax & Sons v Police Tribunal of NSW*, McHugh JA said:

Courts have no general authority ... to make orders binding people in their conduct outside the courtroom. ... [A]n order purporting to operate as a common rule and to bind people generally is an exercise of legislative – not judicial – power.<sup>34</sup>

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<sup>27</sup> *Herald & Weekly Times v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 278.

<sup>28</sup> (1991) 26 NSWLR 131, 141 (Kirby P).

<sup>29</sup> (1991) 26 NSWLR 131, 161 (Mahoney JA; Hope JA agreed).

<sup>30</sup> Cf the statutory position in South Australia in relation to ‘undue hardship’, see below n 50.

<sup>31</sup> (1991) 26 NSWLR 131, 142 (Kirby P).

<sup>32</sup> (2004) 61 NSWLR 344, [19] (Spigelman CJ; Handley JA and Campbell AJA agreed).

<sup>33</sup> A fourth point would concern questions of standing for the media – particularly before the tribunal which makes an order – which have also been significant in the case law; see eg *John Fairfax v Local Court of NSW* (1991) 26 NSWLR 131; *Herald & Weekly Times v Medical Practitioners Board (Vic)* [1999] 1 VR 267, 297.

<sup>34</sup> (1986) 5 NSWLR 465, 477; see also the Privy Council in *Independent Publishing Co v Attorney General of Trinidad and Tobago* [2005] 1 AC 190.

Second, a common law order made within power may indirectly bind the media if the media is aware of the order and acts to frustrate its terms. Again, in the *Police Tribunal* case McHugh JA continued:

[C]onduct outside the courtroom which deliberately frustrates the effect of an order ... may constitute contempt of court. But the conduct will be a contempt because the person involved has intentionally interfered with the proper administration of justice and not because [the person] was bound by the order itself.<sup>35</sup>

And third, the ability of superior courts to suppress publication is part of their inherent powers to regulate their own proceedings. While inferior courts do not have these powers, NSW cases in particular have explored the relevant implied powers: the question for such a body remains: what is ‘really necessary to secure the proper administration of justice in proceedings before it’?<sup>36</sup>

In addition, decisions discussing the common law have explained that the terms of an order must be clear, be as limited as possible (for example, there is a difference in terms of open justice between closing a hearing and making a pseudonym order), and there must be some material on which to base the decision to make an order.<sup>37</sup>

## II STATUTORY SUPPRESSION ORDERS

The common law principles have been outlined at some length because they are influential for interpreting many statutory provisions about suppression. There are ‘an abundance of statutory exceptions’ to open justice.<sup>38</sup> But as the Victorian Court of Appeal said in the *Chief Commissioner of Police* case, statutory provisions for suppression ‘ought ordinarily to be strictly construed and utilised only when clearly necessary.’<sup>39</sup>

Australian statutory approaches to suppressing publication can be illustrated by some Victorian and South Australian provisions.<sup>40</sup> Given the audience, I perhaps should apologise for not considering further jurisdictions. However, the aim is to outline

<sup>35</sup> (1986) 5 NSWLR 465, 477.

<sup>36</sup> *Ibid*; see eg *John Fairfax Publications v District Court of NSW* (2004) 61 NSWLR 344, [38]–[66] (Spigelman CJ; Handley JA and Campbell AJA agreed).

<sup>37</sup> (1986) 5 NSWLR 465, 477 (McHugh JA).

<sup>38</sup> Butler and Rodrick, above n 26, [4.170]

<sup>39</sup> *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275, 286. See also eg *Raybos Australia v Jones* (1985) 2 NSWLR 47, 64 (Kirby P stated the importance of open justice means that statutory provisions are usually ‘strictly and narrowly construed’); *Mirror Newspapers v Waller* (1985) 1 NSWLR 1, 20 (Hunt J).

<sup>40</sup> In relation to NSW (and for some comparison with other jurisdictions) see NSW LRC, DP 43, above n 15, ch 10; NSW Law Reform Commission, *Contempt by Publication*, Report 100 (Sydney: NSW LRC, 2003) ch 10.

possible approaches more than attempt a comprehensive listing of the myriad statutes.<sup>41</sup>

Statutory provisions can be of two types. One creates an exception to reporting which operates automatically unless a court orders otherwise: there is a presumption of non-publication in particular circumstances that are set out in the provision. The other creates power for a court to make an order that limits publication; that is, a statutory power to make a suppression order.

It is worth emphasising the existence of the first type of provision – statutes that apply unless a contrary order is made – because it is sometimes suggested that courts make suppression orders when they are unnecessary in circumstances in which publication is already prevented by these specific provisions. As well as being significant in relation to family law,<sup>42</sup> there is extensive legislation applicable to children,<sup>43</sup> and provisions related to matters such as adoption,<sup>44</sup> coroners,<sup>45</sup> and sexual offences.<sup>46</sup>

As to the second type of provision, which creates a general power to suppress publication, two models can be outlined by drawing on Victorian and South Australian provisions.

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<sup>41</sup> See eg Sally Walker, *Media Law: Commentary and Materials* (Pyrmont: LBC Information Services, 2000) 497 who states in relation to her own substantial text that it ‘is not possible to list all the legislative provisions which prohibit or restrict, or empower a court to prohibit or restrict, reports of judicial proceedings.’ A useful reference point is the statutory extracts in Mallam, Dawson and Moriarty, above n 19, [51.100]–[52.9300]. See also Prue Innes, *Covering the Courts: A Basic Guide for Journalists*, version 6.0 (May 2006) available via <<http://www.supremecourt.vic.gov.au>> under publications/media releases.

<sup>42</sup> See *Family Law Act 1975* (Cth) s 121

<sup>43</sup> See eg *Children’s Protection Act 1993* (SA); *Young Offender’s Act 1993* (SA); *Youth Court Act 1993* (SA); *Children and Young Persons Act 1989* (Vic); *Crimes (Family Violence) Act 1987* (Vic).

