

2012

Open Justice: Concepts and Judicial Approaches

Emma Cunliffe

Allard School of Law at the University of British Columbia, cunliffe@allard.ubc.ca

Follow this and additional works at: http://commons.allard.ubc.ca/fac_pubs

 Part of the [Comparative and Foreign Law Commons](#), and the [Jurisprudence Commons](#)

Citation Details

Cunliffe Emma, "Open Justice: Concepts and Judicial Approaches" (2012) 40 Fed L Rev 385.

This Article is brought to you for free and open access by the Faculty Scholarship at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

OPEN JUSTICE: CONCEPTS AND JUDICIAL APPROACHES

*Emma Cunliffe**

ABSTRACT

Recent years have seen an increase in the number and scope of non-publication orders and other limits on open justice, an increase in the number of statutes that regulate or threaten open justice and the articulation of an Australian constitutional principle (of institutional integrity) that has the potential to protect some aspects of open justice. The purposes and values of open justice are, however, rarely examined in a comprehensive or theoretically-informed manner. This article provides a theory of open justice which accounts for its heterogeneous nature. Australian judicial approaches to the substance, limits and constitutional dimensions of open justice are analysed in light of the purposes and values of open justice, and a comparison with the much more coherent Canadian approach is supplied. The author concludes that threats to open justice are best managed by an analytical framework which systematically identifies both the benefits of open justice and the countervailing values that are at stake in a given case, and which seeks to provide maximum protection to all of these values on a case-by-case basis.

I INTRODUCTION

This article considers the common law concept of 'open justice', and explores how Australian and Canadian courts have approached the requirements of open justice. The principles¹ that information about court proceedings should be widely accessible and may be subject to discussion and critical comment (referred to in this article as the principles of open justice) are important ingredients of the rule of law and fundamental to democratic governance. Accessibility of information about courts and their activities is a necessary correlate to the principle that it should be possible to

* BA, LLB (UMelb), LLM, PhD (UBC). Assistant Professor, University of British Columbia Faculty of Law. The research that forms the basis for this article was funded in part by a grant supplied by the Canadian Social Sciences and Humanities Research Council. I am very grateful to the anonymous reviewer, Benjamin Goold and Susan Boyd for constructive comments on earlier versions of this manuscript and to the editors of the *Federal Law Review* for their assistance. Any errors which remain are my own. Correspondence: cunliffe@law.ubc.ca.

¹ Section 2 of this article explains why, properly understood, there are multiple principles of open justice.

know the law, and helps safeguard the principle that citizens should be equally subject to law.

My interest in open justice was first piqued by difficulties experienced in obtaining court records to research how well courts manage expert testimony in Australian criminal trials. This context offers an alternative perspective on the prevailing concern that open justice facilitates sensationalism or idle curiosity about court proceedings. Appeals to open justice are most often associated with media pressure to be permitted to report more (and more sensational) information about particular cases. It is relatively easy to point to examples of media coverage that illustrate the dangers of the open court principle.² Nonetheless, it is an important goal for a rational, justice-focused legal system to maximise the benefits of open justice while minimising the potential harms of access to information. Facilitating careful study of, and informed debate about, court proceedings strengthens the quality of judicial adjudication and improves public confidence in court processes.

Open justice is often balanced against countervailing interests such as privacy rights and national security.³ While limits on open justice are necessary, my research into contemporary court practice suggests a turn to less transparent court processes. Some first-instance courts are adopting practices and policies that make it difficult to obtain access to information about court proceedings. For example, the Victorian Supreme Court routinely returns exhibits to filing parties so that they are not available for examination as part of the court record; the Victorian Magistrates' Court decides most committal hearings on the basis of affidavits rather than testimony but restricts access to these affidavits; and the number of non-publication orders issued by trial courts is increasing in several Australian jurisdictions.⁴ The practices adopted in contemporary trial courts in respect of open justice are uneven, but seem at times to fall considerably short of the ideal that restrictions on public access to court information should be exceptional and carefully delimited.⁵ Judicially administered justice, which was almost invariably public throughout much of the 19th and 20th centuries, threatens to become increasingly private. At the same time, senior judges in

² The manner in which media reported the OJ Simpson trial and the James Bulger case are notorious examples. See Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press, 2002), appendix. In Australia, some aspects of the media coverage of Lindy Chamberlain's trial provide examples of sensational reporting; but certain journalists and newspapers consistently criticised the rush to condemn Chamberlain. See also Emma Cunliffe, *Weeping on Cue: The Socio-Legal Construction of Motherhood in the Chamberlain Case*, (LLM Thesis, University of British Columbia, unpublished, 2003).

³ See Bentham's discussion of the relationship between publicity, privacy and secrecy. Jeremy Bentham, 'Rationale of Judicial Evidence' in John Bowring (ed), *The Works of Jeremy Bentham: Vol. VI* (London, 1843) 351–2.

⁴ See, eg, the *Criminal Procedures Act 2009* (Vic) pts 4.4, 4.7 and Magistrates' Court policies promulgated under that Act; Supreme Court of British Columbia, *Court Record Access Policy* (2011) <http://www.courts.gov.bc.ca/supreme_court/media/>; Prue Innes (chair), *Report of the Review of Suppression Orders and the Media's Access to Court Records and Information* (Australia's Right to Know, 13 November 2008) <<http://www.australiasrighttoknow.com.au/files/docs/Reports2008/13-Nov-2008ARTK-Report.pdf>>.

⁵ See Innes, above n 4, ch 2; Lord Neuberger MR, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (Master of the Rolls, 20 May 2011) <<http://www.judiciary.gov.uk/media/media-releases/2011/committee-reports-findings-super-injunctions-20052011>>.

several jurisdictions (including Canada, Australia, and the UK) have enlisted a range of common law and constitutional precepts to protect open justice. The aim of this article is to propose a conceptual framework that may help to bring coherence to future judicial consideration of the principles and limits of open justice, and to consider how well this framework is reflected in Australian and Canadian approaches to open justice.

Contemporary manifestations of the privatisation of court processes vary by jurisdiction and context.⁶ They extend well beyond the terrorism prosecutions that have been the focus of much contemporary commentary on open justice and are well documented elsewhere.⁷ Given the depth and quality of existing literature, the special procedures adopted for terrorism prosecutions are not a primary focus of this article. Indeed, focusing exclusively on the exceptional example of terrorism makes it easier to overlook broader trends that are emerging in other contexts. This article identifies and analyses impulses towards privileging secrecy over openness within a variety of juridical contexts.

Section 2 of this article offers a theoretical account of open justice. In contrast to existing accounts, I demonstrate that 'open justice' has numerous connotations. Open justice is therefore best described as a set of related principles, not as a single standard. Rather than having a coherent conceptual core, the idea of open justice gestures towards other key democratic and rule of law values. The multivariate nature of open justice makes it particularly susceptible to limitation in some contexts and jurisdictions.

