University of Sydney, Law Reform Research Project

Suppression and Non-Publication Orders

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I. INTRODUCTION

The right to a fair trial is a fundamental right in Australia. To prevent the influence of material that could be prejudicial to a fair trial, legislation empowers courts to make suppression or non-publications orders. For example, in New South Wales ('NSW') there is legislation that regulates the access to, disclosure and publication of court and tribunal information: the *Court Suppression and Non-publication Orders Act 2010* ('*CSNPOA*'), the *Children (Criminal Proceedings) Act 1987* and the *Court Information Act 2010*.[1] Nevertheless, technological advancements have significantly challenged the effectiveness of non-publication orders.

This submission examines non-publication orders in the digital environment, with its main focus on NSW and its laws. References is also made to laws and arrangements in Victoria, New Zealand and the United Kingdom. Accordingly, this submission is structured into three parts: the effect of non-publication orders on various legal interests, the ineffectiveness of non-publication orders in the digital environment; and arrangements for non-publication orders in the digital environment.

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[1] *Court Suppression and Non-publication Orders Act 2010* (NSW) ('*CSNPOA'*); *Children (Criminal Proceedings) Act 1987* (NSW); *Court Information Act 2010* (NSW).

II. ARRANGEMENTS FOR NON-PUBLICATION ORDER IN THE DIGITAL ENVIRONMENT

New South Wales

The main legislation concerning non-publication orders in NSW in the digital environment is the *CSNPOA*.

In *Ibrahim*, the Court's decision made crucially affected non-publication orders in the digital environment. First, the Court held that section 7 *CSNPOA* empowers NSW courts to make *general* non-publication orders, meaning that in addition to materials published before court, materials extraneous to the proceedings may be suppressed.[2] Secondly, although non-publication orders can be made to apply to the dissemination of information anywhere in the Commonwealth,[3] the order 'must be directed to *particular publishers* in relation to *particular publications*',[4] hence narrowing scope of such orders.[5] Thirdly, internet content is published as a continuing act for as long as the material is available on the web.[6] Therefore, to resolve the impracticality of issuing large numbers of non-publication orders to restrain the large volume of online materials, an order to suppress internet content will satisfy the necessity criterion only if it can be shown to be 'effective'.[7] Fourthly, if the internet content host is unaware of the existing non-publication order and is not given reasonable time to remove the prejudicial material, the necessity criterion will not be satisfied. [8] Fifthly, when considering the making of any non-publication order, regard must be given to the likelihood that jurors will follow the instructions given by the Court and will refrain from doing any independent research online or otherwise.[9]

Despite such strict hurdles in making a non-publication order, [10] some problems are noted in NSW. For example, non-publication orders have been implemented differently across the hierarchy of courts, and there is lack of uniformity across legislation that empower courts to issue non-publication orders.[11]

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[2] *Ibrahim* (n 10) 62-3.
[3] *CSNPOA* (n 1) s 11.
[4] Jason Bosland, 'Restraining "Extraneous" Prejudicial Publicity: Victoria and New South Wales Compared' (2018) 41(4) *UNSW Law Journal* 1263, 1276; see also *Ibrahim* (n 10) 71[72] (Basten JA).
[5] See Brian Fitzgerald and Cheryl Foong, 'Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications' (2013) 37 *Australian Bar Review* 175, 183–4.
[6] Ibrahim (n 10) 65 [43] (Basten JA).
[7] Ibid 72 [78] (Basten JA). See also *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384, 402 [89]–[90]; *AW v The Queen* [2016] NSWCCA 227, [17] (Payne JA).
[8] *Ibrahim* (n 10) [66]-[70], [98] (Basten JA). See also *R v Perish* [2011] NSWSC 1102; *R v Debs* [2011] NSWSC 1248.
[9] *Ibrahim* (n 10) 72 [77] (Basten JA).
[10] *Bosland* (n 31) 1279; see also *Darren Brown (a pseudonym) v R (No 2)* [2019] NSWCCA 69.
[11] *Misrachi* (n 3) 17.

