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Open justice, transparency and the media: representing the public interest in the physical and virtual courtroom

Jason Bosland and Judith Townend

Overview

In 2012, Lord Justice Toulson observed that the practical application of open justice ‘may need reconsideration from time to time to take account of changes in the way society and the courts work’.¹ In this article, we undertake such a reconsideration in light of the declining role that institutional media organisations play in promoting and protecting the principle of open justice, focusing on courts in England and Australia. We argue that due to changes in the communications landscape, the media no longer have the resources or sufficient inclination to adequately safeguard the public interest in transparency in the courts. In order to place the media’s declining role into context, we also briefly explore three further categories of contemporary challenges facing the open justice principle: changes to judicial attitudes to open justice in response to new communication technologies; shifts in the priority given in law to competing interests in national security and privacy; and, finally, new and emerging changes to court processes and procedures that potentially limit open justice, including virtual courts. We then consider mechanisms that would offer enhanced protection of open justice. Most boldly, we examine a novel model in which an open justice advocate (OJA) intervenes in appropriate circumstances, with the overall objective of ensuring maximum transparency of court proceedings. We also suggest additional mechanisms for greater

transparency and accountability regarding the state of open justice in the courts – namely, a statutory duty on courts to give written public reasons for all decisions regarding open justice, a public register of all reporting restrictions (and similar orders) granted by the courts, and annual open justice reporting requirements.

I Introduction

Trials have been conducted in public since ‘time immemorial’.² However, it was not until just over 100 years ago in the seminal case of *Scott v Scott*³ that the House of Lords formally recognised the principle of open justice – the principle that justice must not only be done but must be seen to be done – as fundamental to the administration of justice under the common law and as ‘a sound and very sacred part of the constitution’ of England.⁴ Since then, protection of the principle has been expressly enshrined in Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) (the right to a ‘fair and *public* hearing’),⁵ and has also been interpreted as an aspect of the right to freedom of expression under Article 10 of the ECHR.⁶ Likewise, the principle is recognised in various international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR),⁷ and as an express or implied guarantee in the written constitutions of many nations.⁸



Under the common law, at least three fundamental rules flow from the open justice principle: first, judicial proceedings must be conducted in open court;⁹ second, evidence must not be concealed from members of the public who are present in court;¹⁰ and, third, what happens in court must be able to be communicated to the public outside of the court, including by the media.¹¹ Such rules must be followed in all cases except where departure from them is necessary to protect the fair and proper administration of justice or is permitted or required by statute. The rationales for the open justice principle and the rules that flow from it tend to be framed in utilitarian terms: that is, open justice is a ‘means to an end, but not an end in itself.’¹² Openness and public scrutiny of the courts, which are achieved largely through media coverage, are said to guard against the exercise of arbitrary or partial decision-making,¹³ to provide ‘an impetus for high judicial performance’,¹⁴ and to ensure that all participants in court proceedings, including witnesses, are held to account.¹⁵ Open justice also serves an educative function, by providing a mechanism for the public to learn about court processes as well as what the law is and what standards of behaviour it requires.¹⁶ These effects of open justice are considered central to securing public confidence in the administration of justice and, in turn, the ongoing authority of the judiciary.¹⁷ Open justice is therefore seen as fundamental to the operation of the rule of law¹⁸ and is an essential precept of any modern democratic system of government.¹⁹

The purpose of this article is to explore the media’s declining role as the institutional defender of the open justice principle in the courts and to consider how the principle can be safeguarded into the future. As we discuss in Part II, the fragmentation of media markets due to new communication technologies has significantly undermined the mainstream media’s traditional capacity – and inclination – to devote resources to reporting the courts. Crucially, this fragmentation has also resulted in fewer resources for the mainstream media to fulfil their traditional role as courts’ observer, reporter and defender of the principle of open justice. If there are fewer journalists in court, as recent studies suggest,²⁰ there will be fewer opportunities to challenge applications that limit open justice in some way – for example, reporting restrictions or orders to hear proceedings in camera. We aim to address the likely decline in the media’s latter role with our proposals in Part IV. However, in order to underscore the significance of the media’s decreasing involvement in open justice and to highlight the importance of, and some of

the difficulties with, adopting effective alternative mechanisms for defending the principle, we also canvass in Part III a series of further contemporary challenges, both present and future, that have the potential to place increasing pressure upon the operation of open justice in the courts.

In Part IV we then examine how the open justice principle might be safeguarded into the future. First, we explore the possibility of a fully stated-funded OJA to represent the principle of open justice in the courts. We examine what role an OJA might perform and the interests that it might protect, and how the participation of the OJA might be accommodated in the courts from a case management perspective. We then explore a number of other mechanisms that might be adopted, either independently or alongside an OJA – namely: a statutory duty on courts to give publicly available written reasons for all decisions where departures from open justice are ordered; the adoption of a register of all orders affecting open justice; and, finally, the introduction of annual open justice reporting requirements.

II Declining role of the media in open justice

Since the rise of the popular press, the media have played a significant role in the law and practice of open justice in two important respects. The first is the media’s role in facilitating open justice by reporting on proceedings before the courts. While public attendance at court was once ‘a common mode of ‘passing the time’,²¹ nowadays very few members of the public attend and observe judicial proceedings. Instead, members of the public rely predominantly upon court reporting by the mainstream media to receive information about the operation of the courts. In this respect, a crucial aspect of the modern principle of open justice is the mainstream media’s role in acting as the ‘eyes and ears’ of the public by reporting the workings of the courts.²² The special role of the media in furthering the goals of open justice has been frequently recognised by the courts.²³ For example, Cory J in *Edmonton Journal v Alberta (Attorney-General)* said:

It is only through the press that most individuals can really learn of what is transpiring in the courts. They as ‘listeners’ or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court

*proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.*²⁴

Of course, the media's capacity to fulfil the objectives of the open justice principle by reporting the courts is imperfect and, in many respects, limited.²⁵ For example, it is not possible for the media to report all judicial proceedings; moreover, decisions about what cases will receive coverage and how they will be portrayed will be driven largely by the media's own editorial and commercial imperatives.²⁶ While the principle of open justice predates the news media,²⁷ it is beyond doubt that reporting of the courts by the mainstream media has become an integral component of the practical operation of an open and transparent system of justice.

The second but perhaps less commonly acknowledged role performed by the media is the role of actively *safeguarding* the principle of open justice. The media do this by vigorously challenging attempts to depart from open justice in the courts – for example, by arguing against applications to permit proceedings to be heard in private ('in camera' orders), that anonymity be granted to participants ('anonymity' orders), that certain evidence be concealed from the public in court ('concealment orders') or that restrictions be placed on the media's reporting of proceedings ('reporting restrictions' but also sometimes referred to as 'non-disclosure', 'suppression' or 'postponement' orders). The media will often intervene in proceedings to argue that such measures cannot be justified according to the law, either on the basis that the power to make an order does not exist or that a proposed order goes beyond what is strictly necessary in the circumstances.²⁸

This external oversight function performed by the media has been crucial not only to the development of the law of open justice, but also to maintaining observance of the principle in practice. Importantly, while the courts themselves have a clear responsibility to ensure that the dictates of open justice are adhered to, supervision by the judiciary alone does not provide sufficient defence of the principle. The need for external oversight and scrutiny is perhaps most clearly expressed in the words of Lord Shaw in *Scott v Scott*, who warned that there 'is no greater danger of usurpation [of the principle] than that which proceeds, little by little, under the cover of rules of procedure, and at the insistence of judges themselves'.²⁹ Indeed, the need for some mechanism

of external oversight might be considered from the perspective of principle: while the courts themselves are the final arbiters of what open justice requires,³⁰ it would be curious if the monitoring of the principle's operation were expected to reside entirely in the hand of judges themselves – that is, in the hands of those who are held to account by the operation of the very same principle. However, putting questions of principle aside, evidence of practice alone is enough to establish that some method of external safeguarding of the principle is required. In both England and Australia it has often been claimed that courts, particularly lower courts, are in the habit of making orders limiting open justice where such orders cannot be justified, have insufficient legal bases, or are erroneously made on the consent of the parties.³¹ There is evidence that these complaints have merit,³² and even judges and former judges in both Australia and England have expressed the view that open justice is, at least on occasion, not always observed to the strict requirements of the law.³³ This is despite austere warnings from appellate courts that open justice is a paramount interest and will only be outweighed in rare and exceptional circumstances.

The potential for judges to make orders to depart from open justice in circumstances where such orders are not justified may arise due to a combination of three factors. First, judges may have inadequate understanding of the law of open justice and the limited circumstances that can justify departure from the principle.³⁴ Indeed, this must be a factor, as we can only assume that judges will not make orders that they know are contrary to the law. Second, judges may have a natural tendency to protect proceedings and/or participants in proceedings by limiting publicity. Although judges are bound to act impartially, they are not disinterested participants in proceedings: one of their main functions is to navigate and protect the fair and proper passage of justice through the courts. This may give rise, perhaps quite unconsciously, to a tendency to protect proceedings by departing from open justice on 'therapeutic, prophylactic or prudential grounds'³⁵ – that is, on the grounds that orders are 'desirable' rather than on grounds that meet the strict test of necessity required by law.³⁶ In other words, in a judge's eyes, it might be preferable to take the pre-emptive path of allowing derogations from open justice than to deal with the consequences of, for example, a trial being aborted as a result of publicity or for irreparable harm to be unnecessarily inflicted upon a participant as a result of openness. Third, an application for a reporting restriction (or other derogation from open justice) may be seen by judges as 'peripheral' to the main

issues in a proceeding and therefore 'to be disposed of as quickly as possible.'³⁷ Thus in the absence of an effective contradictor, orders may be made on the basis of little evidence, possibly at the consent of the parties, and with 'little attention ... given to the importance of public transparency'.³⁸

Since it cannot (and perhaps should not) fall solely on judges to guard the principle of open justice, there is an obvious need for a mechanism of enforcement and oversight external to both judges and the courts themselves to ensure that the principle is followed to the fullest extent. It is important to note that in criminal matters, it might be suggested that prosecuting authorities should act to defend the principle of open justice in the courts.³⁹ Ascribing such a role to the prosecution, however, is wholly misguided. This is because the prosecution will often either take a neutral stance,⁴⁰ or will themselves have an interest in maintaining secrecy, particularly in relation to victim identities or publicity that may have the possible effect of prejudicing proceedings, including future proceedings. Consequently, prosecutors may not seek to challenge the granting of some orders and in many cases will be the applicant themselves.⁴¹ Indeed, in the national security and terrorism contexts, it has been accepted that prosecuting authorities may be deterred from proceeding with prosecutions if there is a risk of secret material becoming public during a trial process and therefore will only proceed if reporting restrictions are in place.⁴² While it may be said that all parties, prosecutors and defendants alike, have a duty to 'preserve' open justice as a 'fundamental part of our system of justice',⁴³ the reality is that any apparent duty of this kind is significantly tempered by the adversarial nature of litigation in common law courts where parties predominantly act, through their legal representatives, to advance their own interests.

