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NOT SEEING JUSTICE DONE: SUPPRESSION ORDERS IN AUSTRALIAN LAW AND PRACTICE

ABSTRACT

There are varied Australian approaches to suppression orders under common law and statute. This article outlines notable aspects of the law and examines concerns that have been raised by commentators about practices in Australia. Suppression or non-publication orders have been described as being made too frequently, especially outside the superior courts; their varied legal basis has been said to limit clear and comprehensive analysis by judges and lawyers; orders have been said to lack appropriate argument and reasons to support them; and their scope, precision and duration have been criticised. Existing Australian law and practice is used to evaluate reforms that came into force in April 2007 in South Australia. The reforms appear to be aimed at reducing the number of suppression orders and moving the law closer to the position that applies in most Australian jurisdictions. They offer an important opportunity for the development of suppression order law and practice within South Australia and elsewhere. Analysing restrictions on publication also suggests there would be value in comparative and empirical research into suppression order practice for investigating what, if any, changes are warranted to the applicable law or court procedures.

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INTRODUCTION

Basic to Australian legal discourse is the principle that justice must be seen to be done.[1] 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 court. However, in some circumstances unrestricted reporting can frustrate the administration of justice. At common law, there is only a limited power to prohibit publication, a power which focuses on the administration of justice. That power is often supplemented by statute in Australian jurisdictions, but the common law principles remain important for interpreting many of the statutory provisions. After outlining the common law position, this article contrasts two models of statutory provision, drawing on Victorian and South Australian law. The South Australian law is examined in the form it took for more than a decade until it was recently amended. The article then draws together concerns about suppression order practice that have been raised by a number of Australian commentators. The analysis of common law, statutory models and practice provides a basis for considering the recent South Australian reforms in the *Evidence (Suppression Orders) Amendment Act 2006* (SA). These reforms seek to bring the statutory position on suppression in South Australia closer to other Australian jurisdictions, and they provide courts with a substantial opportunity to achieve that aim. The changes also seek to improve practice, especially in relation to mandating the review of non-publication orders after significant steps in litigation, and improving the flow of information to the media about any orders that are made. The provisions about reviewing orders, in particular, appear to offer a valuable model for other Australian jurisdictions to consider. The analysis also suggests that much remains unknown about suppression order practice in Australia, and investigating that practice appears well suited for addressing the concerns raised by existing commentary.

I SUPPRESSING PUBLICATION AT COMMON LAW

A *Relations between Law and the Media*

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 the practical operation of non-publication orders, appear to be contentious within both the law and the media. There is much critical media commentary; for example, the lawyer, publisher and media commentator Richard Ackland wrote early in 2006:

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[1] The aphorism's possible formation by Hewart CJ or Lord Sankey are outlined in J J Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (Speech delivered at the Media Law Resource Center conference, London 20 September 2005); for information on the New York-based and media industry- and media lawyer-funded MLRC see <http://www.medialaw.org> at 18 June 2007.

> 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.[2]

Similarly, a September 2006 editorial in the Adelaide newspaper, *The Advertiser*, strongly criticised the frequency of South Australian suppression orders.[3] There are many similar comments. However, more conciliatory observations about courts and the media have also been offered; for example, Jon Faine, journalist and former lawyer, began a commentary about radio coverage of the law with apologies 'for the nonsense published about the legal system.'[4] He recognised that it is difficult to convey information about a court proceeding in an accurate, succinct and accessible fashion. Few in the media, however, would appear likely to suggest that the difficulty of legal reporting should mean more of it is subject to suppression.

Judges also display a wide variety of views on the media's roles and performance. A notable recent example comes from members of the High Court in *Australian Broadcasting Corporation v O'Neill*.[5] 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 the concept of 'trial by media'. That was not the way to understand the role of media reporting:

> [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
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> [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.[6]

But other judgments – in that decision and elsewhere – suggest a different conception of the relationship between law and the media. The media, for example, has been seen to possess, and at time misuse, great social power.[7]

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2 Richard Ackland, 'You Wouldn't Read About It – Not That You Can', *Sydney Morning Herald* (Sydney), 27 January 2006, 11.

3 Editorial, 'Fighting for the Freedom of Speech', *The Advertiser* (Adelaide), 29 September 2006, 16. The frequency of suppression orders in South Australia was described as 'farcical'.

4 Jon Faine, 'The Role of Radio in Legal Reporting' (2004-05) 85 *Reform* 12, 12.

5 (2006) 80 ALJR 1672.

6 Ibid [26]-[29].

7 See, eg, *Australian Broadcasting Corporation v O'Neill* (2006) 80 ALJR 1672 [150]-[152], [155] (Kirby J), [179]-[180], [280], [287] (Heydon J). One of the most

B *Power Based on Necessity*

Suppression order law and practice are important elements in shaping the relationship between law and the media. In considering when non-publication orders can be made at common law, the starting point must be open justice.[8] Then, closely related to open court proceedings is media reporting of those events: reporting assists open justice. For example, in *Re Applications by Chief Commissioner of Police (Vic)*,[9] 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 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'.[10]

Jeremy Bentham stated that publicity is the 'soul of justice'.[11] The principle moved him 'over and over again'[12] and his words have become a frequent reference in judgments and commentary.[13] Open justice is believed to offer many benefits, such as improving the conduct of all those involved in proceedings and supporting public understanding of and confidence in the legal system.[14]

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prominent instances is provided by *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 722-9 (Mahoney JA).

8 See, eg, Garth Nettheim, 'The Principle of Open Justice' (1984) 8 *University of Tasmania Law Review* 25; J J Spigelman, 'Seen to be Done: The Principles of Open Justice' (2000) 74 *Australian Law Journal* 290, 378.

9 *Re Applications by Chief Commissioner of Police (Vic)* (2004) 9 VR 275 ('*Chief Commissioner of Police* ').

10 Ibid [25] (citations omitted).

11 Jeremy Bentham, *Works of Jeremy Bentham* (published under the superintendence of his executor John Bowring) (1843) 305.

12 *Scott v Scott* [1913] AC 417, 477 (Lord Shaw).

13 See, 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*, Discussion Paper No 43 (2000) [10.3]; Nettheim, above n 8. Less often examined are the exceptions which Bentham would have allowed to open justice, exceptions which go beyond the common law power that has become established in Australia: see Nettheim, above n 8, 28-30 for an outline of Bentham's suggested exceptions.

14 See, eg, Sackville, below n 143:

> 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.

While endorsing the principle of open justice, judgments also state that justice cannot always be seen if it is to be done. Sometimes, it is necessary to close courts, conceal information within a hearing, or suppress media publication. The power to do so, however, is limited at common law. A classic authority remains the House of Lords in *Scott v Scott*,[15] which the Australian High Court has applied in describing open justice as 'of the essence' of the Australian legal system.[16]

The different approaches to limiting open justice expressed in *Scott v Scott* illustrate a tension that recurs in many judgments between a concern for litigants and a concern for open proceedings. The case arose after a divorce hearing based on the husband's impotence. Those proceedings were heard in camera and were not contested. After the divorce, the former wife and her solicitor sent copies of the proceedings to members of what had been her extended family and to another person.[17] The former wife was held to be in contempt.[18] The House of Lords disagreed, with the majority holding that a hearing could be closed at common law only where justice could not be done in the particular case before the court if the case were heard publicly.[19] 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 enough to overcome open justice and there was no power to close the court in *Scott v Scott*. However, a wider power of that sort was suggested by Earl Loreburn:

> It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it.[20]

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15 [1913] AC 417.