Victoria

Victoria's non-publication orders are regulated primarily through the *Open Courts Act 2013* (Vic) ('*OCA*').[12] Generally, courts can make proceeding non-publication orders under s 17 *OCA*, subject to the necessity test under s 18. Part 4 of the *OCA* expressly permits the County and Magistrate to make general non-publication orders or 'broad suppression orders', but the Supreme Court can make such order in pursuant to its inherent jurisdiction and sections 18 and 19 of the *Supreme Court Act 1986*.[13]

In comparison to other Australian states, Victoria is said to have a 'culture of suppression'.[14] Such culture could be attributed to the courts' broad interpretation of *OCA*, which has critically influenced non-publication orders made in the digital environment.[15] For example, unlike NSW, Victoria courts do not require general non-publication orders to target particular publishers from publishing particular publications.[16] Hence, 'general precautionary orders' are frequently issued, restraining the publication of any unspecified prejudicial material, online or otherwise.[17]

Non-publication orders can only be issued if it can be shown to be 'effective'.[18] However, the fact that an order does not guarantee 'perfect impartiality' does not render an order unnecessary.[19] Moreover, if it can be shown that the materials were not 'forced upon a visitor to the [internet] site who was not searching for them', it is not necessary to make a non-publication order.[20] This is because Victorian courts generally presume that a juror would not defy the judge's warning and direction by deliberately searching for prejudicial material.[21] Hence, education, clear directions, and written pledges are identified as alternatives to non-publication orders that could help protect jurors from prejudicial contents in the digital environment.[22]

An independent review of the *OCA* was conducted by former Supreme Court of Appeal Judge Frank Vincent in 2017.[23] It suggested several recommendations which could indirectly resolve some issues discussed above,[24] however, they have not yet been fully implemented.

[12] *Open Court Act 2013* (Vic) ('*OCA*').
[13] *Supreme Court Act 1986* (Vic) ss 18, 19.
[14] Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35(4) Sydney Law Review 671, 681-3.
[15] Bosland (n 19) 1281.
[16] Ibid 1286; See order made in *R v Hinch* [2013] VSC 520.
[17] Bosland (n 19) 1290. See also *HWT v A* (2005) 160 A Crim R 299*; GTC v DPP* (2008) 19 VR 68 ('*Underbelly*').
[18] *Mokbel* (n 9) 268–72 (Warren CJ and Byrne AJA).
[19] *Pell* (n 9) [59].
[20] Ibid [94].
[21] Ibid.
[22] Warren (n 16), 56.
[23] Frank Vincent, *Open Courts Act Review* (Report, September 2017).
[24] Ibid, see recommendations no. 3, 4, 5, 6, 10.

New Zealand

In New Zealand, non-publication orders are regulated principally by the *Criminal Procedure Act 2011* (‘*CPA’*), the *New Zealand Bill of Rights Act 1990*, and relevant case law.[25] The enactment of the *CPA* in 2011 in particular helped non-publication orders deal with technology. Three specific arrangements should be noted.

First, the definition of ‘member of the media’ in ss 198(2) and 210(1) *CPA* recognises both ‘traditional’ and ‘non-traditional’ members of media.[26] Secondly, the definition of ‘publication’ in *CPA* has been interpreted to incorporate publications of traditional and new media.[27] Thirdly, internet service providers are indirectly regulated under s 211 *CPA*. Accordingly, internet service providers, among other publishers, will be held liable if they knew or were aware of the suppressed publication and did not remove it within reasonable time.[28] However, under the *CPA*, an internet service provider that self-generates information will not be liable if it breaches an automatic suppression order.[29]

In addition to the *CPA* there are several cases that have significantly influenced non-publication orders in the digital environment. In *Lewis v Wilson & Horton Ltd*, the court held that non-publication orders can only be made if it can be shown to be effective.[30] The court in *Re X* noted that suppressed information appearing in an overseas publication will not be a ground for revoking the order.[31]

United Kingdom

In the UK, the most relevant legislation regarding non-publication orders is the *Contempt of Court Act 1981* (‘*CCA’*).[32] UK courts have become more willing to interpret *CCA* provisions in a way that includes and regulates technologies.