The third section of this paper considers how open justice has been treated in Australian case law and briefly compares that treatment with the Canadian approach. Having identified the common law principles that underpin the concept, section 3 demonstrates that Australian and Canadian judges have adopted different approaches to open justice. The differences between the approaches in these two countries are partly attributable to Canada's constitutionalised human rights protections. However, the Canadian trend towards protecting open justice also reflects a broader judicial interpretation of common law principles. The Supreme Court of Canada has successfully articulated an approach to open justice that balances its benefits against the potential harms of publicity, while accounting for the variety of contexts in which open justice principles are engaged. By contrast, Australian courts have not yet generated a coherent articulation of the principles of open justice, nor have they adopted a consistent position regarding the limits of those principles. However, the

⁶ 'Privatisation' commonly refers to the transfer of government functions and responsibilities to the private sector. However, it may also include the adoption of government practices that shield public processes from scrutiny. The latter definition is more pertinent in this context. Susan B Boyd, 'Challenging the Public/Private Divide: An Overview' in Susan B Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, 1997).

⁷ See, eg, Kent Roach *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation between Intelligence and Evidence* (Research Studies of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Supply and Services, 2010); Eric Metcalfe, *Secret Evidence* (Report, Justice, 10 June 2009) <<http://www.justice.org.uk/resources.php/33/secret-evidence>>; Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (University of New South Wales Press, 2006).

seeds of such an approach may be apparent in the contemporary jurisprudence on the institutional integrity of Chapter III courts.

II WHAT IS OPEN JUSTICE?

Open justice is a core principle of the common law.⁸ In the United Kingdom and Canada, open justice possesses constitutional status.⁹ In these jurisdictions, the constitutional principle is strengthened by human rights protections.¹⁰ For example, the Canadian *Charter of Rights and Freedoms* provides:

2. Everyone has the following fundamental freedoms: [...]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[...]

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Collectively, these provisions have been interpreted as guaranteeing a right to open justice that may be enforced by the participants in a court process or by the public. In Australia, as I detail in section 3, an emergent line of judicial reasoning arguably protects some aspects of open justice as an essential aspect of the institutional integrity of courts (in turn protected under Chapter III of the *Australian Constitution*). However, the normative content, applications and limits of open justice are rarely given comprehensive attention within legal scholarship.

This section identifies a variety of practices encompassed by the term 'open justice'. I suggest that the commonly-stated principle, or right, of open justice is not a coherent and unified concept. Rather, it may be best understood as an ensemble of practices and defeasible presumptions. Understanding open justice as an ensemble concept has important ramifications for the manner in which open justice should be approached by courts tasked with balancing competing values.

A satisfying theoretical account of 'open justice' must account for three key features. First, the purposes of open justice are multivalent, incorporating both educational and supervisory aspirations. Bentham characterised publicity about court processes as a safeguard to ensure that judges act in accordance with law, probity and evidence; as an incentive to honest testimony; and as a mechanism by which the moral dimensions of law could be broadly conveyed.¹¹ Constitutional theories of the separation of powers contribute a fourth purpose to Bentham's list: given the courts' role as a check on legislative and executive power, courts are a key source of public information about

⁸ See, eg, *Kimber v Press Association* [1893] 1 QB 65; *Re Vancouver Sun* [2004] 2 SCR 332; *In the Matter of an Application by Chief Commissioner of Police (Vic)* (2005) 214 ALR 422; Neuberger, above n 5.

⁹ See Neuberger, above n 5, 15; *Edmonton Journal v Alberta* [1989] 2 SCR 1326.

¹⁰ *Canadian Charter of Rights and Freedoms*, Pt I of the *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (U.K), c.11 ss 2(b), 7; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) as amended by *Protocol 14* arts 6 (right to a fair and public hearing), 10 (freedom of expression) as re-enacted in *Human Rights Act 1998* (UK) c 42, sch 1.

¹¹ Bowring, above n 3, 351-72; see also Garth Nettheim, 'The Principle of Open Justice' (1984) 8 *Tasmanian Law Review* 25.

legislative and executive activities. The second key feature is that open justice encompasses a tremendous variety of activities. In a given context, open justice can refer to: the principle that an interested citizen may attend court as a spectator; the interest in promoting full, fair and accurate reporting of court proceedings; the convention that a judge publishes reasons for decision; the capacity to access the textual records kept by a court; or the capacity to access documents filed but not yet used in court. In the criminal context, open justice overlaps with the accused person's right to know the case against him or her. A comprehensive explanation of open justice must account for this diversity of activities. Finally, open justice is not absolute and will yield in some circumstances to conflicting imperatives. Although often characterised as a right, it may be better described as a principle to be balanced against countervailing interests.¹²

Given its multiple facets, open justice is perhaps best understood not as a single idea, but as a set of principles that mediate between courts and the public, and are underpinned by broader values.¹³ Specifically, open justice relates information about what happens in courts to other aspects of democratic governance and to the rule of law.¹⁴ These attributes apply to all of the disparate activities termed 'open justice', and have the potential to provide a touchstone for courts when deciding whether to expand or limit open justice in a particular case. In safeguarding public access to information about courts and their activities, open justice provides a set of principles that facilitate other liberal democratic values – the right to know the law and to understand its application, the salutary effects of permitting citizens to observe and evaluate the operation of government, and a repugnance for arbitrary power. However, the focus on information about court processes is a necessary but not sufficient definition of open justice – the common law places many limits on citizens' capacity to know about some aspects of the activities that occur in courts. The ban on knowing the substance of jury deliberations is an obvious example. Arguably, in order to be enlivened, an open justice principle must connect information about courts with another aspect of democratic participation or a dimension of the rule of law.

Existing accounts of open justice tend to focus on one of its dimensions to the partial exclusion of others. For example, Joseph Jaconelli suggests that the 'ideal of open justice may be simply stated'.¹⁵ According to Jaconelli, it is a procedural dimension of the right to a fair trial, requiring openness in the hearing phase; it is also a means to an end (perhaps truth or justice, although Jaconelli does not specify).¹⁶ This characterisation privileges the supervisory aspects of open justice – particularly as they relate to scrutinising witnesses – and downplays educational and probity dimensions. In Jaconelli's view, any educational benefits of open justice are at risk of

¹² See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 26-27; see also *John Fairfax Publications v Ryde Local Court* [2005] NSWCA 101.

¹³ In suggesting that open justice is best understood as a set of principles, I am influenced by Daniel Solove's argument that privacy is a set of rights united by a series of family resemblances, but lacking a universal core. See Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087.

¹⁴ David M Paciocco, 'When Open Courts Meet Closed Government' (2005) 29 *Supreme Court Law Review* (2d) 385, 389-90.

¹⁵ Jaconelli, above n 2, 353.

¹⁶ *Ibid* 353-5.

being overwhelmed by sensational reporting.¹⁷ He is primarily interested in access to courtrooms and the media's desire to disseminate criminal proceedings to a broader public, including by televising trials. Accordingly, Jaconelli pays less attention to judicial reasons and court records. Within this context, he argues for careful limits to be imposed on the 'trial as public spectacle'.¹⁸

Within the US literature, open justice is often treated as promoting informed public debate about individual and corporate behaviour. Discussion tends to focus on whether more or less information should be publicly accessible about certain types of cases.¹⁹ A form of open justice principle – characterised as a citizen's right to know and discuss the details of civil and criminal proceedings – is frequently weighed against individual and corporate privacy interests.²⁰ One important site of contest is obtaining access to materials discovered by a party in civil litigation, whether or not they are used in court.²¹ This engages quite different aspects of open justice from Jaconelli's discussion. The focus here is on the public capacity to assess activities undertaken by corporations and individuals in non-judicial contexts that predate the court proceeding. Court records, rather than courtrooms, are at the centre of the debate. Finally, the constitutional right to freedom of expression is at times engaged to argue for an unlimited power to obtain access to and publish court records whether or not they have been used in open court.²² The implication of discussions about discovered documents tends to be that privacy interests and open justice are in tension with one another, if not antithetical.²³ The challenge that consequently arises is finding a proportionate course between privacy and access to public records.