<sup>44</sup> See eg *Adoption Act 1988* (SA); *Adoption Act 1984* (Vic).

<sup>45</sup> See eg *Coroners Act 1985* (Vic).

<sup>46</sup> See eg *Judicial Proceedings Reports Act 1958* (Vic) s 4; *Supreme Court Act 1986* (Vic) ss 18 and 19; and the useful table in Mallam, Dawson and Moriarty, above n 19, [15.1350]. It is worth noting that sometimes a specific provision does not exist in a jurisdiction and while a general statutory powers does exist, it does not apply to the facts in question; eg there appears not to be power in South Australia to suppress the identity of a mentally ill offender: it does not come within s 69A of the *Evidence Act 1929* (SA) discussed below and it is not covered by other statutory provisions: *Advertiser Newspapers v V* (2000) 211 LSJS 100; [2000] SASC 366 (1 November 2000).



The Victorian model is seen in ss 18 and 19 of the *Supreme Court Act 1986* (Vic).<sup>47</sup> In criminal or civil proceedings, an order can be made prohibiting ‘publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding’ when it is *necessary* for specified reasons; namely, not to endanger national or international security; prejudice the administration of justice; endanger physical safety; cause undue distress or embarrassment to complainants in certain sexual offence proceedings; or offend public decency.<sup>48</sup> This is the sort of provision that tends to be interpreted strictly in light of the principle of open justice.<sup>49</sup> It sets out a power to suppress when suppression is necessary on various grounds. And while some of the grounds are wider than the common law, the test of when an order will be made within those grounds is broadly similar: the test of necessity is seen to impose a high standard so that orders should be made only in exceptional circumstances.<sup>50</sup>

Another model is provided by South Australia. There, courts can make suppression orders under s 69A of the *Evidence Act 1929*. (This outline concerns s 69A as it existed during September 2006; expected reforms are considered below.) It does not use a test of necessity, but requires satisfaction that an order ‘should be made’ on one of two grounds: preventing prejudice to ‘the proper administration of justice’ or preventing ‘undue hardship’ to children, alleged victims of crime, or witnesses (who are not parties) in civil or criminal matters.<sup>51</sup> In addition, courts must recognise as ‘considerations of substantial weight’ the ‘public interest in publication of information related to court proceedings, and the consequential right of the news media to publish such information’.<sup>52</sup> Courts can only make an order against publication ‘if satisfied that the prejudice to the proper administration of justice, or the undue hardship, that

<sup>47</sup> See also *County Court Act 1958* (Vic) ss 80–80AA; *Magistrates’ Court Act 1989* (Vic) s 126. These sections are recognised under the yet-to-come-into-force *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24 (fair hearing), see also s 15 (freedom of expression).

<sup>48</sup> The last ground does not apply in the *Magistrates’ Court Act 1989* (Vic).

<sup>49</sup> See eg above n 39. It notable that ‘necessity’ was an element of the NSW Law Reform Commission’s final recommendations in its contempt reference, see NSW LRC, Report 100, above n 40, [10.15]–[10.20]. The Victorian provision also applies to a wide range of material, unlike some statutory provisions limited to the suppression of evidence.

<sup>50</sup> Eg *Herald & Weekly Times v County Court of Victoria* [2005] VSC 70, [13]–[14] (Byrne J) (18 March 2005). For analysis (which also emphasises the necessity test) of the relevant Federal Court provisions in s 50 of the *Federal Court of Australia Act 1976* (Cth) see *Herald & Weekly Times v Williams* (2003) 130 FCR 435, [24]–[39] (Merkel J; Finn and Stone JJ agreed).

<sup>51</sup> *Evidence Act 1929* (SA) s 69A(1); see also definitions in s 68. ‘Undue hardship’ is discussed briefly in NSW LRC, DP 43, above n 15, [10.90]; see also *Re F* (1989) 51 SASR 141, 147 (King CJ); *G v The Queen* (1984) 35 SASR 349, 352. The position that suppression is warranted on such grounds has been argued for at common law – see eg *John Fairfax Group v Local Court of NSW* (1991) 26 NSWLR 131, 161 (Mahoney JA) and above n 29 – but does not accord with current judgments. In relation to obligations in media reporting about defendants, see *Evidence Act 1929* (SA) s 71B.

<sup>52</sup> *Evidence Act 1929* (SA) s 69A(2).

would occur if the order were not made should be accorded greater weight' than those considerations of substantial weight.<sup>53</sup>

Before 1989, the South Australian statutory wording differed; publication could be suppressed to prevent undue hardship to any person (including parties) or 'in the interests of the administration of justice'.<sup>54</sup> Of the latter phrase, King CJ said:

The width of this expression requires no emphasis. It comprehends every aspect of the administration of justice and is obviously intended to confer on the courts the widest discretions.<sup>55</sup>

In addition, the earlier wording did not require substantial weight to be given to the public interest in open justice.

Both versions of s 69A appear to have allowed more suppression orders to be made than statutory models like the Victorian one. South Australia is commonly said to be the suppression capital of Australia.<sup>56</sup> In part, this appears to follow from the wording which does not set out a power to suppress only where it is *necessary* on various grounds. However, there also may be matters of litigation practice that continue from the less restrictive pre-1989 wording of s 69A.<sup>57</sup>

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<sup>53</sup> *Evidence Act 1929* (SA) s 69A(2). Courts may make interim suppression orders without undertaking this weighing process.

<sup>54</sup> For a discussion of the earlier wording and judicial decisions under it, see Sally Walker, *The Law of Journalism in Australia* (Sydney: Law Book, 1989) 31–32.

<sup>55</sup> *G v The Queen* (1984) 35 SASR 349, 351. The analysis remains relevant under other statutory provisions which use this phrasing, see eg *Australian Broadcasting Corporation v L* [2005] NTCA 7, [23] (Riley J) and [57] (Southwood J) (18 November 2005).