The definition of ‘publication’ under s 2 *CCA*, for example, has been interpreted to incorporate both the modern *act* and *form* of publication.[33] Regarding the act of publication, courts have recognised that internet intermediaries, such as web hosts, blogging platforms and search engines,

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[25] *Criminal Procedure Act 2011* (NZ) (‘*CPA*’); See *New Zealand Bill of Rights Act 1990* (NZ) ss 5, 14.
[26] Ibid ss 198(2)(b), 210(1)(b). See also Justice and Electoral Committee, Parliament of The New Zealand, *Criminal Procedure (Reform and Modernisation) Bill* (Commentary, 2011) 4.
[27] *ASG v Hayne* [2017] NZSC 59, [79] (Ellen France J). Decision confirmed in *Nuku v Police Commissioner* [2018] NZHC 36, [15]. See also *Karam v Solicitor-General* [1999] HC Auckland AP50/98; *Re Victim X* [2003] 3 NZLR 220; *Police v Slater* [2011] DCR 6.
[28] *CPA* (n 40) s 211(1). See also New Zealand Law Commission, *Suppressing Name and Evidence* (Report No 109, October 2009) 66; Justice and Electoral Committee (n 55) 5.
[29] *CPA* (n 40) s 211(3).
[30] [2000] 3 CZLR 546; See also *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.
[31] [2002] NZAR 938, [23-27].
[32] *Contempt of Court Act 1981* (UK) (‘*CCA*’).
[33] UK Law Commission, *Contempt of Court: Juror Misconduct and Internet Publications* (Report No 340, November 2013).13 [2.27].

could be liable as publishers of contemptuous material if they are made aware of the content.[34] As for the form of publication, s 2(1) *CCA* provides four forms of publications,[35] all of which are recognised to include both old and new media.[36] The strict liability contempt requirement that communication be 'addressed to the public at large or any section of it' in s 2(1) *CCA* has also been broadly interpreted to cover the communication of materials online.[37]

Also relevant to technology is the defence given to innocent publishers or distributors under s 3 *CCA*.[38] To further substantiate this defence, Schedule 1 was added to the *CCA* to clarify the interpretation of s 3 *CCA*, effectively protecting online publishers and distributors from liability. Further defences can be found in the *Electronic Commerce (EC Directive) Regulations 2002* ('the *Directive')*.[39] Accordingly, internet intermediaries that cache and host materials are not liable unless they have 'actual knowledge of the unlawful activity or information',[40]and the burden of proof to disprove the defences is on the Crown.[41]

III. EFFECTS OF NON-PUBLICATION ORDERS ON VARIOUS LEGAL INTERESTS

Courts have endeavoured to balance various legal interests when issuing non-publication orders.

Privacy and Confidentiality

Privacy only exceptionally overrides public interest in the context of *CSNPOA*. In *J v L & A Services Pty Ltd (No 2)*, the court found that except under certain circumstances, possible invasions of privacy or business affairs are insufficient to ground non-publication orders.[42] Recently, the New South Wales Court of Appeal confirmed that any competing public interest must 'significantly' outweigh public interest in open justice.[43] Where there is no cogent and non-speculative basis supported by evidence that a party's privacy or dignity would be compromised, a non-publication order is unlikely.[44]

Victims and Witnesses

The principle of open justice overrides any embarrassment or possible negative business impact the revealing of personal information could cause.[45] However, personal information of witnesses

[34] Ibid. See also *Davison v Habeeb* [2011] EWHC 3031; *Tamiz v Google* [2013] 1 WLR 2151; *Metropolitan International Schools Ltd v Designtechnica Corpn* [2009] EWHC 1765; *R v Harwood* [2012] EW Misc 27.
[35] The four forms of publication noted under s 2(1) *CCA* are 'any speech, writing, programme included in a cable programme service or other communication in whatever form'.
[36] UK Law Commission, *Contempt of Court: Juror Misconduct and Internet Publications* (n 48) 11-2.
[37] Ibid 14 [2.31]. See also *R v Sheppard* [2010] EWCA Crim 65, [34].
[38] See UK Law Commission, *Contempt of Court: Juror Misconduct and Internet Publications* (n 48) 17-27.
[39] *Electronic Commerce (EC Directive) Regulations 2002* (UK).
[40] Ibid ss 18,19, 22.
[41] Ibid s 21.
[42][1995] 2 Qd R 10, 32, 35, 46 (Fitzgerald P and Lee J).
[43] *Misrachi v The Public Guardian* [2019] NSWCA 67, [11] ('*Misrachi*').
[44] Ibid [8]-[10].
[45] *Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159, [42], [47] (Wilson J, Hoeben CJ agreed at [1], Price J agreed at [2]).