In the absence of judges and other participants in proceedings providing sufficient oversight, it has traditionally been left to the media to play the vital role of protecting the principle of open justice. It is important to acknowledge, of course, that the media do not occupy a formal role in the operation of open justice: they can intervene (or not) as they wish based on available resources and the level of commercial interest in reporting particular proceedings. This means that the media's role in protecting open justice, like their role in reporting the courts, is both limited and imperfect. Nevertheless, the media's informal function is recognised by the courts and the law in a number of ways. Most significantly, the media are generally granted permission upon application to

intervene in proceedings to make submissions or to challenge decisions that limit open justice, particularly in relation to reporting restrictions.⁴⁴ An informal reliance on the media to make such interventions has evolved in both the Australian and English contexts (as well as in many other common law countries), with national media groups in both countries frequently pooling resources to mount challenges to proposed or granted reporting restrictions. In some Australian jurisdictions, in recognition of the media's important role in safeguarding open justice, the media have statutory standing to appear and be heard on the application for a reporting restriction.⁴⁵ In Australia and England, the media also have various rights of review and appeal.⁴⁶ Furthermore, in Victoria there is a statutory requirement that the media receive notice of all applications for reporting restrictions,⁴⁷ the purpose of which is to give the media adequate opportunity to exercise their right to appear and be heard at the time when the court is considering the substantive merits of whether an order should be made.⁴⁸ In other jurisdictions, legally speaking, notice to the media that a reporting restriction has been applied for is a matter of discretion for the presiding judge and the practice of giving notice differs markedly between jurisdictions and courts.⁴⁹

Unfortunately, the advancement of digital communication technologies and associated shifts in the media landscape are placing both of the aforementioned functions of the media in open justice in jeopardy. The fragmentation of mass media and the rise of new digital media and advertising entrants mean that traditional media – newspapers, radio and television – are losing audience and hence advertising share, resulting in a significant decline in revenue streams for commercial outlets.⁵⁰ One consequence is that the media have far fewer resources to devote to reporting the courts, or where resources exist, they are diverted elsewhere.⁵¹ Indeed, over the past few years, the number of dedicated legal correspondents and court reporters in both Australia and England and Wales has reduced significantly.⁵² This has led to an associated decline in the quantity (and arguably quality) of court reporting. Until recently, such decline was the subject of only anecdotal observation,⁵³ including by the Lord Chief Justice of England and Wales at the time, Lord Judge, who expressed concern that the apparent absence of journalists in the courts posed significant consequences for the continuing vitality of open justice.⁵⁴ A number of recent small-scale studies have provided some empirical evidence that the quantity of court reporting by the media in the United Kingdom (UK) has declined, particularly amongst regional outlets.⁵⁵

Significantly, the declining profitability of the mainstream media is also placing their safeguarding function in open justice under threat. With fewer resources to fund litigation, it seems likely that the media will avoid costly challenges to argue against attempts to depart from open justice in the courts.⁵⁶ Indeed, there are signs that the media, including outlets traditionally very active in defending the open justice principle (and media freedom more broadly), have become much more selective in their approach to litigation across all areas of media law.⁵⁷ In addition, there is a growing range of statutory and common law provisions that allow restriction of public reporting. As a result, it is likely that a smaller proportion of cases with proposed departures from open justice, even where clearly beyond the power of the court, will be challenged.⁵⁸ Although there may be other court observers such as academics and non-governmental organisations who also have an interest in challenging reporting restrictions and the like, these observers are unlikely to have the necessary legal representation and financial resources to mount regular interventions. Consequently, the open justice principle is at risk of being left without a sufficiently robust external mechanism of oversight and enforcement. This is perhaps an unsurprising and predictable weakness of a system which has relied on the intervention of third parties (ie the media), who are under no formal obligation to participate and whose motivations may differ from the objectives of the open justice principle as conceived by judges over the past century. Nevertheless, it raises a question that we seek to address in Part IV of this article: if the media can't or won't continue to act as the institutional defender of open justice, who will?

III Contemporary challenges facing the principle of open justice

Before turning to consider a number of possible solutions to the declining capacity of the media to defend open justice in the courts, it is first necessary to place the issue in the context of some additional contemporary challenges facing the open justice principle. In this part we highlight in general terms three broad and interrelated categories of challenges: changing judicial attitudes to open justice and the media in response to new digital technologies; the shifting priority given in law to competing interests in maintaining secrecy in the courts; and, finally, current and future changes to court processes and procedures that have the potential to significantly

limit the transparency of proceedings. It is important to note that due to both the focus of this paper and constraints of space we do not comprehensively examine each of these challenges; rather, we raise them to emphasise the continuing need for an external mechanism of oversight, and to demonstrate that some developments may make effective external oversight, including by the media, more difficult to achieve.

(i) Judicial attitudes to open justice in response to digital technologies

Digital communication technologies have the capacity to significantly alter the way court information is made available to the public. It is therefore unsurprising that judges are now frequently faced with difficult questions about how such technologies, on the one hand, might facilitate open justice and, on the other, how the degree of openness that they provide might give rise to new risks to the administration of justice and other competing interests (such as the privacy of court participants). Judicial approaches to, and understandings of, new technologies can therefore have significant consequences for open justice.

In some instances, courts have taken steps to embrace new ways of communicating to the public. A frequently discussed example is the use of mobile devices and social media platforms to report and comment on cases 'live' from the court. Most courts have developed practice rules around the use of such forms of electronic communication,⁵⁹ and in light of the potential benefits of social media coverage of the courts for open justice,⁶⁰ they have generally adopted permissive approaches.⁶¹ Some courts have even embraced social media themselves as an avenue of direct communication between the courts and the public.⁶² Another example is the greater capacity for and judicial acceptance of the recording and webcasting of proceedings.⁶³ We suggest, however, that judicial understandings of new technologies and the consequences of material being published online can potentially have a negative impact from an open justice perspective. A robust mechanism of external oversight is therefore essential to ensure that any such impact is kept to a minimum. While judicial attitudes to digital technologies and their consequences for open justice have not been the subject of detailed or systematic research, a number of strands of concern can be noted.

First, judicial concerns about technologically-driven changes in media and journalistic practices in

reporting the courts may encourage the greater use of reporting restrictions. For example, one concern that has been expressed by judges is that the decline in available media resources to employ dedicated court reporters means that journalists who are responsible for reporting the courts may be less familiar with legal restraints on reporting evidence heard during *voir dire* or the variety of automatic statutory restrictions that may apply. As a consequence, it has been suggested that judges may grant reporting restrictions as precautionary measures to reinforce existing statutory bans on publication.⁶⁴ Another concern is that judges may sometimes see a need to restrain the reporting of cases in order to 'mitigate the prejudicial impact' of potentially inaccurate and unbalanced media reporting.⁶⁵ This concern is likely to be amplified by the publication of reports in the digital sphere, where it has been claimed that coverage is often less comprehensive, accurate and balanced than in traditional media formats due the ways in which news is published online.⁶⁶ This concern is also likely to be amplified by the prospect of non-professional members of the public reporting the courts via new media platforms, whether as 'citizen journalists' or interested by-standers. This is because judges may be concerned that citizen journalists are not subject to the same editorial and ethical standards of accuracy and fairness that apply to traditional media journalists,⁶⁷ and that such reporting is likely to adopt less balanced forms of expression.⁶⁸

Second, the prospect of online publicity of cases, and the difficulties of removing material once published online, may lead to a judicial tendency to prevent such publication by imposing earlier and more extensive reporting restrictions. For example, the risk that legitimate reports of the preliminary stages of a proceeding will be republished or come to prominence at the time of a trial, and therefore prejudice the jury, may prompt judges to impose reporting restrictions when the matter first comes to court.⁶⁹ Alternatively, it is possible that the ease with which reporting restrictions can be undermined by the publication of material online, particularly on social media⁷⁰ and sometimes anonymously or from outside the jurisdiction,⁷¹ may have the effect of encouraging the use of more extreme incursions into open justice in order to ensure that information remains contained within the court, such as through the issuing of in camera orders or by requiring the concealment of information from the public in court. Another apparent concern may be that the 'extensive reach and immediacy' of publishing in 'real time' from the court via social media removes the 'space' between courtroom events and publication and therefore may

reduce a court's ability to grant effective reporting restrictions after evidence has been given.⁷² The potential for future restrictions to be undermined in this way may be seen in some cases as warranting the making of 'precautionary' and broadly cast restrictions on the publication of proceedings.

Third, in addition to the possibility of earlier and more extensive orders, it may be the case that judges will make orders in direct response to new media publications, including publication on social media by members of the public, in circumstances where such orders would not previously have been thought necessary. The relatively recent case of *ex parte British Broadcasting Corporation* provides a pertinent example.⁷³ In that case, a blanket ban on reporting any details of a high profile murder case was imposed by a trial judge due to concerns about the risk of prejudicial commentary that might be published by social media users in response to legitimate media reports. While this order was ultimately narrowed by the UK Court of Appeal and the case was perhaps an unusual one (given that the order was made in the context of a retrial being granted as a result of past prejudicial publicity), it nevertheless indicates that changing communication technologies have the potential to have a restrictive influence on decisions regarding open justice. *R v Sarker*⁷⁴ provides another recent example where a trial judge imposed a blanket reporting restriction due to judicial assumptions about potential internet publication. In that case, a reporting restriction was granted out of concern that contemporaneous online reports of the trial would include links to previous stories containing prejudicial information about the accused and that such prejudicial information would therefore become readily accessible to jurors.⁷⁵ While the British Broadcasting Corporation (BBC) was successful in having this order quashed by the Court of Appeal, this occurred more than four months after the trial, by which time media interest in reporting the trial had substantially waned.

It is important to note as an aside that many of the concerns just described may also arise in the context of decisions by judges to provide access to court documents. It has been recognised that access to court documents and exhibits is integral to the operation of open justice⁷⁶ and therefore access will usually be permitted where documents have been deployed in court. Statutes and rules of court often provide rights of access to certain documents;⁷⁷ however, access will sometimes require leave of the court⁷⁸ and decisions whether to grant access appear to be treated as much more discretionary than

decisions to grant orders departing from open justice, such as in camera orders and reporting restrictions.⁷⁹ It is in the exercise of such discretion that the relative permanency and universal accessibility of documents, if published online, may weigh heavily in judicial considerations about access. This is particularly the case given the possibility of publication occurring via social media by individuals and entities not subject to the publishing standards of traditional media. As with reporting restrictions, judicial perspectives about developments in media and journalistic practices may also be relevant, which may result in judges being concerned that documents and exhibits, particularly audio-visual exhibits, may not be presented in a fair and accurate manner.⁸⁰ Finally, the prospect of court documents being published online may raise concerns about privacy, which, for a judge, may significantly militate against a decision to grant access.⁸¹ In the following section, we discuss in further detail the emergence of privacy as a relevant consideration in decisions regarding open justice.

(ii) Greater balancing of competing interests?

