KELLEHERS
AUSTRALIA

In-House Memorandum
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Open Courts

Open justice is central to our legal system[1] but persons in danger, or highly vulnerable or traumatised individuals, may seek protection through orders to close the court or suppress name(s). This may occur, for example, where it is necessary to protect the identity of one or more parties to the proceeding or their witness(es). The Open Courts Act ('OCA'), introduced to Victoria in October last year, provides new regulatory arrangements addressing those open justice issues.

Application of the OCA

In *Rutherford & Ors v Hume CC*[2], the applicants for review sought orders that:

- Witnesses be permitted to give their evidence by telephone;
- The hearing be held in closed tribunal;
- Any information that might identify a witness not be published; and
- A witness may use a pseudonym.

Evidence from the applicant's law firm stated that the witnesses, members of a minority Iraqi Christian group, feared that giving evidence in open court may lead to reprisals against family and friends in Iraq and broader persecution. The evidence also raised concern about the potential impact upon the mental health of members of the Church, exacerbating past trauma and antagonising religious difference. Evidence was submitted that the witness(es) feared retribution in Iraq where violence continues and the threat of violence is real.

Deputy President Dwyer refused the orders sought. He considered that OCA required evidence of a 'real necessity' to protect the safety of witnesses and noted the absence of evidence of any threat posed by the permit applicant. He found that the OCA had "changed the goal posts", creating a presumption of open court. In providing verbal reasons for his Orders, he invited the applicants to examine alternative options than to close the Tribunal (e.g. anonymisation), despite the fact that he rejected the application to use a pseudonym.

Two subsequent Supreme Court cases considered OCA. In contrast to the 'real necessity' test, they applied a 'potential risk' test:

- *RN v Commonwealth of Australia*[3] concerned an application to use a pseudonym in place of a real name. The Court granted an order based upon the applicant's affidavit describing things that may occur were his name published[4]. It also relied on evidence of a psychologist of the plaintiff's clinical history. In contrast to Dwyer's presumption of open court, Dixon J noted that the OCA:

  > *"does not limit or otherwise affect a court making an order that conceals the identity of a person …."*[5]

  The Court ordered that the plaintiff be referred to by the pseudonym 'RN' and that all documents filed refer to the plaintiff as 'RN'.

[1] See *Scott v Scott* [1913] AC 417
[2] PD Decision Unreported.
[3] [2014] VSC 289.
[4] Ibid, at [18(c)].
[5] Ibid, at [12].

- *ABC-1 and ABC-2 v Ring and Ring*[6] also concerned pseudonym orders. The court held, on evidence undisclosed in the Order, that the applicants' fears were reasonably held and there was real risk that they would abandon legal proceedings if a pseudonym order was not made[7]. The Court took account of evidence, including medical evidence, but declined to detail[8].

OCA and Principles of Open Justice

The main purpose of the OCA is to reform and consolidate provisions for suppression and closed court orders in the Supreme Court, County Court, Magistrate's Court, Coroners Court, VCAT and other prescribed courts and tribunals but excludes the Children's Court[9].

OCA provisions are substantially similar to the former provisions[10], although exercise of discretion is quite broad for suppression orders[11]. Whilst there is a presumption in favour of open court, there is power to close Court 'for any other reason in the interests of justice'[12]. An order that the evidence of a particular witness be heard in closed court is not a bar to the publication of a report of the evidence, unless such publication is prohibited by order[13].

Whilst OCA strengthens and promotes the principles of open justice[14], it provides a set of judicial considerations to apply in coming to a decision as to whether:

- the whole or part of a proceeding is to be heard in a closed court or closed tribunal; or
- only specified persons or classes of persons may be present during the proceeding[15].

Relevant elements remain:

- endangering national security or international security of Australia;
- prejudicing the administration of justice;
- endangering the physical safety of any person;
- offending public decency or morality;
- the publication of confidential information or information the subject of a certificate under section 53 or 54; or
- for any other reason in the interests of justice[16].

[6] [2014] VSC 5.
[7] Ibid, per Bell J, at [5], citing the authority of Cavanough J in *TTT and JJJ v State of Victoria* [2013] VSC 162.
[8] *ABC-1 and ABC-2 v Ring and Ring* [2014] VSC 5 at [4].
[9] *Open Courts Act 2014* (Vic), s1; VCAT can make rules with respect to procedure under the OCA (Schedule 1, VCAT Act) but to 4 August 2014 has not done so. The Supreme Court also has the power to make Rules with respect to the OCA (e.g. *Supreme Court Act 1986*, s25(1)(af)). It has done so in certain circumstances (e.g. Order 16, *Supreme Court (Criminal Procedure) Rules 2008*).
[10] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s101.
[11] "*In the case of VCAT, the order is necessary— (i) to avoid the publication of confidential information or information the subject of a certificate under section 53 or 54 of the VCAT Act 1998; (ii) for any other reason in the interests of justice*": Open Courts Act 2014 (Vic), s18(1)(f)
[12] Ibid, s30(2)(f)(ii).
[13] See *Jamieson v Maieson* (1913) 30 WN (NSW) 159.
[14] Ibid, Part 5, s28
[15] Ibid.
[16] Including the power to order that evidence, documents and identifying information not be published except in the manner and to the persons specified by the Tribunal (s101(3). VCAT Act); ss18-19, *Supreme Court Act 1986* (Vic)

It is insufficient that a public hearing will create embarrassment for some or all of those concerned. Mere feelings of delicacy or a wish to exclude publicity of undesirable details are also insufficient reasons. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice[17].

It would be regrettable if the OCA became a burden to vulnerable parties seeking protection under the justice system. Powers to close courts or permit names to be supressed or pseudonyms to be used allow vulnerable parties to access the courts, particularly where there is a likelihood that parties who fear public disclosure of information may be denied access to the justice system.

Robert Forrester and Cameron Algie
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[17] See *Scott v Scott* [1913] AC 417