<sup>56</sup> Eg South Australia, Attorney-General (the Hon Michael Atkinson), *Hansard*, House of Assembly, second reading speech (30 August 2006): 'Suppression orders are more prominent in South Australia than anywhere else in the nation.' See also NSW LRC, DP 43, above n 15, [10.68]; Butler and Rodrick, above n 26, [4.210] and references at its note 195. An aspect of South Australian practice which appears to be consistent with a higher rate of orders is the disclaimer that appears at the start of South Australian judgments online, see eg <<http://www.austlii.edu.au>>:

DISCLAIMER – Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment. The onus remains on any person using material in the judgment to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court in which it was generated.

<sup>57</sup> See eg NSW LRC, DP 43, above n 15, [10.67]–[10.69].

### III SOUTH AUSTRALIAN REFORMS

While current common law and statutory positions are outlined above, the South Australian law appears set to change. The Evidence (Suppression Orders) Amendment Bill 2006 passed the House of Assembly in September and is before the Legislative Council at the time of writing. The Bill would not alter the grounds on which an order could be made: that depends on satisfaction that an order should be made to prevent prejudice to the proper administration of justice or undue hardship to various categories of people. But the Bill would change the evaluation that then applies. If the Bill is passed, s 69A(2) of the *Evidence Act 1929* (SA) would read:

- (2) If a court is considering whether to make a suppression order (other than an interim suppression order), the court
  - (a) must recognise that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings; and
  - (b) may only make a suppression order if satisfied that special circumstances exist giving rise to a sufficiently serious threat of prejudice to the proper administration of justice, or undue hardship, to justify the making of the order in the particular case.

Notable changes in this subsection are that open justice and consequential media reporting are termed ‘a primary objective’ of the administration of justice, and that ‘special circumstances’ must exist creating a ‘sufficiently serious threat’ of prejudice or undue hardship to warrant suppression. Such changes may reduce the frequency of suppression orders and the move the South Australian law further towards a model like Victoria. Reducing orders is certainly the stated intention of the reforms. The Attorney-General noted in the second reading speech:

We will pursue an easing in the number of suppressions by changing section 69A of the *Evidence Act* ... The government wants to send a strong signal to the courts that they must give more weight to the public interest in publication.<sup>58</sup>

Some commentators, however, have doubted whether the change in wording will prompt a reduction in orders.<sup>59</sup> In any event, such concerns raise questions about what common practices are in relation to suppression orders in Australian jurisdictions.

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<sup>58</sup> South Australia, Attorney-General (the Hon Michael Atkinson), *Hansard*, House of Assembly, second reading speech (30 August 2006).

<sup>59</sup> See eg comments by South Australian law academic, Rick Sarre, reported in Verity Edwards and Richard Sproull, ‘Courtroom Secrecy on the Increase’, *The Australian*, 28 September 2006.

#### IV SUPPRESSION ORDER PRACTICE

As well as the law on non-publication orders varying across Australian jurisdictions, practices appear to differ between and within jurisdictions. This section outlines some elements of practice that appear to work well, examines concerns that are frequently raised about the practical operation of suppression orders, and considers further elements of the South Australian reforms which may help address some of these concerns.

##### *A Courts Information Officer and Liaison Committee*

A key element of practice in Victoria – one which is not unique to it, but which appears to operate very effectively – is the courts information officer.<sup>60</sup> Prue Innes, an experienced former court reporter, has filled that role since it was created in 1993. She has helped to develop a good working relationship between the media and the Victorian courts. The active support of judges appears to have been crucial in developing that role, in part through a media-courts liaison committee. As Jane Johnston has commented, jurisdictions without an information officer ‘are missing out on a valuable conduit between the courts and the media’.<sup>61</sup>

Among other things, the Victorian courts information officer notifies the media of suppression orders – by fax or email – and is a general point of contact for journalists. Similar processes occur in a number of jurisdictions and they should be developed more widely and made to operate in as consistent and comprehensive a manner as possible. This sort of information process is one of the changes provided for in South Australia under the Evidence (Suppression Orders) Amendment Bill 2006, as discussed below.

It is worth emphasising that on this issue the interests of media and courts closely align. The media is keenly aware of the value in knowing about any orders that have been made. As a recent Australian Press Council report noted, ‘Inadvertent publication of suppressed material must be prevented to the maximum extent.’<sup>62</sup> And as South Australian litigation well demonstrates, it is no excuse for the media that it

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<sup>60</sup> For an overview see NSW LRC, Report 100, above n 40, [15.15]–[15.20]. For a discussion of the lack of such an officer in Queensland, see G L Davies and S N Then, ‘Why the Public Needs a Court Information Officer’ (2005) issue 85 *Reform* 9.

<sup>61</sup> Johnston, above n 3, 86.

<sup>62</sup> Australian Press Council, ‘Report on Free Speech Issues 2004–2005’, <[http://www.presscouncil.org.au/pcsite/fop/fop\\_ar/ar05.html](http://www.presscouncil.org.au/pcsite/fop/fop_ar/ar05.html)>.

lacks knowledge of a statutory suppression order (because of breakdown in communications within that or other media outlets).<sup>63</sup>

### B *Concerns from Commentators*

A range of concerns have been raised about suppression orders by commentators, including judicial officers, practising lawyers, the media and academics. They involve matters such as:

- The number of orders made and their apparently higher frequency in lower courts.
- The number of statutory provisions which can apply to the making of orders and the unclear ambit of common law powers in some situations.
- The ways in which applications are made, by whom, and with what reasons being offered in support of them.
- The scope, precision and duration of orders.
- Communication of the terms of orders (and amendments to orders) to the media.
- Standing for the media when making an order is being considered and on appeal.<sup>64</sup>