Alongside possible changes to judicial approaches to open justice, the balance that must be struck as a matter of law between the need for transparency (and the benefits that it entails) and various countervailing considerations has also changed in recent years and is likely to continue to do so. These changes, like the potential impact of digital technologies on judicial attitudes to open justice, mean that effective mechanisms for putting forward arguments regarding the public interest in open justice in the courts is critical. The danger is that without an effective advocate, the correct balance will not be struck in individual cases – especially in lower courts – or that, in the words of Lord Woolf MR, the categories or circumstances where exceptions are applied will, little by little, ‘grow by accretion’.⁸²

The public interest in national security provides one example. While concerns over national security have always provided sufficient justification for departing from open justice, the ‘growing volume’ of cases involving national security,⁸³ along with new legal mechanisms for controlling the disclosure of sensitive national security information in the courts, means that such concerns now pose a greater threat to open justice than they did in the past. In England and Wales, for example, concerns have centred around the use of controversial ‘closed material procedures’ (CMPs) in national security cases in the civil courts. Such procedures involve not only the

closure of the court, but also a hearing where one or more parties are absent, as well as the possibility of the court rendering a partly closed judgment (a judgment which, at least in part, is not disclosed to one or more parties or to the public).⁸⁴ CMPs were originally permitted in limited categories of proceedings, but they can now be used in a significantly wider range of civil cases following the introduction of the Justice and Security Act 2013 (UK) and in certain judicial review proceedings following the UK Supreme Court’s recent decision in *R (on the application of Haralambous) v Crown Court at St Albans*.⁸⁵ Furthermore, even more ambiguous and underexplored in the case law and academic literature are the developing mechanisms in England for closing the courts to the public and the media on the basis of ‘ministerial certificates’ in national security cases.⁸⁶ This new breed of in camera order, based on the arguably distinct public interest immunity (PII) procedure, has caused concern on both Article 6 and Article 10 ECHR grounds.

Privacy – perhaps to a greater extent than national security – has also emerged as an increasingly relevant countervailing interest in England and Wales.⁸⁷ Historically, privacy *per se* did not provide a sufficient ground for limiting open justice.⁸⁸ It was only where the publication of private facts would destroy the subject matter of confidential information or trade secret cases, or where publication would otherwise interfere with the administration of justice, could the court adopt measures to prevent publicity. This remains the case in Australia, although some statutory grounds clearly have their underlying interest in privacy.⁸⁹ However, in the UK, unlike in Australia, privacy has emerged as a relatively strongly protected legal interest as a result of the ‘incorporation’ of the right to private life under Article 8 of the ECHR into domestic law via the Human Rights Act 1998 (UK). This, combined with the possibility of new communication technologies that enhance the dissemination of and access to private information, has meant that privacy concerns over the public availability of court information now have greater prominence. From a legal perspective, these concerns must be balanced, essentially on a case by case basis, against competing interests in open justice and transparency as elements of freedom of speech.⁹⁰ Heightened regulation of data protection under the EU General Data Protection Regulation (GDPR) could also affect the handling of courts’ data; for example, the Court of Justice of the European Union (CJEU) has announced that it will no longer publish names of natural persons in requests for preliminary rulings.⁹¹

There are two types of cases affected by privacy concerns in the English courts. The first is where the proceedings have been brought to protect privacy, such as cases involving the tort of misuse of private information, or where there are alleged breaches of the Data Protection Act 1998 (UK) or the Protection from Harassment Act 1997 (UK). In such cases, anonymity orders or reporting restrictions are sometimes ordered – especially where an injunction has been sought – to protect the privacy interests being litigated.⁹² This is because allowing publication of the private information or the identity of the applicant will undermine the administration of justice by disclosing the very information that the claimant has sought, through the litigation, to prevent from being published. From an open justice perspective, the concern in this type of case is to ensure that no more information is suppressed than is necessary to protect the privacy interests at stake. The second, more difficult category of case is where a privacy right is not the cause of action, but private information is nevertheless disclosed during the course of proceedings. In this type of case, if an application for anonymity or a reporting restriction is made,⁹³ a court will be required to strike an appropriate balance between open justice and the protection of privacy. While the common law had already expanded to a limited degree to provide greater protection of privacy-related interests in this context,⁹⁴ there is no doubt that an order resulting from the balancing of rights under the ECHR may be imposed in circumstances that go beyond the common law categories of cases where derogations from open justice have traditionally been permitted.⁹⁵ Having said that, the UK Supreme Court has consistently held that the importance of open justice (and the inherent public interest in court information) means that freedom of speech and the media's right to report the courts will only be trumped by the right to privacy in 'rare' cases.⁹⁶ The concern, nevertheless, is that without an effective contradictor acting in the interests of open justice, the decisions and conduct of the lower courts may not consistently reflect the high threshold test that is required to be applied by law.

(iii) Technology driven shifts in practice and procedure

Finally, approaches to court practice and procedure can have significant implications for the operation of open justice. A conservative and passive interpretation of open justice would mean that courts have no greater obligation than to simply open their doors to allow public observation and reporting – and, at least historically, judicial statements have perhaps

reflected such 'minimalist' understanding. However, a more modern, proactive and meaningful approach to open justice requires that courts adopt practices and procedures that seek to enhance as far as possible public access to information about proceedings before the courts, including through the use of technology.⁹⁷

Certain aspects of court practice and procedure have long been considered problematic from an open justice perspective. A complaint frequently raised by journalists in both Australia and the UK relates to access to court documents and exhibits.⁹⁸ Whilst the courts recognise the importance of access to such material to the operation of open justice,⁹⁹ and statutes and rules of court often provide rights of access,¹⁰⁰ the reality is that gaining access to court documents is often fraught with practical difficulties.¹⁰¹ In England and Wales, for example, access to documents requires a physical visit to the court;¹⁰² furthermore, in many cases, documents can only be accessed in hard copy, and access and copying fees as well as delays in obtaining access can be prohibitive. Other complaints include unreliable and inconsistent access to daily court lists¹⁰³ and information about court orders,¹⁰⁴ particularly active reporting restrictions.¹⁰⁵

Digital communication technologies, of course, can be used to enhance court practices and procedures in order to remedy many of the access issues that have just been mentioned. For example, the introduction of online databases of reporting restrictions and, notwithstanding significant privacy implications,¹⁰⁶ the automatic availability of digitised and searchable court documents, have received particular attention as mechanisms for enhancing open justice.¹⁰⁷ Indeed, access to documents is often crucial to the proper and complete understanding of proceedings due to the increasing use of written rather than oral submissions in court.¹⁰⁸ There is therefore a convincing argument that all documents used in court should automatically be made publicly available in electronic form, and that any departure from such automatic availability should require a court order in a manner consistent with other departures from open justice. What is less often acknowledged, however, is the potential for technology-based changes to court practices and procedures to have the converse effect of *limiting* court transparency and openness.¹⁰⁹ As we shall see, unless appropriate mechanisms are adopted, such changes have the capacity to significantly reduce public access to court proceedings. This, in turn, raises questions about how, if at all, external mechanisms of oversight can continue to safeguard the public interest in open justice.

One example is the use of algorithmic automation and big data to assist in judicial decision-making. While the widespread adoption of ‘robotised justice’ in deciding cases might be some way off, it is certainly not unprecedented.¹¹⁰ As Sharon Rodrick points out, the use of such technology by judges will pose a threat to open justice and transparency unless the algorithms and programs used to make automated decisions are made public.¹¹¹ However, perhaps the most notable example of the impact of technology on court practice and procedure is the shift or potential shift to the use of ‘virtual courts’. The term ‘virtual court’ or ‘virtual courtroom’ can be used in a number of different senses.¹¹² It can mean simply the use of technology within a traditional, physical courtroom – such as participants appearing by way of audio-visual link. The use of such technology is now fairly common in courtrooms across Australia and the UK and is not especially problematic from an open justice perspective, provided the public in court have access to the video-link via audio-visual screens located in the courtroom. However, the term can also be used to describe a ‘distributed courtroom’ – that is a ‘virtual space’ where participants who are physically located in different places ‘meet’ to conduct proceedings. This method has been used in at least one English tribunal hearing, with all parties participating remotely, with only the judge and journalists in the tribunal hearing centre.¹¹³ As noted by Sharon Rodrick, unless ‘the public are permitted to be present in some capacity’, distributed virtual courts pose ‘some serious challenges for the principle of open justice.’¹¹⁴ Such a presence might be physical – for example, by admitting the public to the physical space occupied by the trier of fact – or it might be virtual by enabling the public to stream virtual proceedings, or view from a specified location.¹¹⁵

More problematic from an open justice perspective, however, is the emerging use, or proposed use, of online dispute resolution (ODR) systems. Such systems are similar to, but distinct from, distributed virtual courts.¹¹⁶ Unlike virtual courts, ODR systems do not necessarily involve any form of ‘hearing’, virtual or otherwise; instead, disputes are resolved by a series of electronic communications or exchanges conducted entirely online but without the parties ‘meeting’. At present, ODR systems are largely confined to the private resolution of high-volume, low-value disputes arising out of the use of online services, such as PayPal and eBay.¹¹⁷ However, due to the push to modernise court systems, ODR is increasingly being used as the vehicle for the exercise of state-sanctioned judicial power. For example, since 2004, the Federal Court of Australia has conducted a range of minor applications

by ODR in a service called eCourtroom, including the giving of directions and the determination of *ex parte* applications for substituted service in bankruptcy proceedings.¹¹⁸ In another example, an ODR tribunal called the Civil Resolution Tribunal (CRT) commenced in 2015 in the Canadian province of British Columbia,¹¹⁹ and is now the mandatory forum for the adjudication of all small claims and strata title disputes.¹²⁰

The use of ODR systems to exercise judicial power raises significant challenges for open justice.¹²¹ The primary concern is that if there is no ‘hearing’ in a physical or virtual place, this effectively eliminates a core feature of open justice: the right to attend and observe judicial proceedings. Importantly, this may be contrary to constitutional requirements and international and regional human rights instruments. For example, in Australia, a court exercising judicial power in a way that departs from a core feature of open justice may be in violation of Chapter III of the *Australian Constitution*;¹²² under the ICCPR and the ECHR, on the other hand, litigants are entitled to a ‘fair and public hearing’.¹²³ In lieu of a public hearing in the traditional sense, it may be that the requirements of open justice will be met if all of the electronic messages between the court and the parties are made available to the public, along with all relevant documentation, court orders and reasons for decision.¹²⁴ As it currently stands, the degree to which existing systems cater to open justice varies. In the Federal Court’s eCourtroom, a transcript of the exchange of electronic messages between the judicial officer and the parties is available but only upon request. Court orders and documents, on the other hand, are subject to the usual rules and avenues of access. In the CRT in British Columbia, only orders and decisions are published on the tribunal’s website, but members of the public may ‘request copies of submissions and evidence provided during the tribunal’s decision process’.¹²⁵ However, it does not appear that it is possible to obtain a copy of the messages sent between tribunal members and the parties to a dispute.