16 *Russell v Russell* (1976) 134 CLR 495, 505 (Barwick CJ); and see 520 (Gibbs J): courts being open 'is an essential aspect of their character'; 532-3 (Stephen J). See also *Dickason v Dickason* (1913) 17 CLR 50, 51.

17 *Scott v Scott* [1913] AC 417, 431 (Viscount Haldane LC); 467-8 (Lord Shaw).

18 At first instance, *Scott (otherwise Morgan) v Scott* [1912] P 4, and in the Court of Appeal, *Scott (otherwise Morgan) v Scott* [1912] P 241.

19 *Scott v Scott* [1913] AC 417, 437-8 (Viscount Haldane LC); 484-5 (Lord Shaw). The Earl of Halsbury, at 441-2, did not directly agree with these statements, but that was only to emphasise that the power to depart from open justice was extremely limited; he was concerned that Viscount Haldane's language would leave judges with too great a discretion. Viscount Haldane, at 436, was certainly aware of the need for the principle to be applied restrictively: 'provided that the principle is applied with great care and is not stretched to cases where there is not a strict necessity for invoking it, I do not dissent from this view of the … law'.

20 Ibid 446.

The first aspect of Earl Loreburn's statement – where 'the case could not be effectively tried' – accords with other speeches noted above. The second aspect, which refers to parties being 'reasonably deterred' from seeking justice due to publicity, did not receive approval from most members of the House of Lords. As Brennan, Deane and Gallop JJ noted in *R v Tait*, the wider formulation has not been established at common law.[21] Embarrassment is not enough to depart from open justice at common law.[22]

Scott v Scott stands for the principle that open justice cannot be departed from except where that is *necessary* for the proper administration of justice. The decision concerned closing courts, but the principle of necessity can be seen across the other common law limitations on open justice, including suppressing publication. As the media lawyers Paul 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*'[23] for the administration of justice.

C *Recognised Categories*

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;[24] cases involving police informers;[25] and cases about blackmail.[26] A trade secret hearing is relatively straightforward: derogation from open justice is necessary if a trade secret claim is to be litigated justly. Otherwise the information's secrecy will be lost through the very court proceedings that have been brought to protect it. The administration of justice *in the case at hand* requires some limitation on open justice. For example, the information being sued over may be identified in open court by a code rather than it being discussed explicitly in court.[27] In *Scott v Scott*, trade secrets were used to illustrate a class in which 'justice could not be done at all if it had to be done in public'.[28] Police informers are another example of the categories recognised at common law. It might be said that the proper

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21 *R v Tait* (1979) 24 ALR 473, 489-90 (Federal Court). See also, Sally Walker, *Media Law: Commentary and Materials* (2000) 433-58, 87-97 which provides a useful review and extracts of relevant case law.

22 See, eg, Paul Mallam, Sophie Dawson and Jaclyn Moriarty, *Media and Internet Law and Practice* (2005) [15.195].

23 Ibid [15.60] (emphasis added).

24 Eg *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.

25 See also *Witness v Marsden* (2000) 49 NSWLR 429.

26 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; see, eg, Des Butler and Sharon Rodrick, *Australian Media Law* (2nd ed 2004) 175 (note also 3rd ed forthcoming 2007).

27 See, eg, *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.

28 [1913] AC 417, 437 (Viscount Haldane LC).

administration of justice requires their protection, but that would appear to raise a point about the administration of justice more generally than justice as regards the very subject matter of the action in question. In this, police informers illustrate the small number of recognised instances in which suppression is possible when publicity would dissuade victims or witnesses becoming involved in litigation. A third category concerns blackmail. Blackmail involves a secret, but one that is not the subject matter of the action in the way in which a secret is in a trade secret case. The class of blackmail is perhaps best seen as being 'in a category of its own' in terms of common law derogations from open justice.[29] While in New South Wales the power to conceal information in a blackmail case has been extended by a majority of the Court of Appeal to the situation of extortion, in Victoria it has not been extended to a case involving allegations of stalking.[30]

These examples about confidential information, police informers and blackmail illustrate the observation of Des Butler and Sharon Rodrick that:

> 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.[31]

For example, in *John Fairfax Group v Local Court of New South Wales*, 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 in apparent reference to the categories considered above, or in certain other instances of public interest such as national security.[32] In the same case, Mahoney JA set out a wider view: namely, that 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.[33] That appears to return, in substance, to the minority view of Earl Loreburn in *Scott v Scott*.[34] However, in light of many decisions on the common law and open justice, the better approach is to emphasise

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29 *Herald & Weekly Times v Magistrates' Court of Victoria* [1999] 2 VR 672, 677 (Beach J).

30 Cf *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131; *Herald & Weekly Times v Magistrates' Court of Victoria* [1999] 2 VR 672.

31 Butler and Rodrick, above n 26, 183 (emphasis added). Similarly in *Herald & Weekly Times v Medical Practitioners Board (Vic)* [1999] 1 VR 267, 278 Hedigan J said the cases 'do not speak with one voice' about limitations on open justice.

32 (1991) 26 NSWLR 131, 141 (Kirby P).

33 Ibid 161 (Mahoney JA, Hope JA agreed).

34 *Scott v Scott* [1913] AC 417, 446 (Earl Loreburn) and see above nn 20-22 and accompanying text.

that the bases for derogation are limited, with hardship to parties or witnesses not being recognised as reason for suppression at common law.[35]

In that, the common law on suppression is austere.[36] Its principles are well described as 'astringent'.[37] Notably, in *John Fairfax Publications v District Court of New South Wales*, 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'.[38] 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 situations involving police informers. Notwithstanding the concern for litigants that recurs in some judgments, the common law power is confirmed.

D *Further Aspects of Common Law Suppression*

Four further points about common law suppression orders can be noted briefly, given the focus in this article on what Australian law and practice suggests about recent South Australian reforms.[39] First, orders directed *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 New South Wales*, 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.[40]

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35 Cf the statutory position in South Australia in relation to 'undue hardship': *Evidence Act 1929* (SA) s 69A(1) and see below n 61 and accompanying text.

36 See, eg, Ian Leader-Elliott, 'Suppression Orders in South Australia: The Legislature Steps In' (1990) 14 *Criminal Law Journal* 86, 86 (describing the common law about contempt as it affects media publications).

37 (1991) 26 NSWLR 131, 142 (Kirby P).

38 (2004) 61 NSWLR 344, [19] (Spigelman CJ, Handley JA and Campbell AJA agreed).

39 A fifth point would concern questions of standing for the media, particularly standing before the tribunal which makes an order. Issues of media standing appear to be dealt with well in South Australia, see below nn 110-113 and accompanying text. Media standing has been a significant issue in case law elsewhere in Australia; see, eg, *John Fairfax v Local Court of New South Wales* (1991) 26 NSWLR 131; *Herald & Weekly Times v Medical Practitioners Board (Vic)* [1999] 1 VR 267, 297; see also below n 95.

40 *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477.

