University of Sydney Policy Reform Project

Submission to the NSW Law Reform Commission 'Open Justice Review': a response to term of reference (e).

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About the University of Sydney Policy Reform Project

The University of Sydney Policy Reform Project ('the Project') facilitates University of Sydney students to write submissions to government inquiries, and research papers for under-resourced policy organisations, under the supervision of University of Sydney academics. All the work is completed voluntarily.

In semester 1 2019, the Project was granted funding by the Student Experience Innovation Grants program, which is an initiative of the Faculty of Arts and Social Sciences Student Affairs and Engagement team and the University of Sydney Division of Alumni and Development.

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Executive Summary

This submission is a response to term of reference (e): whether, and to what extent, suppression and non-publication orders can remain effective in the digital environment, and whether there are any appropriate alternatives.

This submission explicates the limited effectiveness of suppression and non-publication orders without the provision of judicial reasoning to support the implementation of such orders. Judicial reasoning contributes to prevent contravention of suppression and non-publication orders in a contemporary society, where information is circulated instantaneously in a globalised network of information sharing through online platforms, social media, international search engines and media outlets. In particular, Australia's incapacity to regulate foreign publication of Australian court materials espouses a need for further improvements to the current system of court suppression and non-publication orders.

This submission recommends the following:

Recommendation 1: Requirement of judicial statements including the reasoning and purpose for all suppression and non-publication orders.

Recommendation 2: Creation of a complete annual registry of suppression and non-publication orders in NSW courts.

Recommendation 3: Creation of a publicly available identification manual outlining the types and categories of information that apply to suppression and non-publication orders.

Recommendation 4: Establishment of a nation-wide framework for implementation of suppression and non-publication orders and access to court information.

Recommendation 5: Allowance for applications to be made for trial by Judge alone.

1. Introduction

1.1 This submission outlines a series of recommendations to improve the availability and provision of information in courts and tribunals pursuant to the *Court Suppression and Non-publication Orders Act 2010* (NSW), the *Court Information Act 2010* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW). The limitations placed on access to and the disclosure and publication of court and tribunal information are necessary to prevent prejudice in the administration of justice and to protect the safety, wellbeing and interests of the State and of the people involved in legal matters. This submission also identifies several key challenges that prevent the effective enforcement of legislative provisions. Among these are the prevalence of global media organisations, social media and online platforms, and balancing public interest with the principle of open justice.

2. Background Information

2.1 Traditionally, there is a strong presumption towards the administration of justice being 'open', this being the primary way to ensure public accountability in the judicial system. This emphasis on the principle of 'open justice' – that all judicial proceedings should be conducted publicly and in open view – has been affirmed in the Australian Courts, with the High Court even going so far as to strike down provisions in the *Family Law Act 1975* (Cth) that mandated for family law proceedings to sit in closed court in all cases in *Russell v Russell* (1976) 134 CLR 495.

2.2 Departure from the principle of open justice is generally made if there is necessity to 'secure the proper administration of justice' in proceedings. The power to make such a departure is based in the inherent power of Superior Courts, and through legislation for inferior courts. The primary legislative power vested in Courts to make suppression and non-publication orders is provided in the *Court Suppression and Non-Publication Orders Act 2010* (NSW).

2.3 Other grounds that may cause Courts to deviate from the principle of open justice include Division 3A of the *Children (Criminal Proceedings) Act 1987* (NSW), which prevents the publication of the name and details of offences committed by a juvenile, as well as general common law exceptions for allowing the identity of an informer, the victims and details of any blackmail, and matters of national security, to be suppressed.

2.4 However, the *Court Suppression and Non-Publication Orders Act 2010* (NSW) lacks a requirement that judicial reasons are to be provided when any suppression order or non-publication order is granted. Instead, s 8(2) of the Act merely requires such orders to 'specify the ground or grounds on which the order is made'. This failure to mandate that reasons be given for the issuing of suppression and non-publication orders leads to a culture of these orders being the norm when an application for one is made, thus detrimentally impacting the principle of open justice.

