JUSTICE and the MEDIA

A Talk
by the Honourable PD Cummins

at
The Melbourne Press Club

The Hotel Windsor
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The Victoria Law Foundation is a not-for-profit community benefit body, in its present form established by the *Victoria Law Foundation Act* 2009. It has a talented and eclectic staff and an outstanding Executive Director, Joh Kirby, present here today, and I am its Chair. Its essential function is educational, also achieved through its programmes of grants and publications. Education includes community and school education about the law and the legal system, and informing Victorians about legal matters in the public interest.[2]

Because the media is central to bringing the legal system to the community, each year the Foundation presents Legal Reporting Awards. The Awards recognise legal journalism at its best, and testify to the professional skills of journalists covering the courts and legal issues in Victoria. There is much to be proud of in legal journalism in Victoria. The standard of knowledge and of analysis is high. This year, the Awards attracted 108 entries across twelve categories. The Reporter of the Year on Legal Issues was Jane Cowan of the Australian Broadcasting Corporation, for her work on the Victorian Bushfires Royal Commission. Jane won a number of category awards as well. Carol Nader, of the *The Age,* was awarded for her work on promoting understanding of the work of the courts, in particular the Children's Court. Geoff Wilkinson of the *Herald Sun* and Kate McGrath, of Channel Ten, were highly commended in that category. Milanda Rout, of *The Australian*, was awarded for excellence in reporting of a long and complex civil case. Kate Hagan, of *The Age*, was highly commended. Steve Butcher and John Silvester, of *The Age*, were awarded for the best reports in print. Brigid Donovan, of ABC TV, was awarded for best television report, long form. David Smith, Leader Newspapers, was awarded best camera work. Norm Oorloff, of the *Herald Sun*, was highly commended. Judy Green, of *The Age* was awarded for best illustration. Kate Swan, of Leader Newspapers, was awarded for best report in community media. Soraya Lennie, of WIN News, Shepparton, was awarded for best report in regional media. Highly commended were Allan Murphy, of the *Sunraysia Daily* and Aleks Devic of *The Geelong Advertiser.*

As well as the quality of their work, what is common to these journalists and generally is the commitment to open justice. The media plays an indispensible function in ensuring that justice is open.

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[1] The views expressed are my personal views only.
[2] *Victoria Law Foundation Act* 2009, s5.

The hallmark of judicial process, as distinguished from administrative or bureaucratic process, is that it is performed openly.[3] In the nineteenth century the legal philosopher Jeremy Benthan stated:

> "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, while trying, under trial." [4]

In his phantasmagoric tale *The Trial*, Franz Kafka well understood the principle. He says of his protagonist Josef K.:

> " K might care to remember that the proceedings were not public. They could be opened to the public if the Court thought this was necessary, but the Law did not insist on publicity." [5]

In Australia the courts are committed to open justice. Daily, year in and year out, the courts have practised and fulfilled these fundamentals. The heads of jurisdiction – the Chief Justice, the Chief Judge and the Chief Magistrate – have assiduously worked towards the proper containment of suppression orders. The Judicial College of Victoria has made commendable presentations upon the matter including the necessity for strict sunset provisions. However, today I would like us to consider whether the principle of open justice is being eroded. This is an appropriate subject for the Chair of the Victoria Law Foundation, because prominent in the statutory charter of the Foundation is the bringing of the law to the public.

II

Although the courts are committed to the principle of open justice and often proclaim it, embedded within the law is the seed of containment. That seed is the judicial process itself. Lord Woolf MR in *R V Legal Aid Board, ex parte Kaim Todner* stated:

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases." [6]

This was put more directly by Lord Shaw of Dunfermline in *Scott & anor v Scott*:

> "There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves." [7]

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[3] *McPherson v McPherson* [1936] AC 177 at 200 per Lord Blanesburgh for the Board; *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J (as he then was).
[4] J Bowling (ed) *Works of Jeremy Bentham* (1843) Vol 4, 316-317.
[5] *The Trial* (1925) p136 (Picador).
[6] [1998] QB 966 at 977.

We need to be alive to this well-documented judicial tendency.

Plainly there will be instances wherein courts cannot responsibly be open or fully open. So much is recognised in sections 18 and 19 *Supreme Court Act* 1986 (Vic). However that Act empowers non-publication and closure orders only in cases of necessity. I consider that the common law requires necessity also.[8] In inter-connected criminal trials, such as those occurring in Victoria over the past decade, and in some terrorism trials, there can be justification for limited prohibition and, in exceptional instances, closure of courts. Physical safety of witnesses can justify such orders. But non-publication and closure should only ever be a last resort and never a first resort.

Given the powerful rationale of open justice and its frequent proclamation by the courts, it is salutary to examine what actually happens. Over the past five years in Victoria suppression orders have been made as follows:

Table 1

	Supreme Court Trial Division	**County Court**	**Magistrates' Court**
2005	52	66	84
2006	61	89	56
2007	80	79	92
2008	66	118	90
2009	53	156	103
2010 to August	32	96	76

Why so many?

There are I think three categories of reasons for the number of such orders.