This view has been reinforced by the more recent decision of the Privy Council in *Independent Publishing Co v Attorney General of Trinidad and Tobago*.[41]

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. In the *Police Tribunal* case, for example, McHugh JA continued:

> [C]onduct outside the courtroom which deliberately frustrates the effect of an order … may constitute a 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.[42]

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 of inferior courts. The question for such a body remains: what is 'really necessary to secure the proper administration of justice in proceedings before it'?[43]

Fourth, decisions discussing the common law power to suppress publication have explained that the terms of an order must be clear, be as limited as possible (for example, it is less restrictive of open justice to make a pseudonym order than to prohibit all publication about a proceeding), and there must be some material on which to base the decision to make an order.[44] Orders being clear, limited and based on proper material are also relevant matters when evaluating orders made under statutory power.

II STATUTORY SUPPRESSION ORDERS

A *Types of Statutory Provision*

There are 'an abundance of statutory exceptions' to open justice.[45] However, the common law principles outlined above are influential for interpreting many of them. As the Victorian Court of Appeal said in the *Chief Commissioner of Police* case, statutory provisions for suppression 'ought ordinarily to be strictly construed

41 [2005] 1 AC 190.

42 (1986) 5 NSWLR 465, 477.

43 Ibid, 477; see, eg, *John Fairfax Publications v District Court of New South Wales* (2004) 61 NSWLR 344, [38]-[66] (Spigelman CJ, Handley JA and Campbell AJA agreed).

44 Eg *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477 (McHugh JA).

45 Butler and Rodrick, above n 26, 190.

and utilised only when clearly necessary'.[46] That is clearly true for most statutory provisions, but the South Australian statute has long supported a wider approach to non-publication orders.[47]

Statutory provisions can be of two types. One creates an exception to reporting which operates automatically unless a court orders otherwise; that is, there is a presumption of non-publication in particular proceedings or circumstances set out in the provision.[48] The other type creates power for a court to make a non-publication order, but publication is not limited unless an order is made.

It is worth emphasising the existence of the first type of provision – statutes that apply unless a contrary order is made – because it has been suggested that courts make some suppression orders that are unnecessary when publication is already prevented by these specific provisions.[49] As well as being significant in relation to family law,[50] there is extensive legislation applicable to children,[51] and provisions related to matters such as adoption[52] and sexual offences.[53]

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46 *Re Applications by Chief Commissioner of Police (Vic)* (2004) 9 VR 275, 286. See also eg *Raybos Australia v Jones* (1985) 2 NSWLR 47, 55 (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).

47 See below nn 61-68 and accompanying text.

48 This type of provision has been significant in recent case law involving media reporting. See, eg, *Doe v Australian Broadcasting Corporation* (Unreported, Victorian County Court, Hampel J, 3 April 2007) which involved a breach of the *Wrongs Act 1958* (Vic) s 4; and *Howe v Harvey; DPP v Quist* [2007] VSC 130 (Unreported, Williams J, 8 May 2007) which concerned the *Children and Young Persons Act 1989* (Vic) s 26.

49 See, eg, below nn 81-83 and accompanying text.

50 See *Family Law Act 1975* (Cth) s 121; for an overview which recommended further relaxation of the limits on publicity in family law matters see I W P McCall, *Publicity in Family Law Cases: Proposals for Amendments to Family Law Act Section 121*, Report to the Attorney-General (April 1997). McCall was a former Chief Judge of the Family Court of WA; his report to the Commonwealth Attorney-General is discussed in, eg, Judith Bannister, 'The Public/Private Divide: Personal Information in the Public Domain' (2002) 8 *Privacy Law and Policy Reporter* 157, 160.

51 See, eg, *Children's Protection Act 1993* (SA) ss 59, 59A; *Young Offender's Act 1993* (SA) ss 13, 63C; *Children and Young Persons Act 1989* (Vic) s 26; *Crimes (Family Violence) Act 1987* (Vic) s 24; and see, eg, *Howe v Harvey; DPP v Quist* [2007] VSC 130 (Unreported, Williams J, 8 May 2007).

52 See, eg, *Adoption Act 1988* (SA) ss 31, 32; *Adoption Act 1984* (Vic) ss 120, 121.

53 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 22, [15.1350]. It is worth noting that sometimes a specific provision does not exist in a jurisdiction and while a general statutory power does exist, it does not apply to the facts in question; eg there appears not to be power in South Australia to suppress the

The second type of provision creates a statutory power to suppress publication. Australian approaches to this type of provision can be illustrated by Victorian and South Australian statutes.[54] Outlining these two models is more practical here than attempting a comprehensive listing of the myriad legislative provisions.[55]

B *The Victorian Model*

The Victorian model is seen in ss 18 and 19 of the *Supreme Court Act 1986* (Vic).[56] 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: 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.[57] The Victorian law is the sort of statutory provision that tends to be interpreted strictly, with great attention paid to the principle of open justice.[58] The Victorian law sets out a power to prevent publication based on necessity. While some of the grounds are clearly wider than the common law, the test of when an order will be made *within* those grounds is not more accommodating. The test of necessity imposes a high standard so that orders should be made only in exceptional circumstances.[59] This model overcomes some

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) 117 A Crim R 141.

54 In relation to NSW (and for some comparison with other jurisdictions) see NSW LRC, Discussion Paper No 43, above n 13, ch 10; NSW Law Reform Commission, *Contempt by Publication*, Report No 100 (2003) ch 10.

55 See, eg, Walker, above n 21, 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 22, [51.100]-[52.9300].

56 See also *County Court Act 1958* (Vic) ss 80-80AA; *Magistrates' Court Act 1989* (Vic) s 126. These sections are recognised under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24 (fair hearing), s 15 (freedom of expression). On the *Charter* in general see, eg, Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264.

57 The last ground does not apply in the *Magistrates' Court Act 1989* (Vic) s 126.

58 Eg *Re Applications by Chief Commissioner of Police (Vic)* (2004) 9 VR 275, 286; and see above n 46. The Victorian provision also applies to a wide range of material, unlike some statutory provisions limited to the suppression of matters of evidence or identity.

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

of the uncertainties of the common law – for example, orders can be made under statutory power that will bind the media directly[60] – but it leaves largely undisturbed the common law's strong support for open proceedings.

C *The South Australian Model*

Another model is provided in South Australia. There, courts can make suppression orders under s 69A of the *Evidence Act 1929* (SA). The section as it existed until recent reforms is discussed here; those reforms are considered below in Part IV. Section 69A did not use a test of necessity, but required 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.[61] In addition, courts had to 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'.[62] Courts could only make a non-publication order 'if satisfied that the prejudice to the proper administration of justice, or the undue hardship, that would occur if the order were not made should be accorded greater weight' than the public interest in publishing information related to proceedings.[63]

Before 1989, the South Australian statutory wording differed from that described above. Publication could be suppressed to prevent undue hardship to *any* person, including parties and, notably, the accused in a criminal case. During the three years from mid-1986, more than 40 per cent of orders included suppression of the name of the accused.[64] Publication could also be suppressed 'in *the interests of* the

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60 Cf above nn 39-42 and accompanying text.

61 *Evidence Act 1929* (SA) s 69A(1); which was not changed by the *Evidence (Suppression Orders) Amendment Act 2006* (SA) see below Part IV. See also definitions in s 68. 'Undue hardship' is discussed briefly in NSW LRC, Discussion Paper No 43, above n 13 , [10.90]; Leader-Elliott, above n 36, 97-8; 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 grounds of hardship has been argued for at common law – see, eg, *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131, 161 (Mahoney JA) and above n 33 – but that does not accord with current Australian judgments. In relation to obligations for media reporting about defendants, see *Evidence Act 1929* (SA) s 71B.