3. Challenges in the Current Digital Environment

3.1 The media was once comprised of distinct silos – press, radio and TV – operating within a given country, for which there could be specialised regulation (Lumby, 2014, p.434). Practitioners and private citizens in the current digital media ecology can now reach audiences on a broader array of platforms and on the other side of the world, because the internet is not bound by the constraints that print and broadcast media were. The digital environment presents a dilemma for courts when issuing suppression and non-publication orders.

4. The Globalisation of Media Organisations

4.1 Suppression and non-publication orders are only enforceable domestically, so suppressed material can be accessed from international news sources regardless of any legal requirements or order imposed on Australian sources. In *DPP v Pell* [2018] VCC 905, Chief Judge Kidd noted that exposure from overseas sources, which were not blocked, were just as likely to reach potential jurors as interstate sources, which were subject to the suppression order. Furthermore,

non-Australian media outlets may be unaware of local reporting restrictions. The respective laws still apply to foreign outlets, but since their assets are not always located within Australia jurisdictions, they do not face legal penalties for non-compliance with the order (Johnston et al., 2019).

4.2 This does not mean that all international media outlets publish without concern for the law. When George Pell was convicted by the Victorian County Court, the New York Times and The Guardian UK chose not to publish stories due to the fact that they have Australian bureaus (Birmingham & Bennett, 2019). Some sites chose to geo-block Australian visitors, which can be circumvented via Virtual Private Networks (VPNs). Within 24 hours of his conviction, 51% of visitors to a handful of online articles in the USA about Pell were Australian (Birmingham & Bennett, 2019). Although this represents a significant circumvention of the effect of suppression orders in *DPP v Pell* [2018] VCC 212, Chief Judge Kidd held that the orders were not futile.

4.3 In the Victorian case of *CDPP v Brady* [2015] VSC 246, Hollingworth J did not conclude whether or not WikiLeaks, a foreign entity, should be prosecuted for publishing the details of a suppression order. In that case, the suppression order did not maintain the right to a fair trial but worked to protect national interests by not implicating the Malaysian Prime Minister in criminal conduct. The suppression order was revoked when Hollingworth J found that the orders were redundant because domestic and international outlets re-circulated WikiLeaks' disclosures.

5. Convergence: Changing Forms and Methods of Publication

5.1 Media forms have also converged, as content flows instantaneously not just between jurisdictions, but between different platforms. The distinction between professional and amateur content is blurred. Professional journalists are generally aware of and adhere to their industry codes of practice, but social media users have no legal or ethical training on how to approach suppression orders and sub judice contempt (Lumby, 2014; Johnston et al., 2019).

5.2 Johnston et al. (2019) notes the cumulative prejudicial effect of many social media users discussing a topic, which masks the initial contemptuous comment and any likelihood of prosecution. Following Pell's conviction, over 2500 Australian Twitter users revealed the name of Pell and/or linked to articles from overseas. However, only mainstream media organisations and figures were the subject of the 36 contempt charges stemming from the Pell suppression order (Sweeney, 2019).

5.3 Courts also must consider whether international and domestic content hosts used to publish the information should also be held accountable; under clause 91 of Schedule 5 of the Broadcasting Services Act 1992, they are only liable for contempt if they are aware of the contemptuous activity and do not take it down (Johnston et al., 2019).

6. Solutions to Issues Stemming from Convergence

6.1 It is apparent that the current legislation does not reflect the globalised and convergent media, where content flows across borders, platforms, and where producer and consumer roles are blurred. Running sensitive cases in closed courts away from the public and media's view would represent a drastic and unnecessary shift away from open justice.

a. Mechanism to enforce NSW suppression and non-publication orders: A mechanism to enforce NSW suppression and non-publication orders overseas would be an overreach of Australian jurisdiction. Freedom of speech is more entrenched in the USA than it is in Australia, meaning content restrictions here may not be acceptable in the USA (McGuirk, 2019). Conversely, if content in a foreign autocratic regime offends their local laws, the suppression of that material there should not be applied in NSW (Esayas & Svantesson, 2018).

b. Regulation of access to contravening online material: To prevent Australians from accessing amateur or overseas content, the government could attempt

to regulate access to contravening content published by platform users and foreign media. Intermediaries such as Google and social media platforms could be requested to restrict access to the material. These requests will likely be disregarded because most intermediaries are also outside of Australia's jurisdiction, and they are hesitant to restrict free speech. Twitter's refusal to appear in Australia's jurisdiction and remove some user content in *X v Twitter Inc* [2017] NSWSC 1300 illustrates this point.