A separate issue – and one which is particularly relevant to the present paper – is how external mechanisms of oversight of open justice might operate in ODR systems. While imperfect as an accountability mechanism, one of the benefits of a physical hearing is that it will be obvious to those present in court, including the media, that an application has been made to close the court or that certain information has been or is about to be withheld in some manner. Where this occurs, the media have traditionally

been in a position to then make a decision about whether to intervene in order to defend the operation of the open justice principle. In ODR systems, such transparency about transparency cannot be guaranteed in the same way, because there is no physical hearing. Instead, transparency must be built into the system in some manner – for example, with messages between the parties and the court and all documents being made accessible to the public automatically and in real time, so that any request to depart from open justice is clearly visible. Furthermore, there must be the capacity in such systems for interested third parties, including the media, to intervene to challenge departures, or proposed departures, from open justice. At present, it does not appear that the Federal Court's eCourtroom or the CRT in British Columbia are designed to facilitate such third party intervention.¹²⁶

The introduction of online processes for both civil and criminal justice are currently being piloted and further considered in England and Wales. The HM Courts & Tribunals Service is currently engaged in a large-scale reform program which includes the introduction of new digitised processes for court disputes and hearings. In 2015, the Civil Justice Council's (CJC) Online Dispute Resolution Advisory Group issued a report containing proposals for ODR for low value civil claims in England and Wales.¹²⁷ The now abandoned Prisons and Courts Bill 2016–17,¹²⁸ which sought to implement some of the recommendations in the CJC's report, contained provisions for certain civil, family and criminal law matters to be dealt with using online methods.¹²⁹ At the time, some mention was made of the issues associated with public access – for example, initial proposals for in-court video and audio terminals were made in discussions about the Bill. However, in general, as Townend has argued,¹³⁰ mechanisms for public access to courts have generally been overlooked in public discussions of the proposals and have not subject to adequate public consultation. For example, the Ministry of Justice has not provided meaningful detail on how any ODR procedure for low-level civil claims would be publicly accessed, despite public assurances by its judicial and academic supporters that provisions for open justice would be improved by new systems. Nor have sufficient details been provided about how the observance of the open justice principle would be monitored in such systems. These details, however, are critical if such initiatives are to facilitate the exercise of state-sanctioned judicial power in a manner that is both transparent and accountable. With regard to proposals for an online plea and conviction system for minor criminal offences, such as rail fare evasion, there is the risk

that 'justice, and a criminal conviction, will be served not just behind closed courtroom doors but behind closed bedroom doors, without any public scrutiny or independent judicial oversight at all'.¹³¹

IV New mechanisms for safeguarding the principle of open justice?

The declining role of the media in protecting open justice raises the question of how the principle will be safeguarded into the future. We are in no doubt that the principle warrants some degree of independent institutional oversight. Indeed, if we accept that open justice is a principle of fundamental importance to the proper exercise of judicial power and the operation of the rule of law, and that it cannot be left solely to judges themselves to guarantee its full observance, then we must accept the need for some form of external oversight and accountability. Furthermore, as we have seen, such a mechanism is essential given the range of contemporary challenges that are imposing, or have the potential to impose, increasing pressure on the law and practice of the open justice principle. Thus, if we can no longer rely upon the media to perform such an overseer role (if ever we could), we believe that the state should adopt appropriate measures to fill the void. In this section, we examine several possible external oversight mechanisms that may be adopted to help ensure (or at least promote) compliance with the stringent requirements of the open justice principle.

(i) Improving advocacy: the introduction of an open justice advocate

The first – and most interventionist – mechanism that we explore is the establishment of an independent, state-appointed open justice advocate (OJA) to appear and make representations in cases where a court is considering an application to depart from open justice.¹³² Under this initiative, it is envisaged that courts would be subject to a statutory obligation to notify the OJA each time a court is considering whether to make a discretionary *in camera*, anonymity or concealment order, or to issue a reporting restriction.¹³³ The OJA would then have statutory rights to intervene in such proceedings, to apply to have orders reviewed at any time during proceedings, and a right to appeal any decision made by a judge which impacts on open justice. To assist the advocate in fulfilling this role, he or she would

have statutory rights to inspect and copy all court documents relevant to the advocate's activities.¹³⁴

The introduction of a version of this model was recently recommended in Victoria.¹³⁵ This was in the context of a review of the operation of the Open Courts Act 2013 (Vic) ('OC Act') conducted by the Honourable Frank Vincent, a retired Justice of the Supreme Court of Victoria (Vincent Review).¹³⁶ The recommendation was made not only in response to the decline in media interventions in open justice cases in Australia, but also because, according to the Vincent Review, it is not and never has been the media's formal 'responsibility to monitor the system or to ensure that orders [departing from open justice] are properly made'.¹³⁷ Furthermore, it was acknowledged in the Vincent Review that it cannot be expected that the parties themselves will provide adequate protection of the open justice principle. This is because, as we suggested earlier, the parties 'may be indifferent' to whether an order is made in any given case or may, as is to be expected, 'prefer that exposure of the full details of the case and their role and conduct does not occur'.¹³⁸ Under the model proposed in the Vincent Review, an existing statutory officer in Victoria, the public interest monitor ('PIM'), would be given powers in relation to orders made under the OC Act, the legislation which governs the making of in camera orders and reporting restrictions ('suppression orders') in Victoria. The PIM currently has statutory powers to represent the public interest in a variety of court hearings, including applications for surveillance and covert search warrants, and preventative detention orders.¹³⁹ Under the proposal, the PIM would be empowered, where it is in the public interest to do so, to seek the review of an order by the judge who made the order or to initiate an appeal of the making of an order to a higher court.¹⁴⁰ However, in contrast to the model set out in the introduction to this section, these powers could not be exercised on the PIM's own initiative; rather, they could only be exercised at the request of an affected party. The Vincent Review also recommended that the PIM be empowered to 'appear as a contradictor, make submissions and ask questions when a judge is determining whether' an order under the OC Act should be made and on what terms.¹⁴¹ However, again, under the proposal the PIM would not be empowered to appear on his or her own initiative; the appearance of the PIM would only be permitted at the request of the judge considering whether to make an order under the OC Act.

The need for a judge to request the assistance of the PIM before he or she could appear in court at the

time when the substantive merits of an order are being considered is a significant shortcoming of the Vincent Review model, because such requests are likely to be rare. This is evidenced by the low uptake of a similar regime that was recently in operation in Victoria. In 2016, in response to concerns that the OC Act had not had the intended effect of reducing the number of reporting restrictions being issued by Victorian courts, the then Chief Justice, the Honourable Marilyn Warren, initiated an agreement with the Victorian Bar to pilot an 'Open Courts Act Duty Barrister Scheme'. Under the scheme, duty barristers would appear on a pro bono basis to assist the court in applications under the OC Act if requested by the presiding judge.¹⁴² While the pilot scheme operated only in the Supreme Court of Victoria, there were very few judicial referrals for pro bono assistance.¹⁴³ This was despite a significant number of reporting restrictions being made by the Supreme Court while the Scheme was in operation.¹⁴⁴ One explanation for the low uptake may be that Supreme Court judges were not sufficiently aware of the scheme or it might point, as we suspect is the case, to a more fundamental judicial reluctance to seek assistance in circumstances where it is optional.¹⁴⁵ Whatever the reason, we are nonetheless of the view that making the intervention of an open justice advocate dependent on a request from a judge undermines the advocate's role, at least as we conceive it, as an independent guardian of the principle of open justice.

If we accept the need for a model where an OJA is empowered to intervene in proceedings based on his or her independent discretion, there are two broad issues that we must subsequently examine. First, what precise interests should the OJA represent? Should the advocate always fervently advocate in favour of open justice? Or should it have a broader or more flexible remit to advance other interests in open justice disputes, such as privacy, reputation, or national security? We are firmly of the view that the OJA's role should be confined to the former.¹⁴⁶ Decisions about open justice are made by judges in an adversarial context where each party puts forward competing arguments representing different interests and, at least in theory, it is through such a process that the judge arrives at the 'correct' decision. Therefore, it makes sense in an adversarial system for the OJA to appear in court *solely* to advocate the public's interest in open justice: the applicant will have the burden of proving that the relevant exception to open justice meets the necessity test and the OJA will put forward contradicting arguments as to why it does not. However, it is important to note

that not every application for an order departing from open justice would require the intervention of the OJA. In some cases, perhaps in most, it will be clear that an order should be made because the circumstances clearly fall within one or more of the accepted categories of cases where open justice can be limited in some way, and that the order is both necessary and, as drafted, goes no further than the circumstances require. Where this is the case, the OJA may elect to wait until the order is made and, if it appears to be incorrectly made or if the terms of the order impose a greater incursion upon open justice than is considered necessary in the circumstances, he or she may at that point intervene to either have the order reviewed or revoked, or to appeal it to a higher court.

Second, would the intervention of the OJA be workable in practice? The main issue in terms of procedure is the difficulty that intervention of the OJA might create for case management, given that hearings may need to be adjourned or relisted at short notice in order to facilitate the appearance of the OJA. This may be particularly problematic in the lower courts, where the caseload is high. However, such difficulties can be avoided in many cases if the OJA has adequate notice that an order is to be applied for and is, in turn, able to give adequate notice to the court of their intention to intervene. As noted above, a notice regime operates in Victoria under the OC Act, which requires that an applicant for a reporting restriction provide three days' notice to the court of their intention to apply; the court is then required to notify all media organisations to enable them to appear, if they wish to do so, when the application is considered by the court. If such a regime can operate to enable media intervention, there is no reason why it could not also operate to enable the appearance of the OJA. Of course, there will be some cases where it is unavoidable that an application for a reporting restriction (or some other derogation from open justice) has to be made on short notice or even without notice. In such cases, with the exception of applications for in camera orders where the effect of such an order is both immediate and irreversible, it is possible that a court could make an anonymity order or a reporting restriction on an interim basis without notice and continue to hear the substantive proceedings.¹⁴⁷ The court would then give notice to the OJA (and the media) to enable them to appear at a later hearing where the court considers the substantive merits of the application. The latter procedure may also be applied where a court makes an order on its own motion.

To ensure that the giving of notice is effective in aiding the OJA's decision about whether to intervene and on what grounds, the statutory requirement for notice should mandate that certain information is contained in the notice provided to the OJA. First, the notice should contain a draft of the proposed order. This will assist the OJA in assessing whether the terms of the order that is sought are appropriate and do not extend further than is necessary in the circumstances, whether in terms of scope or duration. Second, the notice should set out the legal basis of the order – for example, whether it is sought pursuant to statute or common law – and the grounds (ie to protect the administration of justice, prevent the victim of a sexual offence from embarrassment, national security, etc). Third, where the ground of the order is to protect the administration of justice, the notice should also contain a statement of the order's proposed purpose (ie to prevent prejudice to a jury, to prevent the subject matter of the litigation from being disclosed). Fourth, the notice should include a summary of the arguments intended to be advanced in support of the order and a summary of the evidence intended to be relied upon. Where affidavits are available at the time of the giving of notice, they should be annexed to the notice. Similarly, where an order is made without notice it should state the legal basis upon which it was made, the ground or grounds and purpose, and be accompanied by both a statement of reasons and any affidavit evidence relied upon.

Finally, we envisage that the main argument against the establishment of an OJA would be the cost. However, we suggest that the importance of open justice to the rule of law and as the main mechanism, apart from the giving of reasons and the appeals process, by which the judicial branch of government is held to account would more than warrant incurring the expense. Furthermore, the cost of an OJA is likely to be a fraction of what is currently spent out of the public purse holding the other branches of government to account via avenues such as the judicial review of administrative decisions and constitutional challenges to legislative action in the courts, particularly in Australia.

(ii) Enhancing decision-making: statutory obligation to give public reasons

In addition to recommending the introduction of an OJA (of sorts), the Vincent Review recommended that judges be subject to a statutory obligation to provide a written statement of reasons whenever

a reporting restriction is granted.¹⁴⁸ The Vincent Review also recommended that such reasons should be made available to the public, unless restrictions or redactions are required to ensure that an order is not undermined. We are of the view that the statutory obligation to provide public reasons, were it to be introduced, should apply to all decisions that have the effect of limiting open justice.