Four of these concerns are examined here. While there have been some valuable responses to them in recent initiatives,<sup>65</sup> sustained empirical research could support these efforts to improve the law and practice on suppression orders. One area of concern involves the number of orders made and the apparently higher frequency of orders in lower courts. The Australian Press Council, for example, has criticised the numbers of orders being made and has suggested that, in recent years, perhaps 1,000 orders have been made annually, which would be approximately four orders for each sitting day in Australian courts.<sup>66</sup> Similarly, Will Houghton commented at a 2005 Law Institute of Victoria seminar:

Most suppression orders are made by inferior courts and tribunals. Given the long common law tradition of the principle of open justice, they are surprisingly

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<sup>63</sup> See eg *Registrar v Nationwide News* (2004) 89 SASR 113; *Registrar of the Supreme Court v Herald & Weekly Times* (2004) 233 LSJS 473; [2004] SASC 129 (28 May 2004); *Herald & Weekly Times v Director of Public Prosecutions* (2003) 86 SASR 70.

<sup>64</sup> There are many examples raising such criticisms from with law and the media; see eg B Teague, 'The Courts, the Media, and the Community – A Victorian Perspective' (1995) 5 *Journal of Judicial Administration* 22 (in Walker, above n 41, 418).

<sup>65</sup> Eg the Judicial College of Victoria's suppression orders workshop in March 2006, see <<http://www.judicialcollege.vic.edu.au>> and links to the 2006 events calendar.

<sup>66</sup> Australian Press Council, above n 62, referring to an analysis conducted at the media company News Ltd.

common. Superior court judges are, rightly, wary of making suppression orders and do so only rarely.<sup>67</sup>

There have also been notable judicial comments; for example Chief Justice Warren has been reported as saying that orders may be increasing and the Judicial College of Victoria will ‘provide some guidance and leadership, particularly to the lower jurisdictions, with a view as to the appropriate approach, the legal principles to be applied, and the appropriate form of order’.<sup>68</sup> It would also appear clear that, to some extent at least, the number of orders made in recent years is due to particular trials, such as high profile murder trials in Victoria and security-related proceedings in NSW.<sup>69</sup> The extent of influence of such cases appears worthy of further research. A higher number of orders – depending on the reasons for those orders, their scope and duration – is not necessarily problematic,<sup>70</sup> but it is worthy of investigation and analysis.

Another area of complaint relates to the myriad provisions which can apply to suppression orders across different jurisdictions and proceedings. One consequence is that knowledge of specific provisions limiting publication – as opposed to provisions that allow courts to make orders – is not always comprehensive. One example, concerns an experienced criminal lawyer speaking on Melbourne radio during September 2005 about how the names of victims of sexual assault might be published, with no reference to statutory provisions that would apply and limit publication without a specific order being made. In part, the transcript reads:

Lawyer: Other than when proceeding are closed or if there is an order [against] publication, but that needs to be applied for by the prosecuting bodies or by the lawyers involved. If no one makes an application suppressing these details then ... it’s for [the] public record.

Announcer: So when we see in newspaper reports, typically the name of a convicted person is published but the details of the victims are not, that’s not a convention, that’s actually an order of the court is it?

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<sup>67</sup> William Houghton, ‘Suppression Orders’ (Melbourne: LIV, September 2005) [4.1]. Similarly, Chris McLeod has commented that in some instances ‘the bar [to getting a suppression order is set] quite low. ... This has been seen in the lower courts in particular’: ‘Wrestling with Access: Journalists Covering Courts’ (2005) issue 85 *Reform* 15, 18.

<sup>68</sup> Natasha Robinson, ‘Victoria Courts Greater Openness’, *The Australian*, 9 September 2005. See <<http://www.judicialcollege.vic.edu.au>>. And in Victoria, Deputy Chief Magistrate Popovic has produced written guidance for magistrates relevant to suppression orders.

<sup>69</sup> Eg the Hon Justice Geoffrey Eames, ‘The Media and the Judiciary’, speech to Melbourne Press Club Annual Conference, 25 August 2006.

<sup>70</sup> See eg comments by Deputy Chief Magistrate Popovic that increased suppression orders related to Victoria’s organised crime murder trials ‘is not in my view a negative outcome’ and ‘judicial officers are gaining experience in dealing with the applications and building up knowledge in the area’: Chris Merritt, ‘Go Back to School, Judges Urged’, *The Australian*, 18 August 2005.

Lawyer: Oh yes. Every court has got the power to either prohibit publication or close proceedings to the public and usually in respect of a sex case it's whether it will offend public decency or morality or it will endanger a physical safety or cause undue distress or embarrassment to a witness under examination ... but it needs to have an application made by the prosecutor ... to suppress the name so that if no-one carries out that exercise and no order is made by the court then all records are public.

Announcer: So is that not done as a matter of course then?

Lawyer: As a rule it is done and as a rule it ought to be done, but the answer to your question is no it is not done as a matter of course.<sup>71</sup>

Thanks to the work of the Victorian courts information officer, the radio program provided the correct explanation to its audience the following day.<sup>72</sup> However, this sort of exchange suggests that orders may well be sought (and perhaps granted) when they are superfluous.

A third area of complaint from the existing commentary concerns how non-publication orders are sought: the applications may not involve clear argument being offered in support of an order. The experienced media lawyer, Peter Bartlett, provided an example from the transcript of a murder trial when speaking to the Australian Institute of Judicial Administration in 2005:

The trial Judge had just made a Ruling on an evidentiary point and the following exchange took place:

Counsel: Your Honour, we seek a suppression order in relation to your Ruling and the reasons for the Ruling.

Judge: I will grant that suppression order. It's obvious why it should be granted.

