THEORY and REALITY

A Paper delivered to the Melbourne Press Club Symposium

"Suppression Orders – Justice Served or Justice Hidden?"

9 July 2015

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I

The Judicial Principles

We know them all. They are written on our hearts.

In *Scott v Scott* Lord Atkinson stated:

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning public confidence and respect.[1]

In *Russell v Russell* Justice Gibbs (as he then was) stated:

> This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative tribunals, for 'publicity is the authentic hallmark of judicial as distinct from administrative procedure'.[2]

The nineteenth century legal philosopher Jeremy Bentham, said it best of all, in one line:

> Publicity is the very soul of justice … it keeps the judge himself, while trying, under trial.[3]

We know this to be self-evident. So why are we here? Because theory and practice align imperfectly.

In a seminal article published in the 2013 *Sydney Law Review*[4] the academics Jason Bosland and Ashleigh Bagnall reviewed the frequency and breadth of suppression orders made in Victorian courts from 2008 to 2012. The reality the authors revealed certainly did not match the judicial theory. Doubtless the then incidence of cross-related gangland murder trials in Victoria had something to do with it. And doubtless also, it would be beneficial to have a Bosland analysis current to 2015 which would comprehend the era of the *Open Courts Act 2013.* Has it improved since then? Our speakers today will consider current practice.

Further demonstration of the misfit between theory and reality has come not only from academia but from the Victorian Parliament itself.

II

The Legislation

The Victorian *Open Courts Act 2013* came into operation on 1 December 2013. It applies in relation to proceedings commenced after that date. A commendable element of the Act is that it did not implement the 'public interest' ground for suppression orders which was contained in the model *Court Suppression and Non-Publication Orders Bill* endorsed in 2010 by the Standing Committee

[1] [1913] AC 417 at 463.
[2] (1976) 134 CLR 495 at 520, citing *McPherson v McPherson* [1936] AC 177 at 200 (Lord Blanesburgh).
[3] Jeremy Bentham, 'Bentham's Draught for the Organisation of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same', *The Works of Jeremy Bentham, v.4* (1834) 316.
[4] 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) *Sydney Law Review* 671.

of Attorneys-General, and rather stated the correct principle of necessity. 'Public interest' is a malleable test capable of substantial expansion. The Victorian *Open Courts Act* provides a general presumption in favour of disclosure of information and of open courts (s 4). It provides a criterion of necessity, not convenience (s 18). It provides that orders can only be made in specific, limited circumstances where there is a valid reason for doing so (s 13). It provides that the duration of orders must be specified (s 12). It provides that orders must make readily apparent what information is subject to the order (s 13). It provides that orders must only be made where the prejudice to the administration of justice cannot be prevented by other reasonably available means (s 18). It ensures the standing of media entities to appear (ss 15 and 19). It requires the court to take reasonable steps to ensure that media entities are notified of applications for suppression orders (s 11). Given the enunciation of judicial theory I have cited, all this is self-evident and should have been the common law and court practice. But it was the legislature, not the common law or the courts, which enshrined these principles and procedures. Our speakers today will touch upon these matters, including I expect that the three-day notice provision, to the court and then to the media of applications for suppression orders (ss 10 and 11), is more honoured in the breach than the observance.

III

The Analysis

How is it that academia and the legislature have spoken thus? There are, I think, three reasons.

First, plainly there is necessity for some suppression orders to be made. Everyone recognises this. Physical safety of persons, interconnected jury criminal trials, some (not all) terrorism trials, meet the test of necessity. Various extant legislative requirements must be met, as set out in the *Judicial Proceedings Reports Act 1958* (s 3, certain matrimonial proceedings; s 5, victims in sexual cases, and so on), the *Children, Youth and Families Act 2005* (s 34), the *Family Violence Protection Act 2008* (ss 166-169) and the *Serious Sex Offences (Detention and Suppression) Act 2009* (ss 182-186). The judicial duty to ensure a fair trial is a heavy duty. I have no doubt that judicial officers at all levels carefully consider whether suppression orders are made, and do not make them lightly.

Second, unfortunately at times there has been slippage. Slippage from the true criterion of necessity, to considerations of the prudential, prophylactic or therapeutic, which are not and never were proper grounds for suppression orders. Slippage into suppression orders when the legitimate and long-standing principle of *sub judice* applies. We all need to ensure that *sub judice* does not come to be supplanted by erroneous suppression orders. And there have been some unfortunate instances of the making of suppression orders bespeaking a lack of understanding of the health, robustness and decency of Australian juries.

Third, I think is the nature of judicial reasoning 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.[5]

This was put more directly by Lord Shaw of Dunfermline in *Scott 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.[6]

[5] [1998] QB 966 at 977.
[6] [1913] AC 417 at 477-78.

IV

Conclusion

It is a good judicial discipline that judges state their reasons in judgments and rulings with finality. Judges do not further develop, or defend, them. I have continued that judicial discipline in my post-judicial work. There are two reports, which might be of interest to you, on which I have made no further comment but am happy to receive questions or comments should you wish.

As appears in the *Report of the Protecting Victoria's Vulnerable Children Inquiry 2012*, by Recommendation 50 the Inquiry by majority recommended the repeal of ss 182-186 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* whereby non-publication of the identity and whereabouts of offenders subject to that Act may be ordered.[7] In contrast, in the Victorian Law Reform Commission 2014 *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Victoria)* the Commission by Recommendation 64(a) proposed a rebuttable presumption in favour of suppression of an accused's identity and by Recommendation 64(b) proposed extension to any time during the CMIA process of the right to apply to the court for a suppression order. These were steps beyond the existing power in the CMIA to suppress.[8] As you appreciate, the difference between the two Acts is that serious sex offenders are persons who have been found legally responsible for their actions whereas in CMIA the persons have been found not legally responsible.

I warmly welcome you all here, and warmly commend you for your interest in this important subject. I especially commend you for your responsible function of seeking to fulfil Jeremy Bentham's enunciation of publicity as the soul of justice. I look forward to our speakers, who know much more about this than me.

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[7] The Inquiry reasons, including the minority reasons, appear at Volume 2, p 364 of the Report.
[8] The Commission reasons appear at pp 296-300 of the Report.