The literature on terrorism and open courts establishes a reconfigured emphasis of the various dimensions of open justice. For example, Kent Roach emphasises that open justice protects individual citizens from the exercise of arbitrary power by the state, secures freedom of expression and contributes to public confidence in judicial processes.²⁴ Terrorism cases foreground concerns about the exercise of arbitrary state power. They correspondingly position judicial probity and the truthfulness of witnesses as subsidiary, though important, dimensions of the need to scrutinise government processes. The practice of closing courts establishes a focus on hearings

¹⁷ Ibid ch 9.

¹⁸ Ibid 355.

¹⁹ See, eg, Andrew D Goldstein, 'Sealing and Revealing: Rethinking the Rules governing Public Access to Information Generated through Litigation' (2006) 81 *Chicago-Kent Law Review* 375 (and other articles in that volume of the *Chicago-Kent Law Review*); Arthur R Miller 'Confidentiality, Protective Orders, and Public Access to the Courts' (1991) 105 *Harvard Law Review* 427.

²⁰ Goldstein, above n 19; Miller, above n 19; Caron Myers-Morrison, 'Privacy, Accountability and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records' (2009) 62 *Vanderbilt Law Review* 921; Peter A Winn, 'Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information' (2004) 79 *Washington Law Review* 307.

²¹ Goldstein, above n 19; Miller, above n 19. In Australia, see Sharon Rodrick, 'Open Justice, the Media, and Avenues of Access to Court Documents' (2006) 29 *University of New South Wales Law Journal* 90.

²² See especially Myers-Morrison, above n 20; Winn, above n 20.

²³ Bentham adopts a similar characterisation, Bowring, above n 3, 355.

²⁴ Roach, above n 7, 78–9.

and the power to report hearings.²⁵ Procedures established to prevent the accused or the public from knowing some evidence challenge the capacity to gain access to and speak about court records and the judicial practice of writing and publishing reasons. However, concerns about rules that limit disclosure are most often characterised primarily as negatively impacting the accused person's right to a fair trial. Given this primary concern, the open justice dimension of a public right to know the details of a case frequently becomes supplementary.

A final set of circumstances in which open justice is often invoked arises when judges are asked to prohibit publication of the identity of witnesses or parties, including the accused.²⁶ The rationale given for this request varies, but may include protecting the privacy of victims of crime or other vulnerable individuals,²⁷ protecting the privacy of an accused prior to conviction or of an offender after community release,²⁸ or ensuring the safety of undercover police.²⁹ A request to prevent publication of identity may include a request to suppress identity within the courtroom. The principles of open justice at stake in these contexts vary with the rationale, but are primarily concerned with the need to test the truth of a witness's account. Where state action is being protected through anonymity, concerns about executive power also arise. In cases where identity is suppressed, limits on open justice are defined by the conflict with rights to privacy, dignity and equality, and (where police or informers are protected) by tension with executive efficacy.

The discussion of the principles of open justice offered here is not intended to provide a complete definition of open justice or a full list of the circumstances in which it may be engaged. Rather, the comparison of the treatments of open justice from a variety of contexts makes it apparent that open justice engages different principles at different moments. These principles draw in turn on a variety of underlying democratic and rule of law values. While each of these contexts involves the collection or transmission of information about judicial proceedings, not all aspects of judicial proceedings are susceptible to open justice. Equally, in every case in which open justice is engaged, something more than information is at stake. In other words, information about court proceedings is the subject of open justice, but this is not a sufficient definition of open justice. In fact, open justice cannot usefully be reduced to a single definition. One way of understanding open justice is that it comprises an ensemble of practices with various purposes, exercised in diverse ways, and subject to potential limitations where conflict arises with other fundamental values. Any discussion of contemporary approaches to open justice is strengthened by bearing these characteristics in mind.

²⁵ So-called super-injunctions raise similar concerns. See Neuberger, above n 5, ch 2.

²⁶ In Australia and the United Kingdom, the number of such orders has greatly increased in the past few years. *Ibid*; Innes, above n 4.

²⁷ For example, a sexual assault complainant's identity. Christine Boyle, 'Publication of Identifying Information about Sexual Assault Survivors: *R v Canadian Newspapers Co Ltd*' (1989) 3 *Canadian Journal of Women and the Law* 602. An Australian example is supplied by the *Migration Act 1958* (Cth) s 91X which prohibits publication of the name of an applicant for a protection visa.

²⁸ See, eg, *Hogan v Hinch* (2011) 243 CLR 506.

²⁹ Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods: The Position in Canada and Australia, Part One' (2007) 31 *Melbourne University Law Review* 171.

III COMPARING AUSTRALIAN AND CANADIAN APPROACHES TO OPEN JUSTICE

The common law contains a number of principles that are designed to ensure that court proceedings are physically accessible to the public, including the media. The question of whether open justice extends to providing access to court records is comparatively recent, reflecting the growth in importance of the documentary record in contemporary trial practice. After providing a general introduction to common law principles, this section demonstrates that judges in Australia and Canada have adopted somewhat different approaches to the principles of open justice even though they inherited the concept from a common British legal heritage. The discussion of Australian law suggests that Australian courts have not yet succeeded in delineating an approach that protects the core principles of open justice while maintaining sufficient flexibility to account for its heterogeneous manifestations. The comparison with Canada demonstrates that common law practice in that jurisdiction has provided a clearer approach to protecting open justice while respecting countervailing values such as privacy. The Canadian approach provides a possible model for future considerations of open justice by Australian courts.

A *An introduction to common law principles*

In 1893, Kay LJ identified the 'extreme importance that publicity should be given to all judicial proceedings.'³⁰ The UK Supreme Court opened its first judgment of 2010 as follows:

'Your first term docket reads like alphabet soup.' With these provocative words counsel for a number of newspapers and magazines highlighted the issue which confronts the Court in this application. In all the cases down for hearing in the first month of the Supreme Court's existence at least one of the parties was referred to by an initial or initials.³¹

The Court went on to hold unanimously that the public interest in having access to information about court proceedings outweighed the privacy interests of five British nationals who were believed to be involved in terrorist activities:

the legitimate interest of the public is wider than the interest of judges *qua* judges or of lawyers *qua* lawyers. Irrespective of the outcome, the public has a legitimate interest in not being kept in the dark[.]

...

At present, the courts are denying the public information which is relevant to that debate, even though the whole freezing-order system [of counter-terrorism measures] has been created and operated in their name.³²

Recognising the multiplicity of values that are potentially engaged when open justice is at stake, the UK Supreme Court emphasised that the public interest in disclosing the details of court proceedings must be balanced against privacy rights on a case-by-case basis. Nonetheless, *In re Guardian News and Media Ltd and others* holds that judges should avoid issuing anonymity orders unless there is specific evidence of potential harm to privacy or another protected right, even in terrorism-related cases.

³⁰ *Kimber v Press Association* [1893] 1 QB 65, 75.

³¹ *In re Guardian News and Media Ltd and others* [2010] 2 AC 697, 708 [1] (*Guardian News and Media*).

³² *Ibid* 725 [68]-[69].