... [A] further application was made for a blanket Suppression Order in relation to the trial, which the trial Judge again considered 'entirely appropriate'. The end result was two Suppression Orders made without one iota of legal argument and certainly not one reference to a reported case or even the overarching principle of open justice.<sup>73</sup>

Justice Teague has also noted that orders may be sought without reasons being offered.<sup>74</sup> The prevalence of such incidents in different jurisdictions and types of

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<sup>71</sup> Thanks to the Victorian courts information officer for this example and transcript.

<sup>72</sup> By explaining the effect of the *Judicial Proceedings Reports Act 1958* (Vic) s 4.

<sup>73</sup> Peter Bartlett, "Shooting the Messenger?" *The Courts, the Media and the Public*, paper presented at the Australian Institute of Judicial Administration conference, 9 October 2005, New Zealand.

<sup>74</sup> Teague, above n 64.

proceeding would appear valuable to investigate, whether for better developing awareness of the legal principles or for proposing improved practices or legal reforms.

A fourth area of complaint involves the scope, precision and duration of orders. Some orders are said to be too wide – for example, omitting any reference to the relevant proceedings when prohibiting the publication of a person’s name. A classic instance was *John Fairfax v Police Tribunal of NSW*, which involved an order in these terms:

In respect of [X] I make an order that ... his name is not to be published in reports of these proceedings nor in any material which would serve to identify him or his place of abode.<sup>75</sup>

The second part of the order lacked a link to the proceedings; it was too wide. While that case dates back twenty years, contemporary examples exist.<sup>76</sup>

A lack of precision in the ambit of orders is a related point. Some courts issue orders by following a standard wording. However, the wording may not always be well tailored to the circumstances of the case. For example, Victorian forms include statute-derived wording that the order prohibits a report of the whole or any part of a proceeding or any information derived from the proceeding. Some orders then simply add ‘the address of’ a named person. This can leave unclear whether the order is intended only to prohibit publishing the address of that person; it might be read to encompass everything about the proceeding.<sup>77</sup> In this regard, it is worth noting that approximately half the Victorian County Court orders made in 2005 involved a blanket suppression on identifying everyone concerned in the matter; it was less common for orders to be confined to specific information which could not be published.<sup>78</sup>

In addition, orders may lack a clear duration. Practice from 2005 in the Victorian County Court again illustrates this: only about ten per cent of the orders had a specified duration (for example, an order stated to end on a particular future event). A clear majority of orders were made until further notice, and did not have further orders made in relation to them.<sup>79</sup> Orders lacking a specified term may be

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<sup>75</sup> (1986) 5 NSWLR 465.

<sup>76</sup> See eg *Herald & Weekly Times v A* (2005) 160 A Crim R 299.

<sup>77</sup> The example is discussed in Bartlett, above n 73; see also Teague, above n 64; Australian Press Council, above n 62. Bartlett also notes that orders do not always specify the particular ground which is being relied on to make the order.

<sup>78</sup> Thanks to Prue Innes for providing this information, which relates to a total of 60 orders made during 2005 in the County Court. She commented that the orders that were worded carefully tended to be in cases related to alleged police corruption. The use of blanket orders may not be consistent with comments of Chief Justice Warren that orders of a confined scope were generally preferable to blanket bans: Robinson, above n 68.

<sup>79</sup> *Ibid.*



understandable in some circumstances. However, where there is no prompt for reviewing an order after the occurrence of particular events, the basic principles of open justice may be unnecessarily limited.

### C *South Australian and Other Reforms*

As well as changes mentioned above, the South Australian 2006 Bill would add three notable provisions about the practical operation of the system of suppression orders.

First, suppression orders would be subject to review under a new s 69AB of the *Evidence Act 1929*. If an order is made in civil proceedings, it would be subject to review when the case settles, is withdrawn, or judgment is delivered.<sup>80</sup> Orders in criminal cases would be subject to review on any of a number of procedural events, such as completion of preliminary examination, acquittal, exhaustion of rights to appeal conviction or sentence.<sup>81</sup> Reviews must happen as soon as practicable, and applicants for the orders, parties and the media are entitled to be heard in relation to the review under which the order can be confirmed, varied or revoked.<sup>82</sup>

Second, South Australian law already provides clear standing for the media to be heard when applications are made for suppression orders and on appeals against suppression orders.<sup>83</sup> Under the Bill, this would be extended to appeals in relation to the review process.<sup>84</sup>

Third, the Bill would develop provisions related to how non-parties – notably the media and the Attorney-General – would hear about suppression orders. Even before the expected amendments, s 69A requires suppression orders and related information to be forwarded to the Registrar and the Attorney-General:

- (10) Where a court makes a suppression order (other than an interim suppression order), the court must –
  - (a) immediately forward to the Registrar a copy of the order; and
  - (b) within 30 days forward to the Attorney-General a report setting out –
    - (i) the terms of the order; and

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<sup>80</sup> The Evidence (Suppression Orders) Bill 2006 would insert s 69AB(1)(c) into the *Evidence Act 1929* (SA).

<sup>81</sup> *Ibid* s 69AB(1)(a).

<sup>82</sup> *Ibid* s 69AB(3) and (4).

<sup>83</sup> *Evidence Act 1929* (SA) s 69A(5) and (9). The provisions could be contrasted with Victorian legislation: see *Supreme Court Act 1986* (Vic) s 17A and eg *Herald & Weekly Times v Mokbel* [2006] VSCA 93 (9 March 2006).

<sup>84</sup> The Evidence (Suppression Orders) Bill 2006 would insert s 69AC into the *Evidence Act 1929* (SA).

- (ii) the name of any person whose name is suppressed from publication; and
  - (iii) a transcript or other record of any evidence suppressed from publication; and
  - (iv) full particulars of the reasons for which the order was made.
- (11) Where a court varies or revokes a suppression order (other than an interim suppression order), the court must forward to the Registrar a written notification of the variation or revocation.
- (12) The Registrar will establish and maintain a register of all suppression orders (other than interim suppression orders).
- (13) The register will be made available for inspection by members of the public free of charge during ordinary office hours.