First and importantly, a number of orders are justified for the reasons I have stated – interconnecting trials, personal safety, and some terrorism trials.

Second, there has been a marked development in legislative provision founding court orders. The basal legislation is the *Judicial Proceedings Reports Act* 1958. Rightly, by s.5 it prohibits the reporting of names of victims in sexual offence cases. By s.3 it prohibits the

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[7] [1913] AC 417 at 477-478.
[8] See *Re Application by Chief Commissioner of Police (Victoria) for Leave to Appeal* (2004) 9 VR 275.

reporting of elements in certain marital proceedings. Over the past five years the following relevant legislation has been enacted in Victoria:

Table 2

Act	Section	
Children, Youth and Families Act 2005	s 534	Photographs of children in Children's Court proceedings may not be published.
Family Violence Protection Act 2008	ss166-169	Parties in proceedings to the Act may not be identified.
Serious Sex Offenders (Detention and Supervision) Act 2009	ss 182 - 186	Evidence led and documents placed before the court may not be published.

While the purpose of a number of these provisions is beneficial and protects vulnerable persons, a question arises whether the 2009 provisions go beyond legislative purpose. The *Serious Sex Offenders (Detention and Supervision) Act* effectively results in proceedings under that Act not being publishable. This is a serious matter. Certainly, reformation of offenders should be protected and facilitated. Reformation is in the interests both of offenders and of the community. It should not be pushed aside. But ultimately the community has a right to know the substance of proceedings in these matters. Correlatively, the media has a serious responsibility to exercise restraint – in both language and in quantum of publicity – in this difficult area.

There are two developments which warrant attention[9].

The first is alternative dispute resolution. Much of this occurs in private. If a judge is called upon to perform such a task, by way of pre-trial process or otherwise, I consider that it is inherent in the judicial function that the task be performed in public.

The second development is legislative. The proposed *Court Suppression and Non-publication Orders Bill* 2010 is part of a national rationalisation of non-publication legislation. By Clause 8(1)(c) of the Bill, in addition to the existing grounds for the making of orders, a ground is proposed that

[9] In this Paper I do not address the related but distinct matter of media access to court records. For a comprehensive review of this, see J Bellis "Public access to court records in Australia: an international comparative perspective and some proposals for reform" (2010) 19 *Journal of Judicial Administration* 197.

"(c) it is otherwise necessary in the public interest for the order to be made and that the public interest significantly outweighs the public interest in open justice."

I think that, if enacted, this Janus-like provision will found an escalation of suppression orders. Mr Justin Quill has written on the matter in the Legal Affairs section of *The Australian* of 30 July 2010. I agree with him.

Unfortunately, I think that there is a third category of reasons for the number of suppression orders presently made in Victoria. That is that some are wrongly made. Some orders are made unnecessarily, when legislation notably the *Judicial Proceedings Reports Act* 1958 already governs the situation. Some orders are made unnecessarily, when the common law principles of *sub judice* already govern the situation. This is a matter of significance: it would be retrograde if the principles of *sub judice* came to be supplanted by suppression orders. Some orders are made on therapeutic, prophylactic or prudential grounds falling short of the true ground of necessity. Finally, some orders are founded upon a lack of understanding of the integrity and discipline of the jury system. Trial experience shows that juries are well capable of acting solely on the evidence presented in the courtroom and of not being affected by material outside the courtroom.

We must be astute that the large number of suppression orders made in recent years do not generate a change of culture from one of necessity to one of convenience. Scrupulous care is required to preclude the usurpation of open justice "little by little, under cover of rules of procedure, and at the instance of the judges themselves" (Lord Shaw in *Scott & anor v Scott)* and which "grows by accretion as the exceptions are applied by analogy to existing cases" (Lord Woolf MR in *R v Legal Aid Board, ex parte Kaim Todner*).

III

May I conclude by looking ahead. In my view the time has come for the courts to promote open justice by the electronic dissemination of court proceedings. Today, court proceedings routinely are recorded electronically. That recording should be publicly available. There is no reason in principle why the courts should privilege one mode of dissemination over another. The information medium of much of the public is electronic. The requirement of accurate, fair and balanced reporting applies equally to electronic as to print media. The media, not the courts, should decide what is newsworthy. It is not part of the courts' function, as presently occurs, to decide which case or part of case is sufficiently significant to warrant electronic publication. The courts' proper function is the contrary – to prohibit publication where necessary. Further, there is no reason why electronic dissemination should lead to consequences seen in the United States. Apart from the significant matter of cultural

difference, in Australia there is no First and Sixth Amendment jurisprudence which is the effective facilitation of much publication in the United States.[10] Proper protection could be provided to victims and vulnerable persons, an important matter which would need to be worked through given the immediacy and impact of electronic media. Then, perhaps, a century and a half on, we might more truly fulfil Jeremy Bentham's enunciation of publicity as the soul of justice.

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[10] *Richmond Newspapers v Virginia* 448 US 555 (1980). See also *Publicker Industries Inc v Cohen* 733 F2d 2059; *Westmoreland v Columbia Broadcasting System Inc* 752 F2d 16.