62 *Evidence Act 1929* (SA) s 69A(2) before the *Evidence (Suppression Orders) Amendment Act 2006* (SA) came into force on 1 April 2007.

63 *Evidence Act 1929* (SA) s 69A(2) before the *Evidence (Suppression Orders) Amendment Act 2006* (SA) came into force on 1 April 2007. Courts may make interim suppression orders without undertaking this weighing process.

64 Leader-Elliott, above n 36, 88 and its fn 11. For a discussion of the earlier wording and judicial decisions under it, see also Sally Walker, *The Law of Journalism in Australia* (1989) 31-2.

administration of justice'.[65] Of the latter phrase, which goes beyond preventing prejudice to the proper administration of justice, 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 of discretions.[66]

In addition, the earlier wording did not require that substantial weight was given to the public interest in open justice when deciding whether to prohibit publicity in a particular case.

Each of these versions of s 69A differs notably from the common law. In particular, no test of necessity is applied when evaluating whether an order should be made, and undue hardship to a range of people can be sufficient to make an order. Both versions of the section 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.[67] In part, this could be expected to follow from the statutory 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 from the even less restrictive pre-1989 wording of s 69A that have continued to be influential. The 1989 change's removal of undue hardship to the

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65 *Evidence Act 1929* (SA) s 69A(1) before the *Evidence Act Amendment Act 1989* (SA) came into force (emphasis added).

66 *G v The Queen* (1984) 35 SASR 349, 351. The analysis remains relevant under other statutory provisions which use this phrasing, eg in relation to pseudonym orders under Northern Territory law see *Australian Broadcasting Corporation v L* (2005) 16 NTLR 186, [23] (Riley J), [57] (Southwood J).

67 Eg South Australia, *Parliamentary Debate,* House of Assembly, 30 August 2006, (Michael Atkinson, Attorney-General): 'Suppression orders are more prominent in South Australia than anywhere else in the nation.' See also NSW LRC, DP 43, above n 11, [10.68]; Butler and Rodrick, above n 26, [4.210] and references at its fn 195. The label is longstanding, see, eg, NSW LRC, Discussion Paper 43, above n 13, [10.66] and its note 115 and note 116. 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.

Such warnings are not unknown elsewhere, but nor do they appear to be routine; see, eg, *Howe v Harvey; DPP v Quist* [2007] VSC 130 (Unreported Williams J, 8 May 2007) which states prominently on its first page '[t]his proceeding is subject to a suppression order concerning identification of a minor'.

accused as a ground for suppression appears to have been significant in practice, but other aspects of the reforms may have had less impact.[68]

III SUPPRESSION ORDER PRACTICE

As well as the varied law on non-publication orders across Australian jurisdictions, practices appear to differ between jurisdictions and between different courts within jurisdictions. While some elements of practice appear to work well, at least six broad concerns are frequently raised about the practical operation of suppression orders.

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 have operated very effectively in Victoria – is the courts information officer.[69] An experienced former court reporter filled that role from its creation in 1993 until 2007. Prue Innes 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 appear to be 'missing out on a valuable conduit between the courts and the media'.[70]

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68 Eg, in the five years from mid-1990, only 18% of orders included suppression of any person's identity, not just of the accused: see Legislative Review Committee, Parliament of South Australia, *Suppression Orders* (2005) 40; cf above n 64. On suppression order practice more generally in South Australia see NSW LRC, Discussion Paper No 43, above n 13, [10.65]-[10.71].

69 For an overview see NSW LRC, Report No 100, above n 54, [15.15]-[15.20]. On courts information officers in general, see Stephen Parker, *Courts and the Public* (1998) 86-8. NSW also established a media liaison officer in 1993, slightly before Victoria, although there may not have been the same attention paid to suppression orders as in Victoria. The then NSW officer did not address issues of suppression at all in an early outline of her role: Jan Nelson, 'The Role of the Public Information Officer in New South Wales Courts' (1995) 5 *Journal of Judicial Administration* 34. The role appeared to focus more on helping journalists with factual queries and wider communication between courts and the media. However, the NSW development appears to have been warmly received by the media, see Janet Fife-Yeomans, 'Fear and Loathing – the Courts and the Media' (1995) 5 *Journal of Judicial Administration* 39, 41-2.

70 Jane Johnston, 'Communicating Courts: A Decade of Practice in the Third Arm of Government' (2005) 32 *Australian Journal of Communication* 77, 86. For a discussion of the continuing lack of such an officer in Queensland, see G L Davies and S N Then, 'Why the Public Needs a Court Information Officer' (2004-05) 85 *Reform* 9.

Among other things, the Victorian courts information officer notifies the media of suppression orders and is a general point of contact for journalists. Similar processes occur in a number of jurisdictions. They should be developed more widely and maintained in all jurisdictions and they should be made to operate in as consistent and comprehensive a manner as possible. This is an issue on which the interests of media and courts closely align. The media is keenly aware of the value in knowing about any non-publication orders that have been made. An Australian Press Council report has noted that '[i]nadvertent publication of suppressed material must be prevented to the maximum extent.'[71] As South Australian litigation demonstrates, the media is not excused from liability if it lacked knowledge of a statutory suppression order (for example, because of a breakdown in communication within that or other media outlets).[72]

B *Concerns from Commentators*

At least six areas of concern have been raised about suppression orders by commentators, including judicial officers, practising lawyers, the media and academics. They involve:

- The number of orders made and their apparently higher frequency in lower courts;
- The difficulty of accessing clear information about the legal basis on which an order could be made, which relates to 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;
- How the terms of orders (and amendments to orders) are communicated to the media;

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71 Australian Press Council, 'Report on Free Speech Issues 2004-2005', <http://www.presscouncil.org.au/pcsite/fop/fop_ar/ar05.html> at 18 June 2007.

72 See, eg, *Registrar of Supreme Court v Nationwide News Ltd* (2004) 89 SASR 113; *Registrar of the Supreme Court v Herald & Weekly Times* [2004] SASC 129 (Unreported, Gray J, 28 May 2004); *Herald & Weekly Times v Director of Public Prosecutions* (2003) 86 SASR 70.

- Standing for media organisations to appear in relation to suppression when making an order is being considered and on appeal.[73]

Four of these matters are examined here. While there have been some valuable recent responses to such concerns,[74] they appear to remain problematic. All these concerns deserve closer investigation through research into litigation practice. That would be valuable for developing existing debates about courts, suppression and open justice, and it is considered briefly below in Part V.

The first 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 by approximately four orders for each sitting day in Australian courts.[75] 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 common. Superior court judges are, rightly, wary of making suppression orders and do so only rarely.[76]

There have also been notable judicial comments; for example Chief Justice Marilyn Warren has been reported as saying that orders may be increasing and the Judicial College of Victoria will provide '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'.[77]

To some extent at least, the number of orders made in recent years is linked to particular trials that have occurred during the period, such as high profile murder

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73 See, eg, Bernard Teague, 'The Courts, the Media, and the Community – A Victorian Perspective' (1995) 5 *Journal of Judicial Administration* 22; and see sources cited in Parker, above n 69, 86 and its fn 17.

74 Eg the Judicial College of Victoria's suppression orders workshop on 3 March 2006, see Judicial College of Victoria, *Annual Report 2005–2006* (2006) 16 and 18.