Under the Evidence (Suppression Orders) Bill 2006, the scheme would also apply to interim suppression orders and to the variation or revocation of any order.<sup>85</sup> In addition, a new s 69A(10) would require courts to notify authorised members of the news media about each order:

- (10) The Registrar
- (a) will establish and maintain a register of all suppression orders; and
  - (b) will, immediately after receiving a copy of a suppression order, or an order for the variation or revocation of a suppression order, enter the order in the register; and
  - (c) will, when an order is entered in the register, immediately transmit by fax, email or other electronic means notice of the order to the nominated address of the nominated representative of each authorised member of the news media.<sup>86</sup>

Members of the news media would be those authorised by the Registrar or the Registrar's nominee.<sup>87</sup>

The model appears close to the Victorian practice described above, but it extends to mandating the review of orders and informing the media about any variation or

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<sup>85</sup> The provisions would appear in s 69A(8) and (9) as amended under the Bill.

<sup>86</sup> However, a new s 69A(12) would read: 'Without limiting the ways in which notice of a suppression order, or an order varying or revoking a suppression order, may be given, the entry of such an order in the register is notice to the news media and the public generally (within and outside the State) of the making and terms of the order.' Thus, no specific notification would be required in order for liability to arise for breach of an order, which continues the current position; see eg above n 63 and accompanying text.

<sup>87</sup> See the new s 69A(13) under the Bill, which also states that authorised members of the news media may be required to pay fees fixed by regulations.

revocation.<sup>88</sup> If the reforms are introduced it would be useful to review how matters like authorisation, review and notification operate in practice.<sup>89</sup> For example, it appears that in some years many reports to the South Australian Attorney-General about orders failed to provide the information required by the *Evidence Act 1929* (SA) or relied on grounds inconsistent with the legislation.<sup>90</sup>

Beyond these statutory changes, wider changes have been proposed to suppression order practice in Australia. These include making the scope, basis and duration<sup>91</sup> of orders clear – issues of the ‘form, content and specificity’ of orders is a focus of the Judicial College of Victoria’s half day suppression orders workshop<sup>92</sup> – and involving the media more in the process of considering orders. Beyond statutory clarification that the media has standing when consideration is being given to making an order, the media could be *notified* in time so that it can appear before an order is made.<sup>93</sup> Being able to present its argument at that stage could assist the media in accepting suppression orders in those situations where they are warranted.

Related to such proposals, Justice Geoffrey Eames recently called for much closer work between the judiciary and the media about these matters: ‘There is something entirely unsatisfactory in having media lawyers rush, panting, into a court in response to a hurried call from a journalist that a judge is about to make a suppression order.’<sup>94</sup> And he made what may be a useful suggestion on the related issue of closing courts:

In two recent cases where a closed court order was sought and granted I permitted the media lawyers to remain throughout the course of the hearing. I did that – over opposition from the prosecutor, in one of the cases – because I accepted that the media had a right to advocate open justice, and that editors could not fairly

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<sup>88</sup> Richard Ackland has also noted concern that the media is rarely informed of the variation or revocation of orders in relation to NSW Supreme Court orders: Richard Ackland, ‘Suppression Policy is Riddled with Holes’, *Sydney Morning Herald*, 7 April 2006.

<sup>89</sup> Eg one issue may concern the time of the day at which the registrar is informed, which where possible should precede media deadlines; see eg NSW LRC, Report 100, above n 40, [15.10].

<sup>90</sup> See NSW LRC, DP 43, above n 15, [10.69]–[10.71] which discusses reports related to the year 1998–1999. Among other deficiencies, 44 orders were reported as being made under a general category of ‘to prevent publication’. As the NSW LRC notes in [10.71]: ‘Since all such orders are made to prevent publication, this ... category, which accounts for a third of all suppression orders in [South Australia] during this period, fails to provide an adequate explanation as required by the legislation’.

<sup>91</sup> In relation to Victoria, Chief Justice Warren has been reported as emphasising the value in orders with a limited duration: Robinson, above n 68.

<sup>92</sup> See <<http://www.judicialcollege.vic.edu.au>> and links to the 2006 events calendar.

<sup>93</sup> In some circumstances an interim order might be made pending that hearing, and there might be circumstances in which concerns about case management affect how the media can to be heard.

<sup>94</sup> Eames, above n 69.

judge the appropriateness of the orders if they were denied any means of assessing the justification for the order.<sup>95</sup>

Justice Eames continued that providing advance notice to the media could substantially aid practice:

[W]e ought be able to find a more satisfactory way of addressing these competing interests, calmly and consistently ... [I]t should be possible to establish a system where the media is given advance notice of proposed applications for suppression orders, so that lawyers can properly prepare and argue the matter. That is just one of the many areas where the public interest would be served by the media and the judiciary working together, more productively than we now do. What stops that happening is a lack of trust of the media by the judiciary, and for that the media largely has itself to blame.<sup>96</sup>

## V EMPIRICAL RESEARCH

Many of the issues outlined above could be well served by sustained comparative research. In order to shape better law and practice across Australia on suppression orders, it would be valuable to understand more about how often, and in what circumstances, non-publication orders are made and communicated to interested parties like the media.