Where specific evidence of a potential harm to privacy is offered, it remains essential to demonstrate that this harm outweighs the harm that will be caused by the requested limitation to freedom of expression. While the primary contribution of the case is that it sets out an approach to managing conflicting rights and freedoms under the *European Convention on Human Rights*, *Guardian News and Media* also restates and affirms the benefits of the common law presumption of openness in judicial proceedings. Decided more than a century after *Kimber v Press Association*, *Guardian News and Media* suggests that the highest UK court continues to regard the principles of open justice as integral to the common law tradition despite political pressures to keep the state response to terrorism shrouded in secrecy.

The leading common law case on open justice is *Scott v Scott*.³³ A marriage nullification had occurred in camera. The appellant and her solicitor subsequently shared notes of the hearing with persons who had not been party to the proceeding. On appeal from a finding of contempt, the House of Lords was asked to consider whether the original order to close the courtroom was within the trial judge's power. A majority of Law Lords agreed that no jurisdiction existed to close the court. However, they had differing views about whether and when a judge possessed the common law power to close a courtroom. Viscount Haldane held: 'If there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on the application of some other and overriding principle'.³⁴ Viscount Haldane proposed a test of necessity for such exceptions, identifying examples where necessity is met.³⁵ Earl Halsbury preferred to leave the consideration of exceptions to the open court principle to another case.³⁶ Earl Loreborn suggested that a courtroom could be closed in a limited category of cases.³⁷ Lord Shaw spoke most strongly in support of open justice, suggesting that the orders made by the trial judge 'constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties and an attack upon the very foundations of public and private security'.³⁸ Lord Shaw quoted extensively from Bentham, holding that there are very limited circumstances in which privacy is warranted, and that the scope of any non-publicity order must be limited in duration.³⁹

While the lack of jurisdiction to close the court and prevent publication in *Scott v Scott* was broadly agreed, the precise limits on judicial power were more contested. The variety of approaches adopted reflects conceptual uncertainty about the function and limits of open justice. Depending on whether one prefers Viscount Haldane's reasoning to that of Earl Loreborn or Lord Shaw, the circumstances in which a courtroom may be closed could be limited to a set of categories established by precedent or governed by an overarching test of necessity.

B *The Australian approach to open justice*

Scott v Scott has had significant influence on Australian jurisprudence, but the variety of *ratios* adopted by the judges has bequeathed some uncertainty within the Australian

³³ [1913] AC 417 (House of Lords).

³⁴ *Ibid* 435.

³⁵ *Ibid* 438.

³⁶ *Ibid* 442.

³⁷ *Ibid* 445–6.

³⁸ *Ibid* 476.

³⁹ *Ibid* 482–3.

law.⁴⁰ More recently, an emerging jurisprudence suggests that open justice may also be protected – at least to some extent – by the principle of institutional integrity that regulates legislative and executive relationships with courts under Chapter III of the *Australian Constitution*. In Canada, open justice is regarded as a strong but defeasible common law right, which is subject to limits on a case-by-case basis where countervailing interests prevail. While *Scott v Scott* was initially influential, the Supreme Court of Canada ultimately adopted a more coherent approach.

The Australian approach to open justice has at least two strands. A well-established common law approach establishes a presumption of open justice, permitting limits on open justice where 'necessary for the administration of justice'⁴¹ or 'in the interests of justice'.⁴² However, this common law rule will yield to contrary statutory provisions.⁴³ The second, constitutional, strand has emerged more recently. The High Court of Australia has held that Chapter III of the *Australian Constitution* proscribes legislatures from conferring a function or imposing a requirement on a judge or court 'which substantially impair[s] its essential and defining characteristics as a court'.⁴⁴ The principle that Chapter III protects the continuing institutional integrity of courts arises from, but also refines, the reasoning in *Kable v Director of Public Prosecutions*.⁴⁵ In *Hogan v Hinch*, the Court considered whether the principle extended to guaranteeing open justice within Chapter III courts. While the Court upheld the constitutionality of the Victorian legislation at stake, *Hogan v Hinch* affirms that open justice is an essential judicial characteristic. As I explain below, the Court's reasoning left open the possibility that legislation that trenches too far on open justice may contravene Chapter III.

1 Australian Common Law Approach

The High Court of Australia quickly adopted *Scott v Scott* into Australian common law.⁴⁶ It has held on more than one occasion that judges have 'no inherent power' to close a courtroom, while finding that Parliament retains power to provide for the circumstances in which courts should be closed.⁴⁷ In *Dickason v Dickason*, the Court did not comment on common law exceptions to the open justice principle. In *Russell v Russell*, a majority of the High Court struck down a provision of the *Family Law Act 1975* (Cth) which provided that all proceedings under that Act must be held in closed

⁴⁰ Discussed below, page 10.

⁴¹ *R v Kwok* (2005) 64 NSWLR 335.

⁴² *BUSB v The Queen* (2011) 80 NSWLR 17; see also *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518; *Hogan v Hinch* (2011) 243 CLR 506.

⁴³ See, eg, the *Court Suppression and Non-Publication Orders Act 2010* (NSW), which has codified the grounds on which non-publication and suppression orders may be issued by NSW courts and tribunals while reserving the inherent jurisdiction of courts to regulate other aspects of their procedure.

⁴⁴ *Wainohu v New South Wales* (2011) 243 CLR 181, 192 [7] (French CJ and Kiefel J). See also *South Australia v Totani* (2010) 242 CLR 1, 47 [69] (French CJ), 62–3 [131]–[132] (Gummow J), 103 [264] (Heydon J); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 352–4 [50]–[52] (French CJ); 367 [98] (Gummow and Bell JJ); 385 [155] (Heydon J).

⁴⁵ (1996) 189 CLR 51 (*Kable*). See further Ayowande A McCunn, 'The Resurgence of the *Kable* principle: *International Finance Trust Company*' (2010) 17 *James Cook University Law Review* 110, 111–14.

⁴⁶ *Dickason v Dickason* (1913) 17 CLR 50, 51.

⁴⁷ *Ibid*; see also *Russell v Russell* (1976) 134 CLR 495.

court. However, *Russell* was not a particularly strong endorsement of open justice. The Court split 3:2, with Mason and Jacob JJ holding in dissent that the federal Parliament could order state courts to hear federal proceedings in camera

Of the majority, Barwick CJ noted the significance of the open court principle but struck down the impugned legislation on the basis that it constituted an impermissible interference with the states' constitutional power to provide for the organisation and operation of state courts.⁴⁸ Gibbs and Stephen JJ wrote separate reasons from Barwick CJ and from one another, concurring in the result. Both Gibbs and Stephen JJ characterised the provision mandating closed courts as one which altered both the character of proceedings conducted under the Act, and the character of the courts charged with hearing those proceedings. Gibbs and Stephen JJ held that openness is an essential part of the character of common law courtrooms, and that mandating closed courtrooms changed the court into a different type of tribunal. However, Gibbs J would have upheld the constitutionality of the provision if it had merely granted trial judges the discretion to close courts in appropriate cases.⁴⁹ The distinction between granting discretion and mandating closed courts remains important under the emerging constitutional principle of institutional integrity.