Under the common law there is an existing obligation on judges to provide reasons for all decisions other than minor interlocutory and procedural decisions.¹⁴⁹ Furthermore, in both England and Wales and Australia, an emerging view expressed by the courts is that such reasons must be made available to the public.¹⁵⁰ Given the significance of the open justice principle and given that the categories of cases where reasons are not required have been 'progressively decreasing',¹⁵¹ we are certain that any decision to depart from open justice will attract the obligation to provide reasons for that decision.¹⁵² Despite this, it appears that the courts – particularly lower courts – do not routinely provide publicly available statements of reasons when they make orders to depart from open justice. Thus, placing the obligation on a statutory footing would ensure that judges are aware of the obligation. Such judicial awareness would, in turn, ensure that the obligation is more frequently observed.

The provision of public reasons in the context of decisions regarding open justice would have two expected benefits. First, it would enhance external oversight of the operation of open justice, by increasing public knowledge of the extent to which open justice is limited in the courts, and by providing details of the circumstances where it is done and the reasons that have been relied upon for doing so. This, of course, reflects the fact that the provision of public reasons more generally is one of the main ways that the decision-making of judges and the reasoning processes that they adopt are held up to professional and public scrutiny.¹⁵³ Furthermore, the critical role that reasons play in ensuring transparency of judicial decision-making, including in relation to decisions regarding open justice, suggests that the giving of reasons might even be considered 'part and parcel' of the principle of open justice itself.¹⁵⁴

Second, and perhaps more crucially for our purposes, the expectation is that the giving of public reasons would improve the quality of decision-making regarding open justice. One of the key rationales for the general requirement to provide reasons is that

it is said to foster 'good decision making' by judges. As stated by Meagher JA in *Beale v Government Insurance Office (NSW)*, '[t]he requirement to provide reasons can operate prophylactically on the judicial mind, guarding against the birth of an unconsidered or impulsive decision'.¹⁵⁵ In theory at least, the discipline applied in the process of reducing reason to writing causes judges to 'reason more systematically and thoroughly through the relevant facts, law and application of the law to those facts'.¹⁵⁶ It was primarily for the disciplining effect that the Vincent Review recommended the introduction of a statutory obligation to prepare and publish reasons. Thus, having found that judges and magistrates had often demonstrated 'limited understanding of the requirements of the OC Act', it was thought that an obligation to provide written reasons would impose an 'additional level of discipline' by compelling judges to rigorously assess whether an order to depart from open justice is necessary according to the law.¹⁵⁷ It is important to note that an obligation to provide reasons as a means of ensuring compliance with the law will be particularly desirable where an order is applied for in the absence of an effective contradictor, or where the order is made by the court on its own motion.

(iii) Enhancing transparency: public register and reporting obligations

The introduction of an OJA and a requirement to provide reasons are initiatives that are intended to ensure that the law of open justice is rigorously applied by having a direct influence on the decision-making processes of judges. Mechanisms which increase public transparency regarding the state of open justice, both at the level of individual decisions and more broadly, might also be adopted. While such mechanisms may not have a direct effect on improving judicial decision-making, they are nevertheless important to enabling general public oversight of the operation of the open justice principle. We have already mentioned that the provision of written reasons significantly enhances the transparency of decision-making. In this final section we canvass two further options: (1) a public register of all orders that have an impact upon open justice; and (2) open justice reporting obligations.

(a) Public register

Publicly accessible registers of reporting restrictions are in operation, or have been proposed, in a number of jurisdictions. For example, a publicly accessible

online list of all cases where reporting restrictions have been made pursuant to sections 4(2) and 11 of the Contempt of Court Act 1981 (UK) and section 46(1) of the Children and Young Persons (Scotland) Act 1937 by Scottish courts has long been in operation in Scotland.¹⁵⁸ Each entry in the list contains only basic information – case name, court, location, and date of the order – and not the terms of the orders themselves. The Law Commission of England and Wales in its recent inquiry into contempt of court recommended the adoption of a similar online list of all reporting restriction made under the Contempt of Court Act by courts in England and Wales.¹⁵⁹ It was recommended that in addition to the basic information referred to above, the list should also contain details about when orders expire, and that access to the precise terms of orders should be available to authorised publishers via a restricted access online database.

In Australia, public registers of reporting restrictions are available for public access in two states. In Tasmania, the Supreme Court of Tasmania maintains an online list of all cases where reporting restrictions have been issued and, where appropriate, also provides signed copies of orders for download.¹⁶⁰ In South Australia, there is a statutory requirement that the Registrar maintain a register of all reporting restrictions and that the register be open for inspection by members of the public during ordinary office hours.¹⁶¹ However, the register is not available online and can only be accessed by a physical visit to the court administration building. Similarly, the Vincent Review in Victoria recommended the establishment of a ‘central, publicly accessible register of suppression orders made by all Victorian courts and tribunals’.¹⁶² The register would contain ‘details of the terms and duration’ of orders, along with, to the extent reasonably possible, written statements of reasons. However, it is unclear from the Vincent Review recommendations whether the register would be accessible online or exist only in physical form in the court registry.

The primary purpose of a public register of reporting restrictions, as proposed by the Law Commission of England and Wales and the Vincent Review, would be to assist with enforcement by ensuring that the media and other publishers are able to readily obtain information regarding the existence of orders and the information that those orders prohibit from being published.¹⁶³ This would address the persistent concerns of publishers regarding access to orders and would solve some of the legal issues around liability when orders are breached. However, according to

the Vincent Review, a public register of reporting restrictions would also be valuable as a mechanism for monitoring the granting of reporting restrictions more generally. It would do this by providing ‘a mechanism for public scrutiny of our process of justice, as demanded by the principle of open justice.’¹⁶⁴ If a register of reporting restrictions were introduced with the purpose of informing the public about the operation of open justice in the courts, then there would be a good case for extending it to also include in camera, anonymity and concealment orders. This would ensure that the register provides a complete account of the state of open justice in the courts.

(b) Reporting requirements

Finally, a further mechanism for increasing transparency regarding the making of orders to depart from open justice is through the adoption of annual reporting requirements.

In South Australia, section 71 of the Evidence Act 1929 (SA) requires that the Attorney-General of South Australia table in the South Australian Parliament an annual report on the number of reporting restrictions made by all South Australian courts, along with a summary of the reasons that were given for their making. It is worth noting that reports tabled by the Attorney-General since 2011 do not sufficiently comply with the latter requirement: the reports simply repeat in list form the available legal grounds for the making of reporting restrictions under section 69A of the Evidence Act, without indicating how often such legal grounds were relied upon or providing further details regarding the reasons for the orders that were granted.¹⁶⁵ This, of course, renders the reports effectively meaningless in relation to the reasons for the orders.

While compliance with the letter and most certainly the spirit of the reporting requirements in South Australia is clearly lacking, the imposition of mandatory annual reporting is nevertheless a potentially useful way of providing valuable insights into the operation of open justice. We suggest that reporting requirements, like the introduction of a public register of orders, should include all types of derogations from open justice – in camera, anonymity, and concealment orders, along with reporting restrictions. Furthermore, the reporting requirements, in order to provide a comprehensive account of when, how and why courts have departed from open justice, should require reporting of details beyond the number of orders and their reasons. Such details should include: the legal basis of orders, the scope

of orders (particularly whether orders are complete blanket bans or narrower in scope), data about the general subject matter of orders (eg, evidence, identities, etc), grounds (eg, administration of justice, national security, privacy, etc), data about the duration of orders, and the identities of the applicants (eg, claimant, victim, defendant, the Crown, etc). Such information would not only provide the public with information regarding the state of open justice, it would also enable policy makers, as it has in a number of Australian studies,¹⁶⁶ to readily assess on a routine basis how the open justice principle is operating in practice, and whether intervention through reform efforts might need to be explored.

V Conclusion

In this article we have argued that the mainstream media cannot be relied upon as a sole safeguard for transparency in the English and Australian courts; traditional broadcasters and newspapers may not have the commercial resources or the inclination to attend, report and intervene in court, or to necessarily represent wider public interest concerns that are not aligned with industry perceptions of newsworthiness. While the media can and do offer a partial protection of open justice, new approaches are needed. We suggest that an independent state-appointed open justice advocate provides one possible mechanism. Such independent oversight would also help to monitor the impact of the courts' modernisation initiatives on open justice.

Digital developments promise better transparency and access in the interests of court users and the broader public; however, the question of how open justice

will be achieved and the potential friction with legal and ethical protection of personal data, privacy and the rehabilitation of offenders, are yet to be fully explored in both the policy and academic literature. Furthermore, while some academic research has been conducted on media reporting of courts (eg, frequency, type, etc), there is insufficient reliable academic or judicial data on the impact on the frequency and type of media interventions to protect open justice. Further empirical and doctrinal research on this aspect, beyond our discussion here, would help inform the development of robust open justice protections within contemporary and digitised courts.

Beyond new research, we urge policymakers and lawmakers to take a more introspective, if pragmatic, approach to open justice. Open justice cannot be assumed to be done in the absence of media presence and challenge. We opened our article with Lord Justice Toulson's observation that the practical application of open justice 'may need reconsideration from time to time'. We agree, but further assert that such an exercise is, in fact, imperative on a frequent basis, given the complex interplay between technology and rights.

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Notes

- 1 *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, 631.
- 2 Edward Jenks, *The Book of English Law* (6th revised edn, PB Fairest (ed), Murray, London, 1967, 73–4, cited in Lord Neuberger, 'Open Justice Unbound?' (2011) TJR 259, 260. [1913] AC 417.
- 3 *Ibid.*, 473. See Garth Nettheim, 'The Principle of Open Justice' [1984] UTas LR 25.
- 4 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).
- 5 See, eg, *Sunday Times v UK* (1979–80) 2 EHRR 245, [65]. See, also, *R v J* [2003] EWCA Crim 3268, [2].
- 6 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into

- force 23 March 1976) Art 14. See, also, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) Art 10.
- 8 See, eg, *Richmond Newspapers Inc v Virginia*, 448 US 555 (1980) (interpreting the First Amendment as requiring public access to the courts); *Constitution of the Republic of South Africa Act 1996* (South Africa) ss 34, 35(3)(c).
- 9 *Scott v Scott* [1913] AC 417, 434–5.
- 10 *A-G (UK) v Leveller Magazine Ltd* [1979] AC 440, 450.
- 11 *Ibid.* See also *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 603–4. Additional rules in some jurisdictions include the judicial duty to furnish publicly available reasons (see, eg, Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38 MULR 482) and the right to record proceedings and