It is clear that the law on suppression orders varies across Australian jurisdictions. It also seems there is meaningful variation in practice within jurisdictions. And there are a plethora of complaints about the existing law and commentary – some of which have been outlined above – but a detailed investigation and analysis could develop possibilities for reform to the law or modification to practice (whether under existing or reformed law). And such research might support the development of more uniform procedures nationally. The national variation in law and practice is just one of the challenges to longstanding approaches to open justice and contempt of court posed by digital communications in general and the internet in particular.<sup>97</sup> Challenges which may prompt the revisiting of previous efforts aimed at model legislation.<sup>98</sup>

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> See eg the Hon J J Spigelman AC, ‘The Internet and the Right to a Fair Trial’, address to the sixth world wide common law judiciary conference, Washington DC, 1 June 2005. One of the more notable contempt-related incidents involving the internet during 2006 concerned the *New York Times* blocking UK users of its online edition from a detailed analysis of security-related litigation in England, see eg Owen Gibson, ‘New York Times Blocks UK Access to Terror Story’, *The Guardian*, 30 August 2006. It also appears plausible that the making of orders may become less common if jurors are believed to be able to deal with potential prejudicial information better than in the past: see eg Spigelman, *ibid*; *Director of Public Prosecutions v Williams* (2004) 10 VR 348, [20] (Cummins J). Such a view of jurors may be influenced by existing empirical research, see above n 2, but also be prompted by the increase in information’s availability online.

### A *Empirical Research on Defamation Law and Practice*

In relation to such research, there are a few points that can be taken from existing empirical work into defamation law and litigation practice. In *Defamation: Comparative Law and Practice*,<sup>99</sup> defamation law and litigation practice in Australia, England and the US was investigated by combining close legal analysis and extensive empirical research to examine some of the central issues that commonly arise in defamation law. The work started from the expectation that comparative doctrinal analysis could benefit from empirical research into litigation practice. The ‘social’ in this type of sociolegal research was confined – it concerned defamation litigation – and litigation was examined to understand the form that legal rules take in practice.

The research used a combination of court files, transcripts, judgments and interviews with litigators and judges. A similar approach could reveal substantial information about suppression order law and practice across Australia. With that in mind, some aspects of the comparative empirical defamation research are outlined here.

In Melbourne and Sydney, court files were examined and specialist defamation litigators were interviewed. In England interviews with judges, barristers and solicitors were the primary information source because, at that time, court files did not contain the relevant documents that were filed with Australian courts. In the US, interviews with specialist attorneys were conducted (and the lack of specialist court lists, among other things, limited the viability of accessing file records).

Australian court files were valuable for this research for the way they recorded pleadings – a particularly important element of defamation practice – some correspondence between parties, pre-trial challenges to pleaded imputations, transcripts, interlocutory judgments, re-pleadings, and so forth. Almost every defamation case issued during a one year period in Melbourne and Sydney, in the Supreme and intermediate courts, was examined: 132 defamation claims in total. They were claims issued during 1998 and were examined several years later, mainly in 2000 and 2001.<sup>100</sup>

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<sup>98</sup> The NSW LRC, DP 43, above n 15, notes that proposals about non-publication orders went to the Standing Committee of Attorneys-General in the early 1990s: [10.75].

<sup>99</sup> In particular see Andrew T Kenyon, *Defamation: Comparative Law and Practice* (Abingdon: UCL Press, 2006) which also outlines other important empirical research into defamation law that has not focussed on comparing legal doctrine and litigation practice: 9–20. The research was funded in various ways: through the Faculty of Law and the University of Melbourne in its early stages and, in part, through an Australian Research Council Discovery Project grant (Kenyon and Marjoribanks, DP0343258). The research also had generous assistance from the legal profession in all three countries. All of these entities and people are thanked for their assistance.

<sup>100</sup> There were 68 files in NSW and 64 in Victoria.

In addition, a total of 130 interviews were conducted in the research, some during 2000 with a second set being conducted in 2003.<sup>101</sup> The interview transcripts were analysed under various doctrinal issues, such as the defamation defences that can be called Lucas-Box, Polly Peck and contextual truth.<sup>102</sup>

### B *Developments from the Empirical Research*

Something that is notable from this style of research is the way in which it can develop existing legal debates, in large part through developing greater knowledge about comparative law and practice. There are many examples that could be given; two are outlined here.

First, judges have differed for years as to whether the former NSW law under the *Defamation Act 1974*, with its imputation-centred approach promoted quicker, simpler defamation litigation that seemed fair to both parties. The research unequivocally doubts that the law was suitable for those aims. Suggestions that the former NSW approach increased defamation law's 'technicality' were considered by the NSW Law Reform Commission, but it repeatedly supported the state's method.<sup>103</sup> It noted the contrast to other approaches, saying in common law jurisdictions a bargaining process often occurred between counsel and judge as to what meanings to leave the jury at the end of trial evidence. 'In contrast ... the NSW procedure emphasises precision and makes the issues clearer at trial, saving valuable court time.'<sup>104</sup> Any 'appearance' of technicality was said to be far outweighed by precision.

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<sup>101</sup> In 2000, only a small number were conducted in Australia, 18, because of the detailed Australian court files, and 38 were conducted in London. In 2003, 27 were conducted in Australia, 23 in London, and 24 in the US. The later interviews also gave a sense of how court files and practices had changed since the files were first examined. In evaluating these interviews it is important to take into account the concentrated area of practice that exists for defamation: the interviewees formed a substantial proportion of those with significant experience in defamation litigation. In addition, aiming at a comprehensive treatment of the material and including atypical cases aims to improve the research's value and addresses a weakness in some qualitative research; namely, its anecdotalism. Overall, the material from the research should be assessed with the understanding that where an issue received many comments, practitioners see the issue as important; where many interviewees held a particular view, that view is likely to be common among experienced practitioners; and where divergences of views appeared in interviews, they were noted in the reporting.

<sup>102</sup> See eg *Lucas-Box v News Group Newspapers* [1986] 1 WLR 147; *Polly Peck v Trelford* (1985) [1986] QB 1000; the former *Defamation Act 1974* (NSW) s 16 and current *Defamation Act 2005* (NSW) s 26 (as well as equivalent provisions in other Australian jurisdictions); Kenyon, above n 99, chapters 3, 9 and 10.