The principles of open justice have received closer consideration in state and federal courts, particularly in NSW. Decisions issued by the NSW and Victorian Courts of Appeal and by the Full Federal Court have delineated the principles that apply within Australian law. Taken as a whole, these cases establish a working distinction between different infringements of the principles of open justice. For example, the case law suggests that judges view closing a courtroom as a more drastic infringement on open justice than restricting access to exhibits. Such distinctions are in keeping with the proposition that there are multiple principles of open justice, but the Australian case law does not expressly endorse this approach and individual decisions tend to refer to open justice in a relatively undifferentiated way. For example, in *John Fairfax & Sons Ltd v Police Tribunal of NSW*,⁵⁰ the NSW Court of Appeal was asked to consider whether the Police Tribunal could issue an order suppressing the name of a witness. The Court held that open justice requires that proceedings be heard in open court, and that departure from this rule is only permitted where 'its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified' the rule. The principle includes the rule that 'nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.'⁵¹ In the absence of parliamentary authorisation, an order prohibiting the publication of evidence given in open court is only valid if 'necessary to secure the proper administration of justice.'⁵² McHugh JA held that the capacity to publish reports of a proceeding was a 'common law right' that is vital to 'the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice.'⁵³ He questioned whether a non-publication order could in

⁴⁸ *Russell v Russell* (1976) 134 CLR 495, 505-7.

⁴⁹ *Ibid*, 520 (Gibbs J), 532-3 (Stephen J).

⁵⁰ (1986) 5 NSWLR 465.

⁵¹ *Ibid* 476-7.

⁵² *Ibid* 477. See also *Ex parte Queensland Law Society Inc* [1984] 1 Qd R 166, 170 and *Herald and Weekly Times v A* (2005) 160 A Crim R 299, 304 [25].

⁵³ *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 481 (*Fairfax v Police Tribunal*).

any event bind non-parties.⁵⁴ McHugh JA's judgment explicitly connects open justice with democratic values and, in keeping with subsequent judgments of the NSW Court of Appeal, emphasises the need to limit infringements upon open justice.⁵⁵ The decision also recognises that limits on open justice will vary with the nature of countervailing interests.

The test of what is 'necessary to secure the proper administration of justice' would seemingly permit trial judges to issue non-publication orders in 'reasonably necessary' circumstances that are not contemplated by previous case law. More recently, the NSW Court of Appeal has moved towards a categorical approach to exceptions to open justice, coupled with an overriding test of necessity. In *John Fairfax Publications Pty Ltd v District Court of NSW*, the Court suggested that the common law jurisdiction to grant non-publication orders is restricted to an established, and limited, set of categories.⁵⁶ These categories are not listed in *Fairfax v District Court* but were enumerated by Einstein J in *Idoport Pty Ltd v National Australia Bank*:

There appear to be a limited number of general exceptions to the 'open justice' principle, ... namely:

- (a) cases where trade secrets, secret documents or communications or secret processes are involved;
- (b) cases where disclosure in a public trial would defeat the whole object of the action (as in blackmail cases or cases involving police informers);
- (c) cases involving the need to keep order in court;
- (d) cases involving (in certain circumstances) national security;
- (e) cases involving the performance of administrative or other action that may properly be dealt with in chambers;
- (f) cases where the court sits as *parens patriae* involving wards of the state or those with mental illness.⁵⁷

Beyond these categories, the NSW Court of Criminal Appeal held in *Fairfax v District Court* that an order prohibiting publication of a judgment may only be made if it is necessary in the sense that the objective of achieving a fair trial in a subsequent case could not be secured in any other way. The Court expressed doubt as to whether such necessity could ever be demonstrated.⁵⁸

In *R v Kwok*, Hodgson JA softened the position that common law exceptions are limited by precedent, holding that the Court 'will not freely invent new categories of cases, but ... may identify categories that, while not coinciding exactly with the existing categories, are very closely analogous to them and have the same rationale for the making of non-publication orders.'⁵⁹ In *Kwok*, the Court held that the privacy interests of complainants in a sex trafficking case were very like those of a complainant in a blackmail case, and that the categories should be expanded accordingly.⁶⁰ However, a

⁵⁴ Ibid 477; see also *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 57 (*Raybos v Jones*).

⁵⁵ See also *Witness v Marsden* (2000) 49 NSWLR 429, 460-1 [140]-[144] (Heydon JA).

⁵⁶ (2004) 61 NSWLR 344, 353 [19] (*Fairfax v District Court*).

⁵⁷ [2001] NSWSC 1024, [20]. See also *Raybos v Jones* (1985) 2 NSWLR 47.

⁵⁸ (2004) 61 NSWLR 344, 360 [59]. See also *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 300, 306 (*Syme v GM-Holden's*).

⁵⁹ (2005) 64 NSWLR 335, 342 [19] (Rothman J agreeing) (*Kwok*).

⁶⁰ Ibid 342 [21] (Hodgson JA), 345 [34] (Howie J); see also *Witness v Marsden* (2000) 49 NSWLR 429.

decision to make a non-publication order in respect of the names of the particular complainants depends on evidence of necessity in the instant case, and the case was returned to the District Court for reconsideration. While agreeing with Hodgson JA, Howie J added the following caution:

[I]f this application were allowed it may encourage prosecutors to seek, and judges to make, non-publication orders in cases where the necessity for those orders to advance the interests of justice had not truly been shown. It is important in light of the material relied upon by the prosecution to stress that it is the interests of justice that lie at the heart of such an application and not the interests of a private individual, such as a witness or an accused. The decided cases have emphasised the value of open courts to maintaining public confidence in the administration of justice.⁶¹

In this paragraph, Howie J sets out the competing interests at stake when an application for non-publication of a witness's name is made, and emphasises the primacy of open justice. Howie J preferred that new classes of exceptions be established by Parliament.⁶²

While *Kwok*, *Fairfax v District Court* and *Idoport v National Australia Bank* suggest that courts possess inherent power to issue non-publication orders that will bind non-parties, the existence of this power was questioned in *Fairfax v Police Tribunal* and *Raybos v Jones*. This issue remains unsettled in Australian case law, and may become important in light of conflicting decisions of the Privy Council in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago*⁶³ and the New Zealand Court of Appeal in *Siemer v Solicitor-General*.⁶⁴ While the Privy Council has expressed the conclusion that no such power exists, the New Zealand Court held that a power to issue non-publication orders is within the inherent capacity of a court to regulate its own procedures with the ultimate goal of securing fairness.

The NSW Parliament has rendered the question of inherent power less relevant in that jurisdiction by passing the *Court Suppression and Non-Publication Orders Act 2010* (NSW), which codifies five broad grounds on which a suppression or non-publication order may be justified. These grounds are not quite the same as those articulated in prior case law, but include the necessity to protect the safety of a person, a limited power to issue orders to prevent embarrassment and a capacity to issue an order where a countervailing public interest outweighs the public interest in open justice.⁶⁵ In cases decided since the Act came into force, the NSW Court of Appeal has continued to assert the relevance of prior case law.⁶⁶ However, the possibility that some limits on open justice may operate differently from others is being recognised more overtly. For example, in *Fairfax v Ibrahim*, the NSW Court of Criminal Appeal observed that there are circumstances in which the public interest in freedom of discussion operates in tension with the public interest in promoting the administration of justice; and

⁶¹ *R v Kwok* (2005) 64 NSWLR 335, 343–4 [29].

⁶² *Ibid* 344 [30]. In *R v Nantahkhum* (2012) 6 ACTLR 228 Refshauge J applied the principles set out in *Kwok* to suppress publication of the names of witnesses who had paid for the sexual services of trafficked women.