75 Australian Press Council, above n 71, referring to an analysis conducted at the media company News Ltd.

76 William Houghton, 'Suppression Orders' (Paper presented at the LIV seminar, Melbourne, 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' (2004-05) 85 *Reform* 15, 18.

77 Natasha Robinson, 'Victoria Courts Greater Openness', *The Australian* (Sydney), 9 September 2005, 27. In Victoria, eg, Justice Whelan has produced a guide to suppression legislation; see Judicial College of Victoria, above n 74, 18.

trials in Victoria and South Australia and security-related proceedings in NSW.[78] It also appears that the frequency of orders may vary across Australian states; for example, decisions about orders may be more common in South Australia, Victoria, NSW and Western Australia than they are in Queensland.[79] It is important to note that a higher number of orders in itself – depending on the reasons for those orders, their scope and duration – is not necessarily problematic.[80] However, the actual number of orders in different Australian courts and jurisdictions, let alone the influence of particular high profile cases on the total number of orders, is difficult to assess without a systematic review of court records. While there is a significant amount of commentary suggesting that more orders are made than permitted by the applicable legal tests, there is also a lack of research-based knowledge about suppression practice across multiple jurisdictions. Determining the extent to which the differences exist and the possible avenues to address the issue – such as legal reforms, procedural changes, or increasing awareness of the applicable law – would be well served by such research.

A second area of complaint from commentators relates to the myriad of statutory provisions which can apply to suppression orders across different jurisdictions and proceedings. One consequence is that knowledge of specific provisions which automatically limit publication – as opposed to provisions that allow courts to make non-publication orders – is not always comprehensive. Just one example is provided by 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 any specific order being made.[81] In part, the radio transcript reads:

> Lawyer: Other than when proceedings are closed [to the public] 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

78 Eg Justice Geoffrey Eames, 'The Media and the Judiciary' (Speech delivered at the Melbourne Press Club Annual Conference, Melbourne, 25 August 2006).

79 Discussion by participants at the Judicial Conference of Australia's Annual Colloquium in Canberra on 6–8 October 2006 *suggested* that Queensland courts in particular see far fewer orders requested.

80 See, eg, comments by Deputy Chief Magistrate Popovic that increased suppression orders related to Victoria's organised crime murder trials are '"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* (Sydney), 18 August 2005, 15, 18.

81 See *Judicial Proceedings Reports Act 1958* (Vic) s 4.

> not, that's not a convention, that's actually an order of the court is it?
>
> 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.[82]

Thanks to the work of the Victorian courts information officer, the radio program provided the correct explanation to its audience the following day.[83] However, this sort of exchange suggests that orders may well be sought, and perhaps granted, when they are superfluous. That would waste court and litigant resources, and would be likely to aggravate unnecessarily court-media relations. Again, research into the practice of granting orders would be valuable for understanding where, if at all, knowledge of the applicable rule is lacking, and it could address the two issues discussed next, which involve the presence, or lack, of argument and material on which to make orders and the scope, precision and duration of orders.

A third concern in the existing commentary relates to how non-publication orders are sought. Applications for orders 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.

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82 Copy on file; thanks to the Victorian courts information officer, Prue Innes, for this example and transcript, which she supplied before her recent retirement.

83 By explaining the effect of the *Judicial Proceedings Reports Act 1958* (Vic) s 4. See, eg, *Hinch v Director of Public Prosecutions* [1996] 1 VR 683.

> … [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.[84]

Justice Bernard Teague has also noted that orders may be sought without reasons being offered.[85] As McHugh JA stated in the significant 1980s decision, *John Fairfax & Sons v Police Tribunal of New South Wales*, judges must have material on which to base any decision to make a non-publication order.[86]

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 occurred in *John Fairfax & Sons v Police Tribunal of New South Wales*, 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.[87]

The second part of the order – 'nor in any material which would serve to identify' – lacked a link to the proceedings. It was too wide in scope. While that instance dates back two decades, contemporary examples exist.[88]

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.[89] 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.[90] In this regard, it is worth

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84 Peter Bartlett, '"Shooting the Messenger?" The Courts, the Media and the Public', (Paper presented at 23rd Australian Institute of Judicial Administration Annual Conference, 'Technology, Communication, Innovation', New Zealand, 9 October 2005). (Thanks to the author for this material; copy on file).

85 Teague, above n 73, 25.

86 (1986) 5 NSWLR 465, 477 and see above n 44 and accompanying text.

87 Ibid, 467.

88 See, eg, *Herald & Weekly Times v A* (2005) 160 A Crim R 299.

89 Cf wording in *Supreme Court Act 1986* (Vic) ss 18, 19; see above nn 56–60 and accompanying text.

90 The example is discussed in Bartlett, above n 84; see also Teague, above n 73, 25-6; Australian Press Council, above n 71. Bartlett also notes that orders do not always specify the particular statutory ground which is being relied on to make the order.

noting that approximately half the Victorian County Court orders made in 2005 involved the 'blanket' suppression of everything about the matter; it was less common for orders to be confined to specific information which could not be published.[91] The use of blanket orders in such numbers may not be consistent with the comments of Chief Justice Warren that orders of a confined scope are generally preferable to blanket bans.[92] In relation to some orders being too wide in their application, or unclear in their intended scope, it is notable that the 'form, content and specificity' of orders was a focus of the Judicial College of Victoria's half day suppression orders workshop during 2006.[93]

In addition, orders may lack a clear duration. Practice from 2005 in the Victorian County Court also illustrates this. Only about 10 per cent of the orders had a specified duration, for example, by being 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.[94] Orders without a specified term may be 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 appear to be unnecessarily limited.

In addition to such concerns, wider changes to Australian practice have been proposed. These include involving the media more in the process of considering orders. Beyond clarifying that the media has standing when consideration is being given to making an order,[95] the media could be *notified* in time so that it can appear before an order is made. 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 be heard. However, being able to present its argument at that stage could assist the media in accepting suppression orders in those situations where they are made.

Related to such proposals, Justice Geoffrey Eames called in 2006 for closer liaison between the judiciary and the media about potential non-publication orders: 'there

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91 Thanks to the then Victorian courts information officer, Prue Innes, for providing this information. It relates to a total of 60 orders made during 2005 in the County Court of Victoria. She commented that the orders which were worded carefully tended to be in cases related to alleged police corruption.

92 Robinson, above n 77.

93 See Judicial College of Victoria, above n 74, 16.

94 See above n 91.

95 The trend of judgments is to give the media standing at that stage, although it is most clearly established in relation to challenging an order; standing is also provided for in some statutory provisions; see, eg, *Re Kennedy; ex parte West Australian Newspapers* [2006] WASCA 172 (Unreported, Steytler, Roberts-Smith and McLure JJ, 30 August 2006); *Herald & Weekly Times v Medical Practitioners Board (Vic)* [1999] 1 VR 267, 297; *Re Bromfield; ex parte West Australian Newspapers* (1991) 6 WAR 131; *John Fairfax v Local Court of New South Wales* (1991) 26 NSWLR 131; *Evidence Act 1929* (SA) s 69A.

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.'[96] 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 judge the appropriateness of the orders if they were denied any means of assessing the justification for the order.[97]

He also observed that providing the media with advance notice 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.[98]

In relation to non-publication orders, the analogous point would emphasise the value in orders having the correct form, scope and specificity so that it will be easier for the media to understand the appropriateness, or not, of each order.