- broadcast them to the public (see, eg, *Van Brenda v Media 24 Limited* [2017] ZASCA 97, [72]).
- 12 Sharon Rodrick, 'Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2014) 19 *Deakin LR* 123, 123, citing *West Australian Newspapers Ltd v Western Australia* [2010] WASCA 10, [30].
 - 13 *A-G (UK) v Levelesh Magazine Ltd* [1979] AC 440, 450; *Scott v Scott* [1913] AC 417, 463.
 - 14 Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook, 5th edn, 2015) 235.
 - 15 *Ibid.*, 236. See, also, *R (Wagstaff) v Secretary of State for Health* [2001] 1 *WLR* 292, 310–11, 320.
 - 16 Butler and Rodrick, *supra*, n 14, 236–7. See, also, Geoffrey Robertson and Andrew Nicol, *Media Law* (Penguin, 5th edn, 2007) 464.
 - 17 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs CJ); *R v Legal Aid Board; Ex parte Kaim Todner (a firm)* [1999] QB 966, 977 (Lord Woolf MR for Lord Woolf MR, Auld and Buxton LJ).
 - 18 See, eg, *A v British Broadcasting Corporation (Secretary of State for the Home Department intervening)* [2015] AC 588, 600. See, also, Lord Neuberger, 'Open Justice Unbound?' (2011) *TJR* 259, 259.
 - 19 Neuberger, *supra*, n 18, 276; Frank Vincent, *Open Courts Act Review* (September 2017) 28–9. See, also, *Bank Mellat v HM Treasury* [2014] AC 700, 730.
 - 20 See n 55, below.
 - 21 *Richmond Newspapers, Inc v Virginia*, 448 US 555, 564 (1980).
 - 22 *Attorney-General (UK) v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.
 - 23 See, eg, *Khuja v Times Newspapers Ltd* [1917] 3 *WLR* 351, 361–2; *A v British Broadcasting Corporation* [2015] AC 588, 600; *Edmonton Journal v Alberta (Attorney-General)* [1989] 2 SCR 1326, 1339–40.
 - 24 *Edmonton Journal v Alberta (Attorney-General)* [1989] 2 SCR 1326, 1339–40 (emphasis added). See, also, *Khuja v Times Newspapers Ltd* [2017] 3 *WLR* 351, 361–2.
 - 25 See, eg, Rodrick, *supra*, n 12, 134–38.
 - 26 *Ibid.*
 - 27 *Ibid.*, 131.
 - 28 The media's challenge to the secrecy in the 'Incedal' terrorism trial provides a useful example. A coalition of eleven media organisations was able to successfully argue in the Court of Appeal that an anonymity order protecting the defendants' identities should be revoked and that an *in camera* order that applied to the entirety of the case should be replaced with a narrower, albeit still extensive, order: see *Guardian News and Media Ltd & Ors v Incedal* [2014] EWCA Crim 1861 (24 September 2014).
 - 29 *Scott v Scott* [1913] AC 417, 477–8.
 - 30 *A v British Broadcasting Corporation (Secretary of State for the Home Department intervening)* [2015] AC 588, 600–1; *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, 647.
 - 31 See, eg, Mike Dodd, 'Open and Shut Justice' (Paper presented at the Justice Wide Open conference, London, 29 February 2012) 72 <<http://openaccess.city.ac.uk/1926/1/JWO.pdf>>; Law Commission of England and Wales, *Contempt of Court: A Consultation Paper* (No 209, 2012) 32; Vincent, *supra*, n 19, 66–7; Peter Bartlett, 'Our System of Open Justice Under Threat', *The Australian* (Canberra), 19 November 2010, 29–30; Prue Innes, *Report of the Review of Suppression Orders and the Media's Access to Court Documents and Information* (Australia's Right to Know Coalition, 13 November 2008) 38; Andrea Petrie and Adrian Lowe, 'A Heavy Hand on Justice' in Media and Entertainment and Arts Alliance, *Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia* (2012) 61, 61 <https://issuu.com/meaa/docs/press_freedom_2012/1>.
 - 32 For examples, see Robert Todd, 'When Desirable Becomes Necessary: Inroads on Open Justice', *Gazette of Law and Journalism*, 4 March 2016 (paper originally delivered at University of New South Wales Defamation and Media Law seminar, Sydney, 23 February 2016) 9–10.
 - 33 See, eg, *In re Guardian News and Media Ltd* [2010] 2 AC 697, 708 (per Lord Rodger); *R v Ex Parte News Group Newspapers Ltd* [2002] EMLR 9, 167 [26]; Chief Justice J J Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29 UNSWLJ 147, 163; P D Cummins, 'Justice and the Media' (Speech delivered at the Melbourne Press Club, Melbourne, 17 August 2010) 5, <<http://www.lawreform.vic.gov.au/sites/default/files/Justice%20and%20the%20Media%20-%20Melbourne%20Press%20Club%202010.pdf>>.
 - 34 See, eg, Vincent, *supra*, n 19, 115 (noting the lack of awareness of judges and magistrates of the requirements of the Open Courts Act 2013 (Vic)).
 - 35 Cummins, *supra*, n 33.
 - 36 *Ibid.* See, also, Todd, *supra*, n 32; Chief Justice J J Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29 UNSWLJ 147, 163; Andrew T Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *Adel L Rev* 279, 295; *In re Guardian News and Media Ltd* [2010] 2 AC 697, 708 (per Lord Rodger); Dodd, *supra*, n 31, 72–3.
 - 37 Vincent, *supra*, n 19, 135; Todd, *supra*, n 32, 5.
 - 38 Vincent, *supra*, n 19, 135. See also *In re Guardian News and Media Ltd* [2010] 2 AC 697, 708 (per Lord Rodger).
 - 39 See, eg, *R v ex parte News Group Newspapers* [2002] EMLR 9, 167 [25] (Lord Bingham CJ); *R v Sarker* [2018] EWCA Crim 1341, [24].
 - 40 See, eg, *R v Sarker* [2018] EWCA Crim 1341, [12].
 - 41 See, eg, Kerri Judd, 'Suppression orders help to keep our legal system fair', *Herald Sun* (Melbourne), 22 June 2018, 34.
 - 42 *Guardian News and Media Ltd & Ors v Incedal* [2014] EWCA Crim 1861 (24 September 2014) [14].
 - 43 Todd, *supra*, n 32, 3.
 - 44 See, eg, *Re Bromfield, Stipendiary Magistrate; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153. For a thorough analysis of media standing in Australia, see Michael Douglas, 'The Media's Standing to Challenge Departures from Open Justice' (2016) 37 *Adel L Rev* 69. For the English position, see *R v Russell; Ex parte Beaverbrook Newspapers Ltd* [1969] 1 QB 342; *R v Blackpool Justices; Ex parte Beaverbrook Newspapers Ltd* [1972] 1 *WLR* 95.
 - 45 Open Courts Act 2013 (Vic) s 19; Court Suppression and Non-Publication Orders Act 2010 (NSW) s 9; Evidence Act 1929 (SA) s 69A. See, also, Criminal Procedure Rules 2015 (UK) r 6.2 (provides that an affected person, which would include the media, has the right to make representations).
 - 46 See, eg, *Open Courts Act 2013* (Vic) s 15 (review); Court Suppression and Non-Publication Orders Act 2010 (NSW), ss 13 (review) and 14 (appeal); Evidence Act 1929 (SA) ss 69AB (review) and 69AC (appeal); Criminal Justice Act 1988 (UK), s 159 (appeal); Criminal Procedure Rules 2015 (UK) r 6.5.
 - 47 The Open Courts Act 2013 (Vic) requires that a court receive three business days' notice of an application for a suppression order by the applicant and that the court then take 'reasonable steps' to notify 'news media organisations' that an order has been applied for: Open Courts Act 2013 (Vic) s 11. A 'news media organisation' is defined as a 'commercial enterprise that engages in the business of broadcasting or publishing news' or a 'public broadcasting service that engages in the dissemination of news through a public news medium': Open Courts Act (Vic) s 3 (definition of 'news media organisation'). A similar provision can be found for applications in the English Family Court: *Practice Direction (Applications for Reporting Restriction Orders)*

- [2005] 2 FLR 120; also relevant are Human Rights Act 1998 (UK) s 12(2); Civil Procedure Rules (UK) r 25.3(2) and (3); Civil Procedure Rules PD 25A 4.3(3); and Criminal Procedure Rules 2015 (UK) rr 6.2 and 6.4.
- 48 *PQR v Secretary, Department of Justice and Regulation (No 1)* [2017] VSC 513, [50].
- 49 In criminal courts in England and Wales there is generally no formal procedure for notification, so interventions have relied on the media becoming aware of relevant proceedings, whether via the parties' representatives, a noticeboard listing, or the judge if he or she is inclined to alert a trusted journalist or media lawyer. More formalised notice of injunction applications in the English High Court can be made to media subscribers of the Press Association's Injunction Applications Alerts service. Currently, this service has tended to primarily disseminate family law-related notices, but the newly created Queen's Bench Division Media List User Group Committee is exploring the possibility of encouraging greater use for appropriate media cases as well.
- 50 See, eg, Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40(1) Mon LR 45, 45, 47–8; Senate Select Committee on the Future of Public Interest Journalism, *Report* (2018) ch 2; House of Lords, 'The Future of Investigative Journalism' (House of Lords, 2012) HL Paper 256, ch 2.
- 51 See, eg, Nick Davies's book, *Flat Earth News* (Vintage, 2009), which discusses the displacement of public interest journalism by public relations-driven content.
- 52 Warren, *supra*, n 50, 48; Jon Robins, 'More than half of local newspapers don't have a court reporter', *The Justice Gap* (online), October 2016, <<http://www.thejusticegap.com/2016/10/half-local-newspapers-dont-court-reporter/>>.
- 53 See, eg, Roy Greenslade 'New studies suggest continuing decrease in court reporting', *The Guardian* (online) 29 October 2016 <<https://www.theguardian.com/media/greenslade/2016/oct/28/new-studies-suggest-continuing-decrease-in-court-reporting>>.
- 54 Chris Tryhorn, 'Keep reporting courts and councils, Lord Chief Justice urges newspapers', *The Guardian* (online), 16 November 2009, <<https://www.theguardian.com/media/2009/nov/16/keep-reporting-courts-council>>.
- 55 Brian Thornton, 'The Case of the Disappearing Court Reporter' (2016) 2 *Proof* 92; Roy Greenslade 'New studies suggest continuing decrease in court reporting', *The Guardian* (online), 29 October 2016 <<https://www.theguardian.com/media/greenslade/2016/oct/28/new-studies-suggest-continuing-decrease-in-court-reporting>>.
- 56 Vincent, *supra*, n 19, 79–80; Todd, *supra*, n 32, 3; Peter Bartlett, 'Suppression Orders: A Fine Balance' (Paper presented at the Justice Open and Shut Conference, Rule of Law Institute, Sydney, 4 June 2014) 1–2.
- 57 Matthew Knott, 'The Spiralling Cost of Freedom of the Press', *Crikey* (online), 24 April 2013 <<https://www.crikey.com.au/2013/04/24/the-spiralling-cost-of-freedom-of-the-press/>>.
- 58 Jason Bosland, 'Two Years of Suppression Under the Open Courts Act' (2017) 39(1) Syd LR 25, 55. See, also, comments by Lord Steyn regarding the burden on local media outlets of challenging reporting restrictions in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 608–9.
- 59 See, eg, Lord Chief Justice of England and Wales, *Practice Guidance – The Use of Live Text-Based Forms of Communication (including Twitter) from Court for the Purpose of Fair and Accurate Reporting* (14 December 2011).
- 60 See, eg, Leah Findlay, 'Courting Social Media in Australia's Criminal Courtrooms: The Continuing Tension between Promoting Open Justice and Protecting Procedural Integrity' (2015) 27(2) CICJ 237.
- 61 *Ibid*, 240–42; Anne Wallace and Jane Johnston, "'Tweeting from Court": New Guidelines for Modern Media' (2015) 20 MALR 15.
- 62 Warren, *supra*, n 50, 53.
- 63 While the enthusiasm for cameras in courts has varied over the years, the UK Supreme Court now provides webcasts of all substantive hearings in the court, as does the High Court of Australia; other courts, particularly superior courts, will sometimes allow footage of proceedings to be downloaded or streamed from their websites in cases where there is thought to be sufficient public interest. Significantly, in neither the UK nor Australia, unlike in South Africa, have the courts gone so far as to recognise a *right* to film and broadcast or webcast proceedings as a requirement of the principle of open justice: see, eg, *Van Breda v Media 24 Ltd* [2017] ZASCA 97.
- 64 Vincent, *supra*, n 19, 108–9; Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 Syd LR 671, 693–4. See, also, comments by Justice Bongiorno reported in Innes, *supra*, n 31, 82.
- 65 Vincent, *supra*, n 19, 64 (reporting comments of judge as to why suppression orders may be more prevalent in Victoria than in other jurisdictions). Note, however, that in *In re Guardian News and Media Ltd* [2010] 2 AC 697, it was noted by Lord Rodger (at 726) that 'the possibility of some sectors of the press abusing their freedom to report cannot, of itself, be a sufficient reason for curtailing that freedom for all members of the press.'
- 66 Warren, *supra*, n 50, 51.
- 67 *Ibid*, 48–50; Jonathan Barrett, 'Open Justice or Open Season? Developments in Judicial Engagement with Social Media' (2011) QUTLJ 1, 26; Findlay, *supra*, n 60, 238–9.
- 68 Warren, *supra*, n 50, 49.
- 69 This is much more likely in Australian than in England and Wales. In the latter jurisdiction, various automatic statutory restrictions are imposed on the reporting of aspects of preparatory and pre-trial hearings in criminal matters: see, eg, Criminal Procedure and Investigations Act 1996 ss 37 and 41; Magistrates' Court Act 1980 s 8C; Criminal Justice Act 1987 s 11; Magistrates' Court (Crime and Disorder Act) 1998 s 52A. A recent high profile example in Australia is the reporting restriction imposed by the Magistrates' Court of Victoria in Cardinal George Pell's committal hearing in relation to historical sex offences.
- 70 See, eg, Jane Johnson, et al, *Juries and Social Media* (Report, Victorian Department of Justice, 2013). See, also, Findlay, *supra*, n 60, 240; Barrett, *supra*, n 67, 2.
- 71 See, eg, *Department of Public Prosecutions (Cth) v Brady* [2015] VSC 246 (16 June 2015).
- 72 Findlay, *supra*, n 60, 240–1.
- 73 [2016] EWCA Crim 12.
- 74 [2018] EWCA Crim 1341.
- 75 *Ibid*, [11].
- 76 *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521.
- 77 See, for example, Supreme Court Act 1935 (SA) s 131; District Court Act 1935 (SA) s 54; Magistrates Court Act 1991 (SA) s 51; Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 28.05; Uniform Criminal Procedure Rules 2015 r 5.8.
- 78 See, eg, Supreme Court (Criminal Procedure) Rules 2017 (Vic) r 1.11(4).
- 79 This has changed to a certain extent in England following the decision in *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, where the Court of Appeal held that access to documents deployed in open court should be granted unless there are overriding reasons to deny granting access.