⁶³ [2005] 1 AC 190.

⁶⁴ [2012] NZCA 188.

⁶⁵ *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 8.

⁶⁶ See eg, *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [8] (Bathurst CJ), [46]–[51] (Basten JA) (*Fairfax v Ibrahim*); *Rinehart v Welker* [2011] NSWCA 345, [45] (Tobias AJA).

circumstances in which these values act in concert.⁶⁷ In *Rinehart v Welker*, Tobias AJA held that open justice was a primary objective of the administration of justice, which exists alongside other objectives.⁶⁸ Neither case proposes a methodology for reconciling inconsistencies between such objectives. In fact, the Australian case law is uniformly silent on the questions of how to decide among competing objectives when open justice is at stake, and on what evidence of interference with countervailing interests is needed to support an application to limit open justice.⁶⁹

The Victorian Court of Appeal has also held that necessity is the touchstone for non-publication orders.⁷⁰ However, in recent cases it has adopted a relatively generous interpretation of necessity. The Victorian Court of Appeal held in *News Digital Media Pty Ltd v Mokbel* that a trial court possesses inherent jurisdiction to postpone publication of court proceedings, including verdicts, in order to protect trial fairness in an impending trial.⁷¹ The Court applied a test of whether there was a 'real risk' that publishing the material would 'interfere substantially with the administration of justice in a pending proceeding.'⁷² Non-publication orders published in these circumstances should be time limited. In *News Digital Media Pty Ltd v Mokbel*, the Court held that non-publication orders should not extend to requiring online news services to remove archived articles where those articles are only accessible by searching.⁷³ The Court held that this order was not necessary to protect trial fairness given the warnings routinely issued to jurors to refrain from researching a case.

While there are some inconsistencies, it is implicit within the judicial discussions of non-publication orders that some principles of open justice — for example, the importance of permitting the public to know about a verdict or judgment — are more vigorously protected than others — for example, the capacity to publish the identity of a witness.⁷⁴ Countervailing values also appear to influence the outcome of an application to restrain open justice — for example, *News Digital Media Pty Ltd v Mokbel* turns on the primacy of an accused person's right to a fair trial, and may fairly be distinguished from the NSW cases which consider a witness's request for privacy. Likewise, in that case the Victorian Court of Appeal explicitly adopts a hierarchy of principles when it treats the interest in reporting evidence given in a court proceeding as more central to open justice than the capacity to report extra-judicial information that readers may find interesting.

Australian case law concerning public access to court records exhibits considerably more ambivalence about the open justice principle in that context. The NSW Court of Appeal was asked in *John Fairfax Publications Pty Ltd v Ryde Local Court* to decide

⁶⁷ *Fairfax v Ibrahim* [2012] NSWCCA 125, [55], citing *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 26 (Mason CJ).

⁶⁸ [2011] NSWCA 345, [38].

⁶⁹ In addition to cases already discussed, see *Da Silva v The Queen* [2012] NSWCCA 106.

⁷⁰ *Herald and Weekly Times v A* (2005) 160 A Crim R 299, 306 [30].

⁷¹ (2010) 30 VR 248. See also *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68, which considered publication bans issued in relation to a fictionalized account of events relevant to a trial then proceeding in the Victorian Supreme Court (the *Underbelly* TV series).

⁷² *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 266 [68].

⁷³ *Ibid*, 272 [94].

⁷⁴ See *Syme v GM-Holden's* [1984] 2 NSWLR 294; *R v Wise* (2000) 2 VR 287, 296 [26]; *Wainohu v New South Wales* (2011) 243 CLR 181.

whether a right of access to court records existed at common law.⁷⁵ The applicant sought access to court records associated with an apprehended violence order issued by consent against a high profile Magistrate. Seemingly distancing itself from the language used by McHugh JA in *Fairfax v Police Tribunal*,⁷⁶ the Court held that open justice is a principle rather than a right; and that the principle does not encompass a routine capacity to obtain access to documents held as part of the court record.⁷⁷ Given that an apprehended violence order could be issued without a magistrate being satisfied that the alleged violence had occurred, and as this order was issued by consent, the Court held that it was sufficient for a judge to give reporters access to the fact that a complaint had been laid and a consent order issued, and the terms of the order. However, Spigelman CJ held that a media request for access to documents used in open court should ordinarily be granted, as the principle of open justice is engaged once documents are used in this manner.⁷⁸ In *Herald & Weekly Times Ltd v Magistrates' Court of Victoria*, the Victorian Court of Appeal rejected an argument that there is a right to obtain access to the hand up brief on which many committal proceedings are now decided in Victoria in lieu of hearing oral evidence. However, the Court also held that magistrates have the power to authorise access to this brief.⁷⁹

The reasoning adopted in these cases seems in keeping with the proposition that information relied upon by a court is more central to the principles of open justice than information that is contained within the court record but not expressly relied upon. Nonetheless, the tone adopted in these two decisions is notably different from that adopted by the NSW Court of Criminal Appeal in cases concerning non-publication orders. When the capacity to report testimony and judgments is at stake, open justice tends to be treated as an essential good, albeit one which must sometimes yield to more pressing objectives. By contrast, the courts downplay the importance of open justice when considering requests for court records, even when those records have been used in open court. The legitimate concern underlying the court records cases is the possibility that media will report allegations of wrongdoing in a manner that suggests those allegations have been proven.⁸⁰ Even so, the courts' reluctance to enforce a stronger principle of access to court records marks a particularly interesting shift. Having access to committal records or to the documentary record on which interlocutory orders are issued is arguably an important dimension of exercising democratic oversight in relation to the actions of courts and Crown prosecutors.⁸¹ Equally, the concern about misreporting allegations of wrongdoing is similarly present

⁷⁵ (2005) 62 NSWLR 512 (*Fairfax v Ryde Local Court*).

⁷⁶ See above text accompanying notes 50-5.

⁷⁷ *Fairfax v Ryde Local Court* (2005) 62 NSWLR 512, 521 [29]-[31].

⁷⁸ *Ibid* 521 [32], 526 [65].

⁷⁹ (2000) 2 VR 346.

⁸⁰ See for example, *eisa Ltd v Brady* [2000] NSWSC 929, [18]-[21]. Interestingly, this argument for restricting open justice was made and rejected in *Kimber v Press Association Ltd* [1893] 1 QB 65. The Court of Appeal considered that a fair and accurate report of court proceedings would make it clear that no final decision had been rendered.

⁸¹ For example, this author applied unsuccessfully for copies of the hand-up brief used by the Crown in the committal hearing of Carole Louise Matthey. The case against Matthey for allegedly killing four children was withdrawn after the trial judge excluded much of the Crown evidence against her. See *R v Matthey* (2007) 17 VR 222. Important questions about prosecutorial discretion and expert witnesses in this case remain unstudied because access to the court records has not been granted (although access to transcripts was provided).

whenever the media reports oral evidence given or legal arguments made prior to a trial or verdict. It is difficult to identify a principled basis on which textual records should be treated differently than sworn testimony, particularly when the textual record explicitly replaces oral evidence and forms the basis for judicial decisions.