IV SOUTH AUSTRALIAN REFORMS

The law and practice, outlined above, provides a basis for analysing recent changes to the relevant South Australian law. The *Evidence (Suppression Orders) Amendment Act 2006* (SA) was passed during the second half of 2006 and began operation on 1 April 2007.

A *The Amendments and Orders for Non-Publication*

The *Evidence (Suppression Orders) Amendment Act 2006* (SA) does not directly alter the grounds on which a suppression order can 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 Act does change the evaluation that must be undertaken before an order is made on one of those grounds. Section 69A(2) of the *Evidence Act 1929* (SA) now reads:

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96 Eames, above n 78, 16.
97 Ibid 16.
98 Ibid 16.

> (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 wording from the earlier law 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 move the South Australian law towards a model like Victoria. Reducing orders is certainly the stated intention of the reforms. For example, the Attorney-General's second reading speech noted:

> 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*.[99]

The reforms follow a pre-election commitment of Premier Rann, who was reported as saying '"We need to change the use of suppression orders in our courts in the interests of public confidence … This will send a strong message to judges that South Australians want less secrecy in their courts"'.[100]

Some commentators have doubted whether the change in wording will prompt a reduction in orders.[101] This is an understandable observation given South Australian case law and the history of the 1989 amendments to the *Evidence Act 1929* (SA).[102] At the least, however, the changes should prompt courts to re-evaluate the

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99 South Australia, *Parliamentary Debates,* House of Assembly, 30 August 2006, 785-6 (Michael Atkinson, Attorney-General) (emphasis added). In these reforms, the South Australian Parliament has taken a position markedly more supportive of open justice than the majority report in Legislative Review Committee, above n 68, 7-61; cf minority report 62-74.

100 Greg Kelton, 'Rann Vows to Ease Suppression', *The Advertiser* (Adelaide) 22 February 2006, 1.

101 See, eg, comments by University of South Australia law professor, Rick Sarre, about the Bill which were reported in Verity Edwards and Richard Sproull, 'Courtroom Secrecy on the Increase', *The Australian* (Sydney) 28 September 2006, 6.

102 See above nn 61-68 and accompanying text.

circumstances in which orders are made. Orders based on the ground of preventing prejudice to the proper administration of justice *could* become as tightly controlled as in other states. The common law emphasis on open justice, which is reflected in the interpretation of similar statutory provisions elsewhere in Australia,[103] would support this approach. Such an increased emphasis on open justice is easily seen in the reformed s 69A(2). The new wording makes open justice a *primary objective* and requires *special circumstances* to exist creating a *sufficiently serious threat* of prejudice for an order to be made. This would appear to be just the sort of provision for non-publication that 'ought ordinarily to be strictly construed and utilised only when clearly necessary.'[104]

The reformed wording and parliamentary debates support courts taking a stricter approach to when suppression can be ordered to avoid prejudicing the administration of justice. The wording encompasses situations in which, for example, confidential information requires protection in order to ensure the very 'subject matter of the action is not destroyed'.[105] That situation could lead to suppression at common law or under the Victorian statutory wording. It could also lead to suppression under the reformed *Evidence Act 1929* (SA). There would be 'special circumstances which give rise to a sufficiently serious threat of prejudice to the proper administration of justice as to warrant' making a suppression order.[106] Even if courts do take a stricter approach, however, non-publication orders may remain more common in South Australia on the distinct basis of preventing undue hardship to various categories of people. The very existence of this basis for suppression is wider than the common law. However, as with the first ground, the amendments could promote a stricter approach by courts. The reforms require special circumstances to exist creating a sufficiently serious threat of undue hardship. Recognising the importance of the new qualifying terms in the South Australian Act would reflect the central role of openness in court proceedings and the parliamentary intention in the reforms. The courts appear to have ample scope to take this approach under the reformed Act: future decisions can be awaited with interest.[107]

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103 See, eg, above nn 46 and 59.

104 *Re Applications by Chief Commissioner of Police (Vic)* (2004) 9 VR 275, 286.

105 *Re J N Taylor Holdings Ltd (in liq)* [2007] SASC 193 (Unreported, Debelle J, 25 May 2007) [24].

106 Ibid [24].

107 The first Supreme Court decision under the reformed Act appears to be *Advertiser Newspapers v South Australia Health Commission* [2007] SASC 158 (Unreported, Debelle J, 8 May 2007) in which no detailed consideration of the amendments was required. Similarly, *Re J N Taylor Holdings Ltd (in liq)* [2007] SASC 193 (Unreported, Debelle J, 25 May 2007) did not raise issues about the amended wording.

B *The Amendments and Practice*

As well as changing the legal criteria for granting orders, the reforms add three notable provisions about the practical operation of suppression orders. They appear to offer useful models for consideration in other Australian jurisdictions.

First, suppression orders are subject to automatic review under the new s 69AB of the *Evidence Act 1929* (SA). If an order is made in civil proceedings, it is subject to review when the case settles, is withdrawn, or judgment is delivered.[108] Orders in criminal cases are subject to review on any of a number of procedural events, such as completion of preliminary examination, acquittal, and exhaustion of rights to appeal conviction or sentence.[109] Applicants for the orders, parties and the media are entitled to be heard in relation to the review, which must happen as soon as practical and can confirm, vary or revoke an order.[110] All this appears to be a useful method for dealing with concerns about orders of uncertain duration, and the apparent tendency for open-ended orders to be made and not be reviewed.[111]

Second, South Australian law already provided standing for the media to be heard when applications are made for suppression orders and on appeals against orders.[112] After the recent reforms, this has been extended to appeals in relation to the review process.[113] As with the provisions for the review of suppression orders, these measures about standing offer a useful model for consideration elsewhere in Australia. In relation to standing, it is notable that the South Australian approach does not appear to have caused any difficulty when orders are sought during proceedings. The clear statutory basis may sidestep the complex arguments about standing that can arise at common law, and promote useful incorporation of the media in the whole process of the consideration and making of non-publication orders – which much of the commentary addressed above in Part III would strongly endorse.

Third, the reforms develop the way in which the media and the Attorney-General learn about suppression orders that have been made. Even before the recent

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108 The *Evidence (Suppression Orders) Act 2006* (SA) inserted s 69AB(1)(c) into the *Evidence Act 1929* (SA).

109 *Evidence Act 1929* (SA) s 69AB(1)(a).

110 *Evidence Act 1929* (SA) s 69AB(3) and (4).

111 Eg in relation to NSW, Richard Ackland has noted the 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* (Sydney), 7 April 2006, 13.

112 Formerly under *Evidence Act 1929* (SA) s 69A(5) and (9). Since 1 April 2007 under *Evidence Act 1929* (SA) ss 69A(5), 69AB(3), 69AC(2). The provisions could be contrasted with Victorian legislation: see *Supreme Court Act 1986* (Vic) s 17A; *Herald & Weekly Times v Mokbel* (2006) 161 A Crim R 238.