- 80 Indeed, it appears from case law in Victoria in particular that the likelihood of fairness and accuracy in media reporting has been a relevant consideration when making a decision to grant access to audio-visual exhibits: see, eg, *DPP v Bracken (Ruling No 16)* [2014] VSC 96. Note, also, that the England and Wales Court of Appeal has held that an application for access to documents and exhibits will be particularly strong where access is sought for a 'proper journalistic purpose': see *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, 650. This implies that the likelihood that the applicant will comply with accepted journalistic standards in reporting the courts, including balance and fairness, may be a relevant factor in decisions regarding access.
- 81 For recent scholarship on the privacy implications of access to court information in the digital age, see, eg, Jacqueline Burkell and Jane Bailey, 'Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information' (2017) 48(1) *Ottawa L Rev* 147; David S Ardia, 'Court Transparency and the First Amendment' (2017) 38 *Cardozo L Rev* 835; Rory B O'Sullivan and Catherine Connell, 'Reconsidering the History of Open Courts in the Digital Age' (2016) 39 *Seattle U L Rev* 1281; Karen Eltis, 'The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context' (2011) 56(2) *McGill LJ* 289. See, also, Karen Eltis, *Courts, Litigants, and the Digital Age: Law, Ethics, and Practice* (Irwin Law Inc, 2nd edn, 2016), ch 3.
- 82 *R v Legal Aid Board; Ex parte Kaim Todner (a firm)* [1999] QB 966, 977. Note, in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, Lord Steyn said (at 604) that '[g]iven the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice.'
- 83 *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351, 361.
- 84 *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 729.
- 85 [2018] UKSC 1.
- 86 Paul F Scott, 'An Inherent Jurisdiction to Protect the Public Interest: From PII to "Secret Trials"' (2016) 27 *King's LJ* 259.
- 87 *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351, 361.
- 88 See, eg, *Scott v Scott* [1913] AC 417, 463.
- 89 For example, statutory powers that allow courts to prevent the publication of material that would cause undue distress to victims or witnesses in sexual offence or family violence cases: see *Open Courts Act 2013* (Vic) s 18(1)(d); *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 8(1)(d).
- 90 See, eg, *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 603; *In re Guardian News and Media Ltd* [2010] 2 AC 697, 718; *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351, 364–5.
- 91 CJEU, 'Court of Justice of the European Union PRESS RELEASE No 96/18', <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180096en.pdf>>.
- 92 For a summary of the applicable principles, see *H v News Group Newspapers Ltd* [2011] 1 WLR 1645 (CA), 1651–2. For an example of a misuse of private information case where anonymity was granted, see *PJS v News Group Newspapers Ltd* [2016] AC 1081.
- 93 Note, courts are required to comply with Art 8 of the ECHR in relation to their own conduct even in the absence of such applications: see, eg, *In re Guardian News and Media Ltd* [2010] 2 AC 697, 715. This is because under s 8(1) of the Human Rights Act 1998 (UK), courts are required to act compatibly with convention rights. This may result in litigants being referred to by pseudonym in court judgments or certain private facts being omitted from court judgments.
- 94 See *A v British Broadcasting Corporation* [2015] AC 588, 604 citing *HM Advocate v M* 2007 SLT 462, where the Inner House ordered that the identity of a victim in a case concerning the reckless infection of HIV should not be published.
- 95 *A v British Broadcasting Corporation* [2015] AC 588, 610.
- 96 *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351, 374. For a critical analysis of this case, see Paul Wragg, 'Open Justice and Privacy' (2017) 3 CL 89.
- 97 For a discussion on such proactivity in this context see Judith Townend, 'Positive Free Speech and Public Access to Courts' in Andrew Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Hart Publishing, 2018).
- 98 Access to court judgments is also sometimes difficult: see, eg, Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38 *MULR* 482.
- 99 *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 *NSWLR* 512, 521. On the Australian position regarding access to documents, see Sharon Rodrick 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29(3) *UNSWLJ* 90.
- 100 See n 77.
- 101 For an account of the difficulties in obtaining access to court documents in England and Wales, see Heather Brooke, *The Silent State: Secrets, Surveillance and the Myth of British Democracy* (William Heinemann, 2010), ch 6.
- 102 For example, to access publicly available documents in cases heard in the Queen's Bench Division in the Royal Courts of Justice, a member of the public or the media must visit the court to ascertain the claim number, which is listed chronologically in paper files.
- 103 See, eg, Summary Notes of the Information Law and Policy Centre's Round-table Meeting on Open Justice and Open Data <https://clip.blogs.sas.ac.uk/files/2016/07/230516-Open-Courts-Data-Event-Summary_for-uploading.pdf>. Some magistrates' courts in England and Wales send journalists listings of forthcoming cases electronically; however, in other instances journalists have experienced significant obstacles in obtaining access to court listing information. One local journalist reported in 2012 how a colleague in South Wales had been ordered to collect weekly magistrates' court lists in a locked metal box, with strict instructions not to open it until the journalist returned to the newspaper's office: see Judith Townend, 'Court short of basic information', *The Guardian* (UK) (online), 6 March 2012 <<https://www.theguardian.com/law/2012/mar/05/court-case-lists-open-justice>>. In Victoria, journalists have reported instances of the Magistrates' Court ordering that particular cases not appear on the daily court lists: Elissa Hunt, 'Silent hearings can escape scrutiny', *Herald Sun* (online), 15 September 2013, <<http://www.heraldsun.com.au/news/law-order/silent-hearings-can-escape-scrutiny/news-story/1ca221fddcf83d57d6fef4094dc42f35>>. Such 'silent listing' orders prevent anyone with notice of the order from disclosing that a particular case is being heard or where the court is sitting, and are designed to avoid the public and the media attending proceedings. Moreover, despite having the same practical effect as in camera orders, the fact that the media will be unaware that a silent listing order exists means that such orders are likely to go unchallenged. Silent listing orders are made under the Magistrates' Court Act 1989 s 136, which is a general provision allowing a magistrate to 'give any direction for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination': see Melbourne Magistrates' Court, *Practice Direction 3 of 2014*, available at <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/Practice_Direction_3_of_2014.pdf>.