Those who seek to enforce the principles of open justice are often media outlets. Despite this pattern, the Australian case law lacks a consistent approach to the relationship between media and the principles of open justice. Media outlets receive some recognition of their special status by, for example, receiving notice of non-publication orders and being permitted standing to appeal such orders. However, Hutley AP suggested in *Syme v GM-Holden's* that there is no special priority attaching to the press or other media. Rather, '[t]he privilege to see what the courts do and say belongs to the public generally.'⁸² In *Fairfax v Ryde Local Court*, Spigelman CJ rejected the proposition that freedom of expression or freedom of the press were legitimate ends of open justice, holding that open justice 'has purposes related to the operation of the legal system.'⁸³ Some judges have expressed mistrust of the media in the course of adjudicating applications for access. Decisions have aired concerns that media may publicise speculative or prejudicial information about one or another party, thereby damaging reputations and imperilling the right to a fair trial.⁸⁴

By contrast, in *R v Davis*, the Full Federal Court suggested that journalists play a different role in relation to court proceedings from that of other observers:

Whatever their motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them.⁸⁵

In some cases, trial judges have relied upon the principle of open justice to grant media access to documents that have been used in open court.⁸⁶ These judges have reasoned that providing access will assist the public to understand the basis on which orders have been made and help reporters to cover court proceedings fairly and accurately. Their judgments emphasise the need to trust the media to report proceedings with

⁸² [1984] 2 NSWLR 294, 310.

⁸³ (2005) 62 NSWLR 512, 525 [60] (citation omitted). See also *eisa Ltd v Brady* [2000] NSWSC 929, [36]; *Australian Securities and Investments Commission v Rich* (2001) 51 NSWLR 643. This formulation may explain judicial reticence to offer access to documents that have not yet been used in court, as on a narrow reading providing such access may not have a purpose relating to the legal system. However, such an interpretation depends on how broadly one conceives of the legal system and whether, for example, it extends to pre-trial activities and the operation of organisations such as police and prosecutors.

⁸⁴ See eg, *eisa Ltd v Brady*, [2000] NSWSC 929; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680; *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248; *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68.

⁸⁵ (1995) 57 FCR 512, 514. See also *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 258–9 [35].

⁸⁶ See eg, *Australian Securities and Investments Commission v Rich*, (2001) 51 NSWLR 643; *Tuqiri v Australian Rugby Union Ltd* [2009] NSWSC 781; cf *eisa Ltd v Brady*, [2000] NSWSC 929.

appropriate restraint.⁸⁷ The alternative approaches to media access discernible within the case law suggests that Australian judges have not yet settled upon a principled understanding of the role that media plays in relation to open justice. As I later explain, Canadian courts have provided a more complete account of the media's role vis-a-vis open justice.

2 *Australian Constitutional Principles*

Legislative restraints on open justice are far more numerous than those anticipated under common law, and so it is important to consider whether there are constitutional limits on the legislative power to restrain open justice. However, until very recently the complexities of Australian federalism seemed to present a significant barrier to a coherent position on whether any constitutional principle limits legislative and executive powers to infringe upon open justice. The *Australian Constitution* has been interpreted to require a separation of judicial power from legislative and executive functions at the federal level, but state constitutions have no such requirement. Federal judicial power may be vested in both state and federal courts. When a state court is invested with federal power, the federal government must respect the state's rights to provide for organisation and operation of that court.⁸⁸ On the other hand, 'Chapter III courts' (those exercising or possessing the capacity to exercise federal judicial power) must be allowed to operate in a court-like manner.⁸⁹ Therefore, Chapter III of the *Australian Constitution* will limit parliamentary and executive power to regulate the openness of judicial proceedings if the various activities that comprise open justice are part of the 'essential character of a court or ... the nature of judicial power'.⁹⁰

In *Kable*, a majority of the High Court of Australia held that an implied constitutional requirement of institutional integrity prevents state legislatures from vesting non-judicial (executive or administrative) powers in Chapter III courts if the exercise of that power is incompatible with the exercise of federal judicial powers. McHugh J expressed this principle in terms of reasonable perceptions of judicial independence:

While nothing in Ch III prevents a State from conferring non-judicial functions on a State Supreme Court in respect of non-federal matters, those non-judicial functions cannot be of a nature that might lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State.⁹¹

⁸⁷ See *Tuqiri v Australian Rugby Union Ltd*, [2009] NSWSC 781; *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293.

⁸⁸ *Dickason v Dickason* (1913) 17 CLR 50.

⁸⁹ See, eg, *Polyukovich v Commonwealth* (1991) 172 CLR 501; *Harris v Caladine* (1991) 172 CLR 84; *Leeth v Commonwealth* (1992) 174 CLR 455; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. See Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) ch 6.

⁹⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane, Dawson JJ). Saunders' observation that the separation of powers is often invoked in Australia to resolve questions that would in other jurisdictions be resolved using constitutional rights applies well to open justice. See Saunders, above n 89, 185.

⁹¹ *Kable* (1996) 189 CLR 51, 117.

Other passages in the *Kable* decision suggested that the implied limitation is concerned with protecting essential characteristics of the judicial process.⁹² Subsequent formulations of the *Kable* principle have tended to focus on these institutional characteristics, of which independence is arguably an important element. For example, Gummow, Hayne and Crennan JJ articulated the *Kable* principle as follows:

[T]he relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court' ... It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.⁹³

The refined *Kable* principle is most precisely referred to as a principle that safeguards the institutional integrity of Chapter III courts. However, attempts to further define the principle have proven somewhat unsuccessful. In fact, French CJ has twice referred to the undesirability of reducing the principle of institutional integrity to a test or formulation which dictates future outcomes.⁹⁴

While *Kable* was regularly relied upon in argument before the High Court of Australia, attempts by parties to apply the doctrine failed for several years. Until 2009, a majority of the High Court invariably distinguished *Kable*, seemingly confining that case largely to its facts. In that sense, prior to *International Finance Trust Co Ltd v NSW Crime Commission*,⁹⁵ the *Kable* decision had largely fallen dormant.⁹⁶ However since then, the High Court of Australia has articulated and applied a version of the *Kable* doctrine at least seven times.⁹⁷ On three occasions, it has struck down state legislation based on a principle of institutional integrity.⁹⁸ Quite suddenly, a wealth of judicial reasoning has refined and clarified the scope and potential application of constitutional principles emerging from *Kable*. The relevance of this constitutional reasoning to legislative and executive checks on open justice was most directly addressed in *Hogan v Hinch*. However, a number of earlier decisions set the context in which the defendant in *Hogan v Hinch* argued that open justice was an essential defining characteristic of judicial process.

In several cases decided since *Russell v Russell*, individual High Court judges have relied upon the principle of open justice in cases that largely turned on other matters. In a widely cited dissent in *Re Nolan; Ex parte Young*, Gaudron J held that the essential

⁹² Ibid 98 (Toohey J), 106–8 (Gaudron J), 121 (McHugh J), 131–2 (Gummow J). See further Saunders, above n 89, ch 6; Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397.

⁹³ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63].

⁹⁴ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 530 [90]; *Wainohu v New South Wales* (2011) 243 CLR 181, 201–2 [30]; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 [104]–[105] (Gummow J).

⁹⁵ (2009) 240 CLR 319.

⁹⁶ See further Wheeler, above n 89.

⁹⁷ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co Ltd v NSW Crime Commission*, (2009) 240 CLR 319; *SouthAustralia v Totani* (2010) 242 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506; *Wainohu v New South Wales* (2011) 243 CLR 181; *Momcilovic v The Queen* (2011) 245 CLR 1.