113 See *Evidence Act 1929* (SA) s 69AC.

changes, s 69A required suppression orders and related information to be forwarded to the Registrar 'immediately' and to the Attorney-General 'within 30 days'.[114] The Attorney-General had to be informed of:

> (i) the terms of the order; and
>
> (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.[115]

The Registrar also had to be notified of any variation or revocation to orders, and a register of suppression orders was maintained and available for public inspection during office hours.[116] After the recent amendments, the scheme also applies to the making of *interim* suppression orders and to the *variation* or *revocation* of any order.[117] These are valuable developments. However, the degree to which they are implemented deserves attention because the reports that were previously supplied under the South Australian Act may not have complied with the statutory requirements. It appears that, in some years at least, many reports to the South Australian Attorney-General about suppression orders failed to provide the information required by the Act or they relied on grounds inconsistent with the legislation.[118]

In addition to extending reports to interim, varied and revoked orders, the changes require courts to notify authorised members of the news media about each order. Section 69A(10) reads:

> The Registrar
>
> (a) will establish and maintain a register of all suppression orders; and

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114 *Evidence Act 1929* (SA) s 69A(10) before the *Evidence (Suppression Orders) Amendment Act 2006* (SA) came into force on 1 April 2007.

115 *Evidence Act 1929* (SA) s 69A(10)(b) before the *Evidence (Suppression Orders) Amendment Act 2006* (SA) came into force.

116 *Evidence Act 1929* (SA) s 69A(11), (12) and (13) before the *Evidence (Suppression Orders) Amendment Act 2006* (SA) came into force.

117 The provisions appear in s 69A(8) and (9) of the amended Act. Reports must be sent to the Registrar 'as soon as reasonably practicable'.

118 See NSW LRC, DP 43, above n 13 , [10.69]-[10.71] which discusses reports related to the year 1998-99. 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.'

> (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 news media representative.

The news media can nominate authorised representatives to the Registrar.[119] These requirements to notify the media about orders do not mean that liability for breach of an order arises only once the media has been notified. The earlier position on liability continues; the statutory basis to orders under the *Evidence Act 1929* (SA) makes liability different to the position at common law.[120] Other Australian jurisdictions have not set out detailed reporting requirements in statutes, although courts information officers appear to undertake somewhat similar communication. It may be the sort of process that is well dealt with by such officers and media-courts liaison committees, although a consistent national approach could make media compliance with reporting restrictions far easier to achieve.

Ian Leader-Elliott described the 1989 reforms in South Australia as an attempt by legislators 'to regain the initiative' from courts when they had 'outstripped the legislature and developed a generous catalogue of exceptions to the fundamental principle of open justice.'[121] If those reforms did not change practice markedly – apart from removing prejudice to the accused as a ground for suppression – that may be because South Australia's legislative wording remained far wider than the common law as to when suppression could be ordered. The recent changes offer another important opportunity for South Australian courts and the media. Although

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119 *Evidence Act 1929* (SA) s 69A(13). It also states that authorised members of the news media may be required to pay fees fixed by regulations. The scheme does not involve a court or judicial official 'authorising' the news media representatives, although that was contained in the Evidence (Suppression Orders) Amendment Bill 2006 (SA) as originally introduced. That Bill included a definition of 'authorised member of the news media' as being 'a member of the news media who has been authorised by the Chief Justice, at the Chief Justice's discretion, to receive, through the member's nominated representative, notices'. The Bill as passed originally by the Legislative Council changed that definition so that authorisation would be made by 'the Registrar (or the Registrar's nominee)'. Instead, the reforms as finally passed rely on an administratively simpler system of registration.

120 *Evidence Act 1929* SA s 69A(12) reads: '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.' As to the earlier position, see above n 72 and accompanying text. For the common law, see above nn 40-42 and accompanying text.

121 Leader-Elliott, above n 36, 87.

the changes are not as dramatic as a shift to something like the Victorian model,[122] the requirements for 'special circumstances' and 'sufficiently serious threats' should see some alteration in *when* orders are made. Just as importantly, the South Australian reforms further develop the good management of practice in this area, especially in relation to reviewing orders and providing the media with standing in relation to the making or review of orders.

V THE VALUE IN FURTHER RESEARCH

The law on suppression orders varies across Australian jurisdictions; practice also appears to vary both between and within jurisdictions; and there are many existing complaints about the law. The review set out above has implications for the *law* on suppression Australia wide. Four points are noted here. First, there could be great value in moving towards a consistent statutorily based power for non-publication orders. This should apply across multiple courts within a jurisdiction, as the Victorian and South Australian models do. Second, it should allow for the suppression of information derived from a proceeding, and not just information about the identity of those connected with a proceeding. Third, it should provide the media explicitly with standing in relation to the making and reviewing of orders. Fourth, while an appropriate statutory approach would be broad in those elements, it should set a strict test for *when* orders could be made. This would reflect the longstanding weight given to open justice – and to consequent media publicity – at common law. New South Wales, in particular, has a complex mix of common law and statutory provisions that deserves reform.[123]

In relation to the test for when an order should be made, it is worth remembering the Earl of Halsbury's caution in *Scott v Scott*.[124] There, it was thought that even the common law rule might allow judges too much discretion to restrain publication. As Garth Nettheim said, it was 'questioned whether [the] formulation of a power to close courts when necessary for the attainment of justice was tight enough'.[125] However, given the way that test has come to be understood in case law, it *does* restrict orders closely and offers what may be the best basis for a statutory power. Under it, courts appear to operate well with a test that allows suppression where it is necessary for justice in the case at hand and in limited recognised categories related

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122 The Victorian legislation relevant to suppression orders is discussed above at nn 56-60 and accompanying text.

123 As the NSW Law Reform Commission has called for: NSW LRC, Report 100, above n 54, chapter 10.

124 [1913] AC 417, 441-42.

125 Nettheim, above n 8, 34 (quoting the Earl of Halsbury in *Scott v Scott* [1913] AC 417, 442: 'I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret').

to the administration of justice.[126] This approach supports media reporting, and the value of much media reporting *for the courts*, should not be overlooked.[127] Specific limitations on reporting in particular types of proceedings – which apply unless contrary orders are made – would continue alongside this type of general statutory power, as they do under the Victorian and South Australian models discussed above.[128]

The above analysis also suggests important matters about suppression order *practice*. In particular, all jurisdictions would be well served by considering automatic review processes and promoting careful formation of orders. Orders need to comply with the applicable common law or statutory basis, and have the appropriate form, duration and specificity.[129] These issues appear to be recognised in the commentary, but deserve ongoing attention. In addition, a more comprehensive notification system about orders, and a system that is consistent Australia-wide, is a challenge facing Australian courts and one which has increasing importance in a digital media environment. The national variation in law and practice is made more problematic by digital communications in general and by the internet in particular.[130] Such challenges may prompt the revisiting of previous efforts aimed at model legislation.[131] Even without such statutory reform, more consistent practices could be developed for many aspects of suppression orders through courts information officers and media-courts liaison committees.

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126 See above nn 8–38 and accompanying text. It could also be noted 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 54, [10.15]-[10.20].

127 Eg the history of the Family Court of Australia, which understandably requires some greater restriction on publicity than other courts, illustrates the dangers in limiting reporting; see generally McCall, above n 50.

128 See above nn 50–53.

129 In regard to this aspect of practice, the experienced court reporter, Peter Gregory, has suggested that if a suppression order is to be made, media lawyers should assist by drafting 'clear and simple' orders for the situation: Peter Gregory, *Court Reporting in Australia* (2005) 172.

130 This is true of contempt of court more generally: see, eg, J J Spigelman, 'The Internet and the Right to a Fair Trial' (Paper presented at 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 because the report could breach UK contempt legislation, see, eg, Owen Gibson, 'New York Times Blocks UK Access to Terror Story', *The Guardian* (London), 30 August 2006, <http://www.guardian.co.uk/terrorism/story/01860876,00.html>.