- On the issue of silent listings, see Larina Mullins, 'Open Justice versus Suppression Orders: A Battle of Attrition' (2014) 33(3) CLB 7, 9. See, also, Vincent, *supra*, n 19, 76–7.
- 104 In the UK, difficulties with access to court orders were most notably raised in the context of the Master of the Rolls' (MR) investigation into privacy and anonymity orders and so-called 'super-injunctions' in 2011. At a press conference announcing his report, the MR admitted that he could not say how many 'super-injunctions' had been issued by the England and Wales High Court. To an extent, a new measure introduced in response to the report has provided a little more accountability: the Ministry of Justice now issues bi-annual updates on the number and type of non-disclosure orders granted in privacy and confidence proceedings in the High Court and Court of Appeal. However, as accepted by the judge currently presiding over the Media List, Mr Justice Warby, this data has not been complete in recent bulletins, and efforts are now underway to remedy this problem (one of the authors, Townend, sits on the committee of the RCJ Media List User Group which is undertaking this work).
- 105 In Australia, for example, the availability of information about reporting restrictions varies widely between jurisdictions. Even in jurisdictions where orders are readily available, such as Victoria and New South Wales, concerns are sometimes raised about difficulties in obtaining information about the precise subject matter of an order or who the order is about: Vincent, *supra*, n 19, 117–8. Concerns about access to accurate information about reporting restrictions was raised in the context of the England and Wales Law Commission's recent inquiry into contempt: see Law Commission of England and Wales, *Contempt of Court (2): Court Reporting* (Law Com No 344, HC 1162, 25 March 2014), available at <https://www.lawcom.gov.uk/project/contempt-of-court-court-reporting/>. See, also, New Zealand Law Reform Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017), 53 [2.86]–[2.88].
- 106 See n 81.
- 107 Sharon Rodrick, 'Opportunities and Challenges for Open Justice in Light of the Changing Nature of Judicial Proceedings' (2017) 26 JJA 76, 88. See, also, Marilyn Warren, 'Embracing Technology: The Way Forward for the Courts' (2015) 24 JJA 227, 233.
- 108 See, eg, Butler and Rodrick, *supra*, n 14, 320–1.
- 109 An important and notable exception is Rodrick, *supra*, n 107.
- 110 Lyria Bennett Moses and Janet Chan, 'Using Big Data for Legal and Law Enforcement Decisions: Testing the New Tools' (2014) 37(2) UNSWLJ 643.
- 111 Rodrick, *supra*, n 107, 91–2.
- 112 *Ibid* 92–6; Warren, *supra*, n 107, 230–3.
- 113 Owen Bowcott, 'First Virtual Court Case Held Using Claimant's Laptop Camera', *The Guardian* (online), 26 March 2018 <<http://www.theguardian.com/law/2018/mar/26/first-virtual-court-case-held-using-claimant-laptop-camera>>.
- 114 Rodrick, *supra*, 107, 94.
- 115 *Ibid*.
- 116 *Ibid*, 94–6.
- 117 *Ibid*, 94; Warren, *supra*, n 107, 233.
- 118 Rodrick, *supra*, n 107, 95. See Federal Court of Australia, *eCourtroom* <<http://www.fedcourt.gov.au/online-services/ecourtroom>>.
- 119 See, Civil Resolution Tribunal, <<https://civilresolutionbc.ca/about-the-crt/>>. For an overview of the Civil Resolution Tribunal, see Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 Windsor Y B Access Just 112.
- 120 This was following an amendment to the Civil Resolution Tribunal Act, SBC 2012, c 25: see Bill 19, Civil Resolution Tribunal Amendment Act, 4th Sess, 40th Leg., British Columbia, 2015 (passed 21 April 2015).
- 121 Rodrick, *supra*, n 107, 95–6. See, also, Clive Anderson, 'Digital Courts', *Unreliable Evidence*, BBC Radio 4 14 April 2018, <<https://www.bbc.co.uk/programmes/b09yfnnc>>. See, also, comments by Sir Ernest Ryder regarding the opportunities that ODR presents for open justice and judicial accountability: Ernest Ryder, 'Securing Open Justice' (Address delivered at the Max Planck University Luxembourg for Procedural Law and Saarland University, Luxembourg, 1 February 2018) <<https://www.judiciary.gov.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf>>, 21–3.
- 122 See, eg, *Russell v Russell* (1976) 134 CLR 495; *Grollo v Palmer* (1995) 184 CLR 348; *Hogan v Hinch* (2011) 243 CLR 506.
- 123 See, eg, Julia Hornle, 'Online Courts Must Not Compromise Fairness', *The Conversation* (online), 18 February 2015 <<http://theconversation.com/online-courts-must-not-compromise-fairness-37692>>.
- 124 *Ibid*. See, also, Paul Magrath, 'Journalism, Judges and Justice: A Crisis in Court Reporting?', *Inform's Blog*, 27 April 2018 <<https://inform.org/2018/04/27/journalism-judges-and-justice-a-crisis-in-court-reporting-paul-magrath/>>.
- 125 Civil Resolution Tribunal, *Information Access & Privacy Policy* <<https://civilresolutionbc.ca/resources/information-access-privacy-policy/>>.
- 126 Note, the Federal Court's eCourtroom is currently limited to hearing matters that would otherwise be heard in chambers, where the capacity for third party intervention to protect open justice would be subject to similar limitations. However, if the eCourtroom, like the CRT, commenced hearing more contentious matters, mechanisms for allowing third party intervention to protect open justice would need to be considered.
- 127 Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (February 2015), <<https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>>.
- 128 This Bill was discontinued because of the timing of a General Election.
- 129 For a discussion of the proposed resolution of summary offences online, see Jane Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80(6) MLR 995, 1015–9.
- 130 Judith Townend, 'Online Courts: What's the "Human" Impact?', *Transparency Project Blog* (online), 20 February 2017 <<http://www.transparencyproject.org.uk/online-courts-whats-the-human-impact/>>; Ryder, *supra*, n 121, 21.
- 131 *The Secret Barrister*, *The Secret Barrister: Stories of the Law and How It's Broken* (Pan Macmillan, 2018) Kindle Locations 1148–49.
- 132 We do not consider in this article how the independence of the OJA would be secured; nor do we consider whether the decision of the OJA to intervene would be open to judicial review. Of course, these matters would need to be explored if the initiative were to be introduced.
- 133 We do not intend that ordinary applications of automatic anonymity provisions – eg those that prohibit the naming of alleged victims of certain sexual offences in England and Wales – would be subject to this process.
- 134 This should include access to confidential material; however, limitations on access might be appropriate in national security cases.
- 135 Vincent, *supra*, n 19, 80. Note, the idea of an open justice advocate was first recommended by Bosland in 2017: Jason Bosland, 'Suppression Orders vs Open Justice', *Pursuit* (online), 1 March 2017 <<https://pursuit.unimelb.edu.au/articles/suppression-orders-vs-open-justice>>. Since the Vincent Review,

- media organisations and advocacy groups have supported the initiative: see, eg, Editorial, 'Strong case for suppression scrutiny', *The Age* (Melbourne), 26 June 2018; Media, Entertainment and Arts Alliance, *Criminalising Journalism: The MEAA Report into the State of Press Freedom in Australia in 2018* (Report, May 2018) 14-6 <<https://www.meaa.org/download/criminalising-journalism-the-meaa-report-into-the-state-of-press-freedom-in-australia-in-2018/>>.
- 136 Vincent, *supra*, n 19, 134-6.
- 137 *Ibid*, 135.
- 138 *Ibid*.
- 139 See, eg, Public Interest Monitor Act 2011 (Vic). A similar system operates in Queensland: See, eg, Crime and Corruption Act 2001 (Qld) Ch 6 Pt 5; Police Powers and Responsibilities Act 2000 (Qld) Ch 21, Part 5. At least in Victoria, the introduction of a PIM was due to concerns that applications for telecommunications interception warrants and the like may not have been made on the basis of proper evidence and that they may not have been subject to sufficient scrutiny, given the lack of opportunity for evidence to be challenged in an adversarial context: see George Brouwe, *Investigation into the Office of Police Integrity's Handling of a Complaint* (Victorian Ombudsman, October 2011) 8-11. The introduction of the PIM in Victoria has reportedly been effective in subjecting applications to an additional degree of scrutiny, with orders being rejected at a greater rate than was previously the case, and applicants, usually the police, sometimes withdrawing applications following intervention by the PIM: Carly Crawford, 'Covert police tactics on slide after scrutiny from Public Interest Monitor', *Herald Sun* (online), 16 September 2013 <<https://www.heraldsun.com.au/news/law-order/covert-police-tactics-on-slide-after-scrutiny-from-public-interest-monitor/news-story/f678e95cf0bc6521576c8d8c4cb6bae1>>.
- 140 Vincent, *supra*, n 19, 136.
- 141 *Ibid*.
- 142 *Pilot: Open Courts Act Duty Barristers Scheme: Scheme Protocols* (28 April 2016) (copy on file with authors).
- 143 Vincent, *supra*, n 19, 80.
- 144 There were 34 suppression orders made by the Supreme Court of Victoria in 2016: *ibid*, 102.
- 145 A scheme to monitor the issuing of privacy injunctions in the English High Court has resulted in incomplete data publications, which can perhaps be explained by judges' lack of awareness of the obligation to record such data: see Inform's Blog, 'News: Privacy Injunction Statistics for 2016, Three Applications Recorded, Statistics Incomplete', *Inform's Blog* (online), 27 April 2017 <<https://inform.org/2017/04/28/news-privacy-injunction-statistics-for-2016-three-applications-recorded-statistics-incomplete/>>.
- 146 Whether an equivalent role should be created to consider the latter interests is a question for separate consideration.
- 147 In Scotland, courts are empowered to make interim reporting restrictions in order to give the media and interested persons notice that an order has been applied for: see Act of Sederunt (Rules of Court of Session and Sheriff Court Rules Amendment No 3) (Reporting Restrictions) 2015. Similar powers to make interim suppression orders operate in Victoria: Open Courts Act 2013 (Vic) s 20.
- 148 Vincent, *supra*, n 19, 113-5. Note, at the time of writing a Bill had been introduced into the Parliament of Victoria to amend the Open Courts Act 2013 (Vic) by inserting a statutory obligation to provide reasons for suppression orders: see Open Courts and Other Acts Amendment Bill 2018 (Vic) cl 9. The obligation expressed in the Bill does not expressly require that the reasons for decision be made publicly available. The Bill was second read by the Legislative Assembly on 8 August 2018.
- 149 See, eg, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Wainohu v New South Wales* (2011) 243 CLR 181; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377.
- 150 See, generally, Bosland and Gill, *supra*, n 11, 495-502, 506-513. See, eg, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279 (McHugh JA); *Wainohu v New South Wales* (2011) 243 CLR 181, 215 [58] (French CJ and Kiefel J); *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] 4 All ER 91, 107 (Lord Judge CJ), 128-9 (Lord Neuberger MR), 168-73 (Sir Anthony May P). Note the European Court of Human Rights has recognised the requirement for public reasons: see, eg, *Ruiz Torija v Spain* (1999) 303-A Eur Court HR (ser A) 12 [29].
- 151 Lord Harry Woolf et al, *De Smith's Judicial Review* (Sweet & Maxwell, 8th edn, 2018) 440 [7-091].
- 152 *Hogan v Hinch* (2011) 243 CLR 506, 540 [42] (French CJ). Note, also, that in England and Wales, r 6.8 of the Criminal Procedure Rules (2015) requires that a 'court officer' must 'record the court's reasons' where a court 'orders, varies or removes' a reporting restriction or orders that a trial be conducted in private. However, there is no express requirement under the Criminal Procedure Rules that the reasons be made public or otherwise available to non-parties.
- 153 Reasons are essential to enabling a losing party to pursue an appeal and have also been described as central to the development of the common law under the principle of *stare decisis* and the workings of the rule of law.
- 154 See, eg, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279; *Grollo v Palmer* (1995) 184 CLR 348, 394; *Wainohu v New South Wales* (2011) 243 CLR 181, 214; *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] 4 All ER 91, 107 (Lord Judge CJ), 128-9 (Lord Neuberger MR), 168-173 (Sir Anthony May P).
- 155 (1997) 48 UNSWL 430, 442.
- 156 BV Harris, 'The Continuing Struggle with the Nuanced Obligation on Judges to Provide Reasons for Their Decisions' (2016) 132 LQR 216, 221. See, also, *AK v Western Australia* (2008) 232 CLR 438, 418; Chief Justice Murray Gleeson, 'Judicial Accountability' (1995) 2 JR 117, 122.
- 157 Vincent, *supra*, n 19, 115-6.
- 158 Scottish Courts and Tribunals, *Contempt of Court Orders* <<https://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders>>.
- 159 Law Commission, *supra*, n 105, 27-32.
- 160 Supreme Court of Tasmania, *Suppression Orders*, <https://www.supremecourt.tas.gov.au/for_the_media/suppression_orders>.
- 161 Evidence Act 1929 (SA) s 69A(10).
- 162 Vincent Review, *supra*, n 19, 117.
- 163 Law Commission, *supra*, n 105, 27; Vincent Review, *supra*, n 19, 117.
- 164 Vincent Review, *supra*, n 19, 117.
- 165 Reports tabled prior to this included the number of orders made under each ground.
- 166 See, eg, Vincent, *supra*, n 19; Bosland and Bagnall, *supra*, n 64; Bosland, *supra*, n 58.