c. Blockage via Australian Internet Service Providers: The next step to restrict access would be an order requiring Australian Internet Service Providers (ISPs) block domestic access to offending sites. Commonwealth support would be required to improve feasibility and NSW could lead a proposal to the Council of Attorney-Generals to adopt a uniform approach. This is consistent with a recommendation arising from a Victorian review into its Act, where the Council considered harmonisation of suppression order practices (DJCS, 2018). The Commonwealth Parliament postured towards internet regulation with the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019* (Cth). The amendment mandated that ISPs remove "abhorrent violent content." The Media, Entertainment and Arts Alliance (MEAA) criticised the Act because it erodes the public's right to know, which is not a statutory right in Australia (Murphy, 2019). However, internet censorship to restrict news sites would be an even more drastic and controversial measure. In addition, people can use VPNs to circumvent ISP website blocks.

d. Permit DFAT to argue for suppression and non-publication orders in the national interest. *Brady* illustrates that a globalised media does not just complicate the right to a fair trial. Concerns about national security can be wedged into the continuum between open justice and proper administration of justice when reports from domestic outlets are disseminated overseas. Ensuring that legislation permits the Department of Foreign Affairs and Trade (DFAT) to become a party to proceedings when matters of national interest arise, as it did in *Brady*, would ensure that security interests are represented in the globalised media climate.

7. Cardinal George Pell and the Royal Commission into Institutional Child Sexual Abuse

7.1 Though the case of *DPP v Pell* [2018] VCC 212 was conducted under Victorian jurisdiction, the deficiency of the *Open Courts Act 2013* (Vic) to address digital challenges bore many similarities to shortfalls in NSW legislation, making the circumstances of the suppression order over Pell's trial highly pertinent.

7.2 In an investigation into the allegations against George Pell resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse, two trials were to be held regarding two separate counts of child sexual abuse. A blanket suppression order was placed over all information obtaining to the first trial under s 18(1)(a), "to prevent a real and substantial risk of prejudice" to the jury of the second trial. However, many misconceived the order as a form of protection for Pell and the Catholic Church's reputation. This contributed to the public's insistence for a right to know, ensuing in as many as 100 violations of the suppression order across many major media outlets (Meade, 2019).

7.3 What distinguishes Pell's case from the majority requiring suppression orders is its previous comprehensive media coverage due to the severity of charges against the world's third-highest ranking Catholic official (Davey, 2019). Pell's prominence evoked international interest in the case, resulting in numerous online publications of the case's details by international media which were accessed by a majority of Australian readers. As these media outlets fall outside of Australian legal jurisdiction, the scope of the court to counteract these publications was inherently limited. The primary methods of upholding the suppression order included geo-blocking the publication sources, and convicting Australian media of providing the information to international organisations (Ackland, 2019).

7.4 This case underlines a key difficulty in suppressing court details when they are of intense public interest. It also demonstrates how current provisions of the legislation operate retrospectively to remove published information which, due to

the multiplicity of media who sequentially pick up the story, may prove insufficient to protect an individual.

8. International Responses: The British Example

8.1 Internationally, common law courts in the UK use suppression orders such as gag orders or injunctions, however they are used less frequently than by Australian courts.

8.2 In 2009, media outlets breached a series of super-injunctions handed down by UK courts. Some parliamentarians also used parliamentary privilege under Article 9 of the Bill of Rights 1689 to discuss details of cases and reveal identities of people who had been granted super-injunctions on their cases (D'Arcy, 2011). In response to public concerns that the orders were overused by courts, the UK Master of the Rolls established the Committee on Super-Injunctions to head an inquiry examining issues related to the use of interim injunctions. This included examining the impact of super-injunctions and anonymised proceedings on the principles of open justice, and proposing any necessary reforms to allay public concerns and ensure open justice was maintained to the greatest extent possible. The report highlighted the need to balance privacy rights and freedom of speech in a democracy, as outlined in articles 8 and 10 of the European Convention of Human Rights. It also reaffirmed the principle of strict necessity, that is, the principles of open justice should be upheld unless it is strictly necessary to deviate from such principles to ensure the proper administration of justice. It recommended the provision of a practice guideline and model order to direct judges when determining whether to grant an interim injunction order, as well as collection and annual publication of data relating to the number of orders granted.