131 The NSW LRC, DP 43, above n 13, [10.75], notes that proposals about non-publication orders went to the Standing Committee of Attorneys-General in the early 1990s.

With digital communications, there is far greater availability of information due to the multiplication of sources and the power of search functions. Past media reports and official documents no longer have the 'practical obscurity'[132] they enjoyed in the twentieth century. This qualitative change in publicity has occurred alongside recognition that jurors may not be so liable to influence by prejudicial information.[133] Jurors and the effects of media publicity has been one area in which valuable legally-focussed empirical research relevant to contempt has been undertaken.[134] Some examination has also been undertaken of courts information officers.[135] But there has not been substantial empirical research centred on suppression order law and practice. The likely value of such research is a final matter worth emphasis. Many of the points about the current situation which can be made reasonably confidently – and are set out above – suggest the value in comparative, empirical research into suppression order law and practice across different Australian jurisdictions.

In order to shape better law and practice 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 the media. How many orders are made, in which levels of courts Australia-wide, and in criminal and civil cases concerning what types of dispute? In what ways are legal differences – such as hardship to various people being a ground for non-publication orders in South Australia – reflected in the orders that are made? What material and arguments are offered when orders are sought, and who are the lawyers making those arguments acting for? More could be understood about the form, specificity and duration that orders take, the reasons provided for the making or refusing such orders, and the ways in which orders communicated to the media. Research combining the analysis of court files, transcripts and judgments with interviews of legal and media professionals could substantially develop the understanding and operation of this aspect of litigation. The research would be valuable in developing greater knowledge about key practices and investigating what, if any, changes are warranted to the applicable law, to court procedures, or to the legal awareness of all those involved in litigation and its reporting. Much of the current commentary is anecdotal and specific to a single jurisdiction – even if it often comes from commentators who could be

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132 Spigelman, above n 1, 'Conclusion'.

133 Eg *Director of Public Prosecutions v Williams* (2004) 10 VR 348, [20] (Cummins J).

134 See, eg, Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001); Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 289-92. 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' (2004-05) 85 *Reform* 23, 26. The value of the Australian research was noted by the UK Attorney-General when he called for similar work to be undertaken there: 'Goldsmith Calls for Research into Juries', *Media Lawyer* (London), 25 May 2007, <http://medialawyer.press.net/article.jsp?id=1452245>.

135 See, eg, Johnston, above n 70.

expected to have detailed understanding of the law and practice, at least for the jurisdiction in which they are most experienced. But the questions raised by that commentary deserve more developed, comparative investigation.

As well as the juror-focussed contempt research mentioned above, empirical defamation research suggests some of the benefits that could arise from such research into suppression. In recent years, researchers have investigated aspects of defamation related to litigation, news production and audience reception.[136] Work on defamation law and litigation practice offers one illustration from my own research. It used a combination of court files, transcripts, judgments and interviews with legal and media practitioners.[137] A similar approach – taking account of the need to maintain the confidentiality of material that is subject to suppression – could be applied to suppression orders. While not wanting to labour the reference to one's own work, something that may be useful to note from this style of research is the way in which it can develop existing debates, in large part through enhancing knowledge about comparative law and practice.

To that end, a brief example from defamation can be given about how comparative, empirical research can inform longstanding issues. Although some points about suppression orders can be made with confidence – such as the value in orders having clear form, duration and specificity, how the recent South Australian reforms should reduce the number of orders, and the four legal implications noted above – the example suggests how more detailed understanding of practices could develop debates about suppression. Judges and commentators have differed for years as to whether the former NSW law under the *Defamation Act 1974* (NSW), with its imputation-centred approach promoted quick and simple defamation litigation that was fair to both parties when compared with the common law. Empirical research combining the analysis of court files, transcripts, judgments and interviews with practitioners strongly suggested that the NSW law had been markedly worse than the common law in promoting those aims of quick and simple litigation. The research provided clear support for criticisms of the former NSW

136 See, eg, Andrew T Kenyon, *Defamation: Comparative Law and Practice* (2006) which also outlines other empirical research into defamation law internationally: 9-20; and, in relation to Australia or New Zealand: Roy Baker, *Deciding Defamation* (2004); Roy Baker, 'Defining the Moral Community: The "Ordinary Reasonable Person" in Defamation Law' (Paper presented at Communications Research Forum, Canberra, 2 October 2003); Ursula Cheer, 'Myths and Realities about the Chilling Effect: The New Zealand Media's Experience of Defamation Law' (2005) 13 *Torts Law Journal* 259; Chris Dent and Andrew T Kenyon, 'Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers' (2004) 9 *Media & Arts Law Review* 89.

137 See the appendix in Kenyon, *Defamation*, ibid for an overview of the approach. (The interviews in that research focussed on lawyers and judges. Interviews with media practitioners are being drawn on, in particular, in future publications examining media production processes rather than defamation litigation.)

law that some judges have long raised,[138] and leaves unsupported the repeated endorsement of the former defamation statute by the NSW Law Reform Commission.[139] The change from that law in the recent uniform *Defamation Acts* appears more than warranted.[140] The research also supports some refinement of defamation practice that has been undertaken in recent years in NSW independently of that law reform.[141] And it suggests how concerns about the technicality of defamation practice remain significant for courts throughout Australia to consider under the current uniform defamation law. It is worth emphasising how that sort of comparative research can reveal variation in the application of particular legal rules in different jurisdictions, variation which has not been expressly recognised or justified in case law.[142]

That work on defamation litigation is just one example from the variety of researchers and projects that have empirically investigated defamation in recent years. All those projects suggest how Australian law and practice on suppression orders would be likely to benefit from similar comparative, empirical research. And the burgeoning of such research in media and communications law underlines how suppression law and practice is something about which 'the ancient and civilised

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138 Eg comments from the judge who headed the NSW Supreme Court Defamation List for approximately a decade from the early 1990s: David Levine, 'The Future of Defamation Law' (Speech delivered at launch of the first issue of *UTS Law Review*, 'Courts and the Media', Sydney, 31 August 1999):

> 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 *John Fairfax Publications Pty Ltd v Gacic* [2007] HCA 28 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 14 June 2007) [34] (Gummow and Hayne JJ), [71] (Kirby J), [193] (Callinan and Heydon JJ); *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, 578 (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, NSWCA, Kirby P, Priestley and Meagher JJA, 1 February 1996) 4-5 (Kirby P in dissent).

139 See especially NSW Law Reform Commission, *Defamation*, Discussion Paper No 32 (1993); NSW Law Reform Commission, *Defamation*, Report No 75 (1995); Kenyon, *Defamation*, above n 136, 336-44.

140 See, eg, *Defamation Act 2005* (NSW), *Defamation Act 2005* (Qld), *Defamation Act 2005* (Vic); Kenyon, *Defamation*, above n 136, 361-72, 377-9.

141 See, eg, *Greek Herald v Nikolopoulos* (2002) 54 NSWLR 165.

142 See Andrew T Kenyon, 'Perfecting Polly Peck', (2007) 29 *Sydney Law Review* forthcoming.

discourse between judges and representatives of the media'[143] should be further developed.

[143] The Hon Justice Ronald Sackville, 'The Judiciary and the Media: A Clash of Cultures' (Response to the Australian Press Council Annual Address, Sydney, 31 March 2005), <http://www.presscouncil.org.au/pcsite/activities/a_address/sackville.html> at 18 June 2007.