<sup>103</sup> See in particular NSW Law Reform Commission, *Defamation*, Discussion Paper 32 (Sydney: NSW LRC, 1993) and *Defamation*, Report 75 (Sydney: NSW LRC, 1995); Kenyon, above n 99, 336–344.

<sup>104</sup> NSW LRC, Report 75, above n 103, [4.5]

When that interpretation is evaluated in light of the evidence from practice developed through empirical research, the Law Reform Commission's statements cannot be supported.<sup>105</sup> And the change from that law in the recent uniform *Defamation Acts* appears more than warranted.<sup>106</sup>

Thus, the research has provided empirical support for criticisms of the former NSW law that judges such as Levine J<sup>107</sup> and Kirby J have long raised.<sup>108</sup> It also supports some refinement of defamation practice that has been undertaken in recent years in NSW.<sup>109</sup> And, importantly, the research suggests how those criticisms about the technicality of defamation practice remain significant for courts throughout Australia to consider under the current uniform defamation law.

Second, the research offers strong support for the practicality and fairness of allowing defence pleadings of meaning in the English style. This is a technical area of defamation law that has been treated differently across Australian jurisdictions. And while some of the differences have been recognised in case law, others have not: this aspect of legal doctrine has been shaped in litigation practice in ways that are not recognised when it is moved across jurisdictions. (There might well be arguments for or against the changes, but to a large extent the alterations have not been recognised.)

There was serious criticism of what the judgment called Polly Peck pleading by two members of the Australian High Court in the late 1990s decision *Chakravarti v Advertiser Newspapers*.<sup>110</sup> In their joint judgment, Brennan CJ and McHugh J said pleading justification to a meaning that has not been raised by the plaintiff does not

<sup>105</sup> See Kenyon, above n 99, chapter 10.

<sup>106</sup> See eg *Defamation Act 2005* (NSW), *Defamation Act 2005* (Qld), *Defamation Act 2005* (Vic); Kenyon, above n 99, 361–372, 377–379.

<sup>107</sup> The Hon David Levine RFD.

<sup>108</sup> Eg the Hon David Levine RFD, who ran the NSW Supreme Court Defamation List for about a decade from the early 1990s, made these comments in a 1999 speech on the former NSW law and practice, 'The Future of Defamation Law' (31 August):

The tort of defamation is intended to provide a remedy for a person whose reputation has indefensibly been injured. . . . It boils down to determining what the publication means. Or it should. The amount of . . . time, let alone litigants' resources, expended profligately in the determination of what words, sentences and phrases mean is positively scandalous.

See also *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, [139] (Kirby J) suggesting a comparison be made with *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135, 149–51 (Kirby P in dissent); *John Fairfax Publications v Rivkin* (2003) 201 ALR 77, [84] (Kirby J); *Rigby v John Fairfax Group* (Unreported, NSW CA, Kirby P, Priestley and Meagher JJA, 1 February 1996) 4–5 (Kirby P in dissent).

<sup>109</sup> See eg *Greek Herald v Nikolopoulos* (2002) 54 NSWLR 165.

<sup>110</sup> *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519.

offer a good defence.<sup>111</sup> In their view, the ‘Polly Peck defence or practice contravenes the fundamental principles of common law pleadings’ and must cause difficulties in practice by embarrassing a fair trial.<sup>112</sup>

Subsequent Australian cases in some jurisdictions took these obiter comments and refashioned defence meanings.<sup>113</sup> So the law in Victoria, for example, restricted what defence meanings could be argued for.<sup>114</sup> (In NSW, the former *Defamation Act 1974* centred closely on the plaintiff’s pleaded imputation and did not allow for this sort of defence meaning to be pleaded.<sup>115</sup>)

There had been some commentary on these Australian developments – the change to defence pleading was good, the change was bad, because ‘X’ was clearly the best way to deal with meaning in defamation. Comments often followed a simple line that plaintiffs or defendants would be terribly handicapped if such defence pleading was, or was not, allowed. It was, at least to a degree, somewhat facile argument based on unexamined assumptions about comparative litigation.

However, the comparative empirical research outlined above alters the weight of evidence about matters like, ‘How should defence meanings in defamation law be dealt with, or what approaches to pleading disputes in defamation is appropriate?’ The research suggests that if defence pleas are not available for truth and opinion defences in the English style, under Australia’s uniform defamation law, greater interlocutory activity is likely to occur in defamation, with no clear benefit to litigation practice or the just resolution of disputes. Without the careful re-examination of these defences by the courts, Australian jurisdictions can be expected to move an appreciable distance towards the NSW practice that existed under the former *Defamation Act 1974*, a style of practice which the research suggests suffered from unhelpful and wasteful technicality.

### C Conclusion: Suppression Order Law and Practice

To recap, the defamation research arose in a situation of differing law across multiple jurisdictions and varied criticisms of how well that law operated; it has offered findings that should be useful when applying the current uniform defamation law (and

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<sup>111</sup> See Kenyon, above n 99, 54–60, 283–293. They noted that in traditional legal terms justification is a plea of confession and avoidance, so raising a different meaning is inappropriate.

<sup>112</sup> *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, [8] (Brennan CJ and McHugh J).

<sup>113</sup> See generally Kenyon, above n 99, chapter 9.

<sup>114</sup> See eg *David Syme v Hore-Lacy* [2000] 1 VR 667; *Anderson v Nationwide News* (2001) 3 VR 619.

<sup>115</sup> Ie what can be called Lucas-Box and Polly Peck pleading is distinct from contextual truth, see Kenyon, above n 99, 86–87.



the former law, particularly in NSW) and when considering how to improve practices under Australian defamation law. Similarly, the law and practice across Australia about suppression orders would seem likely to benefit from this style of empirical research: the law and practice on on-publication orders varies and many concerns that have been raised about suppression could be evaluated well through such research. It could also support developments and reforms that are underway in some Australian jurisdictions. And that is something the Judicial Conference of Australia may wish to consider.