8.3 A 2012 report by the UK Parliament Joint Committee on Privacy and Injunctions further discussed the challenges of enforcing injunction orders on online news outlets and other content providers, such as social media websites and search engines (United Kingdom Parliament, 2012). It also noted the international reach of online platforms and the jurisdictional challenges posed by the speed at which information is disseminated both by news outlets and private citizens. The

committee recommended that when granting an injunction, the court should direct the claimant to serve notice on internet content providers and proactively make use of notice and take-down orders to remove online content. Additionally, social media platforms should seek to encourage best practice and discourage users and companies from committing illegal action. Search engines should develop and implement monitoring software to prevent such dissemination of information. However, these issues with the internet continue to persist today due to an inability to control international media outlets and private citizens from spreading information.

9. Recommendations

9.1 Requirement of judicial statements: Following the Victorian model of Court Suppression orders, a provision should to be added to the *Court Suppression and Non-publication Orders Act 2010* (NSW) to expand the requirement in s 8(2) of the *Act*, which currently requires the order to specify the grounds or grounds on which the order was made. The current provision would be improved by requiring judges to give reasons for granting a suppression or non-publication order with respects to the specific circumstances of the parties involved, and the overarching purpose of orders of this kind. Judicial reasoning should be provided in a written statement with justifications for the order and its order. New South Wales should follow the Victorian model in making judges' statements available, with all identifying information, specific details of the case, restrictions and redactions to be excluded from the statement to preserve parties' privacy.

9.2 Creation of a comprehensive registry: All court registries in New South Wales should be required to keep a register of the number of suppression and non-publication orders issued within a given year in order to reduce orders made unnecessarily or without sufficient grounds to do so. There should be an annual release of the register to increase transparency in the judicial decision for a suppression order, adding another factor for accountability to avoid the usage of unnecessary or excessive orders.

9.3 Creation of an identification manual: The creation of an identification manual as to court suppression and non-publication orders will better inform the public and members of the media about the nature of these orders and the reasons for these orders being made. The manual would assist legal publications and the media to identify the types and categories of information that apply to suppression and non-publication orders handed down by the court. It is vital for the public to be able to understand what information cannot be released to prevent accidental publication of suppressed information

9.4 Consistency in national implementation: The New South Wales Attorney-General could cooperate with Attorney-Generals of the Commonwealth and other states in the Council of Attorney-Generals to establish a nation-wide framework for the implementation of suppression and non-publication orders, as well as regulating access to contravening court information. Legislative harmonisation will reduce the likelihood of contravening information being published interstate due to differences in government regulations. This is consistent with Victorian Law Reform Commission recommendations (Vincent, 2017). Regulation of access can be implemented by a government requirement for intermediaries such as Google and social media platforms to remove information published about court cases under suppression or non-publication orders from their platform or website. A further recommendation to the removal of information is to work with internet service providers to block Australians' access to offending sites.

9.5 Application for trial by Judge alone: An amendment could be made to the *Criminal Procedure Act 1986* (NSW), specifically, s 132 of the *Act*, to allow parties to matters with wide public interest and affecting many groups of society to apply for a trial by a Judge alone in order to avert possibilities that the jury may not be impartial due to accessing to online information. However, judicial officers must carefully balance a party's right to a fair trial and the need to withhold case materials in exercising their discretion to allow a judge-only trial.

10. Conclusion

10.1 Evidently, the nature of open justice and the principles underpinning court suppression and non-publication orders have merit in ensuring the 'proper

administration of justice' and protecting public safety and community interests. Our submission explicates the limited effectiveness of suppression and non-publication orders without the provision of judicial reasoning to support the implementation of such orders. Judicial reasoning contributes to prevent contravention of suppression and non-publication orders in a contemporary society, where information is circulated instantaneously in a globalised network of information sharing through online platforms, social media, international search engines and media outlets. In particular, Australia's incapacity to regulate foreign publication of Australian court materials espouses a need for further improvements to the current system of court suppression and non-publication orders, as clearly depicted in George Pell's case.

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