in blackmailing cases, of police informants, and of undercover police officers, may be suppressed given the overarching public interest.[46]

Public Safety and National Security

In addition to giving weight to the interest of victims and witnesses where public safety is concerned, the court in *Hogan* suggested that national security may also justify a non-publication order.[47] Similarly, the New South Wales Court of Criminal Appeal confirmed that the interests of the Commonwealth may be sufficient to grant non-publication order.[48]

IV. INEFFECTIVENESS OF NON-PUBLICATION ORDERS IN THE DIGITAL ENVIRONMENT

Non-publication orders are increasingly undermined by technological advances.

Firstly, prejudicial material is easily accessible outside the court's jurisdiction. In *News Digital Media Pty Ltd v Mokbel* (*'Mokbel')*, the court noted that easy access to foreign based websites has made attempts to protect jurors from contamination difficult, especially when the person responsible for releasing suppressed information is from outside the court's jurisdiction.[49] Moreover, giving notice of a non-publication order to an internet content host in another country, or to the 'world at large', would be impractical to enforce and would arguably exceed the *CSNPOA*'s constitutional limits.[50] *DPP (Cth) v Brady* is an example where, due to an anonymous leaking of already suppressed materials on WikiLeaks, a non-publication order was set aside on the basis that the information had entered the public domain and no longer met the necessity test.[51]

Online publications have also challenged the effectiveness of non-publication orders. A significant number of media outlets upload publications online, making an order to suppress *all* prejudicial publications would be almost impossible.[52] Furthermore, it is unclear whether online 'historical articles', such as archived articles that were published prior to the making of the non-publication order, qualify as prejudicial.[53]

Another issue is determining which prejudicial material out of all that is available online should be suppressed. In *Mokbel*, the court highlighted that there is a mixture of both responsible and irresponsible media outlets using the internet.[54] Accordingly, 'if the articles put up by the

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[46] *Hogan v Hinch* (2011) 243 CLR 506, 531 [21] (French CJ) ('*Hogan*').
[47] Ibid 532 [21] (French CJ). See also *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 148 (Kirby P), 159 (Mahoney JA).
[48] *Lodhi v The Queen* (2006) 65 NSWLR 573, 584 [25]-[26] (McClellan CJ, Spigelman CJ agreed at 574 [1], Sully J agreed at 586 [38]).
[49] *News Digital Media Pty Ltd v Mokbel* ('*Mokbel').* See also *DPP v Pell (Suppression Order)* [2018] VCC 905, [59] ('*Pell*').
[50] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] 263 FCR 211, [74], [95] ('*Ibrahim*').
[51] *DPP (Cth) v Brady* [2015] VSC 246.
[52] *Mokbel* (n 9) [79].
[53] Ibid.
[54] Ibid [86].

responsible media were to be taken down …this would give clear prominence for the searcher to those put up by the less responsible outlets'.[55] If it is impractical to suppress all articles on the internet but a non-publication order is still held 'necessary', the question remains as to which articles should be suppressed.

V. CONCLUSION

Courts and the governments have been under pressure to make arrangements for non-publication orders and offer new ways to ensure a fair trial.[56] Various arrangements in Australia and overseas attempt to address the risk of ineffectiveness of non-publication orders in the digital environment. Such arrangements include reinterpreting existing legislation to incorporate and regulate technologies, amending and/or proposing new non-publication order legislation, and educating the public and jurors. We respectfully commend these various arrangements to the Commission for its consideration.

[55] Ibid.
[56] See Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40(1) *Monash University Law Review* 45.

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