⁹⁸ *International Finance Trust Co Ltd v NSW Crime Commission*, (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

features of the 'judicial process' include 'open and public inquiry'.⁹⁹ Her Honour went on to hold that 'open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice.'¹⁰⁰ In *Grollo v Palmer*, McHugh J held, in dissent, that '[o]pen justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power.'¹⁰¹ In a concurring decision in *K-Generation Pty Ltd v Liquor Licensing Court*, French CJ described the open justice principle as 'an essential part of the functioning of courts in Australia', but upheld a statutory provision that had on this occasion been applied in a manner that infringed this principle.¹⁰² French CJ held that statutes which regulate court processes should, as far as possible, be interpreted in a manner consistent with the requirements of open justice. He applied this interpretive principle in *K-Generation*.

Each of the cases mentioned so far engages with the power to order closed courtrooms, or to hear evidence in camera. In *Re Application by the Chief Commissioner of Police (Vic)*, the High Court was asked to consider an application made for orders that would prevent the publication of evidence given in open court.¹⁰³ This evidence related to investigative practices of police,¹⁰⁴ and the Commissioner sought an indefinite publication ban. The Court declined to engage with the substantive issues raised by the case, finding that the Commissioner had not met her burden to demonstrate why leave to appeal should be granted from the trial judge's decision to issue the orders.

Given a substantial rise in the number and variety of non-publication orders being issued in Australia, it was inevitable that the refined *Kable* principle would be relied upon to pursue judicial suggestions that open justice is an essential characteristic of courts.¹⁰⁵ *Hogan v Hinch* raised a constitutional challenge to s 42 of the *Serious Sex Offenders Monitoring Act 2005 (Vic)* ('the Act').¹⁰⁶ The Act empowered Victorian courts to make and enforce community supervision orders in respect of sex offenders who had served their custodial sentence. Section 42 permitted the court, 'if satisfied that it is in the public interest', to make an order prohibiting publication, inter alia, of material which could identify a person as being the subject of a community supervision proceeding. The defendant Hinch, a controversial media figure, allegedly contravened orders made under s 42 of the Act by publishing names on his website and identifying offenders at a public rally. He challenged s 42 on the basis that it distorted the institutional integrity of courts, was contrary to an implied requirement 'that all State and federal courts must be open to the public and carry out their activities in public'

⁹⁹ (1991) 172 CLR 460, 496.

¹⁰⁰ Ibid 496-7.

¹⁰¹ (1995) 184 CLR 348, 379.

¹⁰² *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. The majority held that the procedure infringed the open justice principle. However, properly interpreted, the legislation was not incompatible with the exercise of federal judicial power.

¹⁰³ (2005) 214 ALR 422.

¹⁰⁴ Very little information is given about these investigative practices in the judgment, other than that they relate to 'scenarios' used to help obtain admissions from suspects.

¹⁰⁵ Innes, above n 4.

¹⁰⁶ *Hogan v Hinch* (2011) 243 CLR 506. The Act has now been repealed and replaced with the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*.

and contravened the implied freedom of political expression.¹⁰⁷ The High Court of Australia unanimously upheld the constitutionality of s 42 and denied any absolute requirement of open justice.

The brief leading judgment was written by Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. These judges held that s 42 did not impermissibly impair the status of Chapter III courts as independent and impartial tribunals because the phrase 'in the public interest', while broad, conferred a legitimate discretionary power upon courts.¹⁰⁸ The expectation that a court would issue reasons for decision, and the availability of ordinary rights of appeal, together with the requirement of subjective *mens rea* within the offence created by s 42 bolstered the conclusion that this section was constitutionally valid.

The leading judgment distinguished limits on the legislative power to regulate open justice from those exceptions which apply to the common law presumption of open justice. Adopting Gibbs J's reasoning from *Russell v Russell*,¹⁰⁹ the leading judgment held that there is no 'restriction drawn from Ch III which in absolute terms limits the exercise of the legislative power of the Parliament'.¹¹⁰ It is implicit within the majority's acceptance of Gibbs J's reasoning that a statutory or executive rule which required closed proceedings in all cases may impair the institutional integrity of the court and thereby violate the refined *Kable* principle.

Chief Justice French issued separate and more lengthy reasons. He held more clearly than the leading judgment that an 'essential characteristic of courts is that they sit in public'.¹¹¹ The entitlement to publish a fair and accurate report of proceedings, including the documentary record, was characterised by French CJ as a 'common law corollary' to open justice.¹¹² French CJ would have adopted a principle of statutory interpretation that minimised interference with all kinds of open justice (not just open courtrooms), while accepting the constitutionality of statutes which grant discretionary powers to infringe open justice.

Hogan v Hinch represents a mixed outcome for proponents of open justice. It now seems relatively clear that (some) principles of open justice are among the essential characteristics of courts, and therefore attract (some) constitutional protection. The basic requirement that legislative restrictions on open justice should be expressed in permissive and discretionary rather than directive terms has the potential to safeguard open justice, but does not seem to apply to all circumstances. For example, it raises questions about the constitutionality of provisions that impose blanket restrictions on open justice without providing the tools to resolve those questions.¹¹³ To date, the

¹⁰⁷ Only the first two grounds are considered in this article. The Court accepted that cases may arise in which the implied freedom of political communications could apply to communications about the courts and their processes if a discussion of legislative or executive action was implicated and the matter had a sufficient connection to a federal issue.

¹⁰⁸ *Hogan v Hinch* (2011) 243 CLR 506 [80].

¹⁰⁹ (1976) 134 CLR 495.

¹¹⁰ *Hogan v Hinch* (2011) 243 CLR 506 [91].

¹¹¹ *Ibid* [20] (French CJ).

¹¹² *Ibid* [22].

¹¹³ Examples of such blanket prohibitions include s 121 *Family Law Act 1975* (Cth) (banning publication of information that identifies a party or witness to a family court proceeding); s 10 *Children (Criminal Proceedings) Act 1987* (NSW) (providing that a criminal proceeding

Court has not defined the substance of open justice, suggested a methodology by which courts should exercise legislatively granted discretion to infringe open justice, or provided clear guidance about the limits of legislative power to interfere with open justice. Pressing questions about the nature and limits of open justice remain unanswered within Australian law.

3 *Conclusion: Australian approaches to open justice*

The Australian case law on open justice principles frequently articulates the importance of these principles to common law courts. Australian judges are nonetheless customarily reticent to recognise anything approaching a 'right' to open justice. Despite their asserted centrality, Australian case law has not yet coalesced around a coherent theory of the substance of open justice principles. Intermediate courts' decisions suggests that common law exceptions to the principle may be based on necessity, or may need to fit within one of a limited number of pre-existing categories. There exists considerable ambivalence about whether there is a strong common law principle of openness in relation to access to court records, as compared with the higher priority placed on openness in relation to oral proceedings.

Deference to parliament is apparent in all levels of the case law, although a limit to this deference appears from the High Court's emphasis on the need to grant discretion to courts that are statutorily empowered to restrict open justice. If unchecked, deference to parliament has the potential to become a particular threat to the principle of open justice. Returning to a core value of open justice – its capacity to promote informed debate about government, its processes and participants – the executive and legislative arms of government will, at times, have a considerable vested interest in maintaining secrecy in respect of some matters that come before the courts.¹¹⁴ Courts have a fundamental obligation to decide sensitive disputes impartially, according to generally applicable principles, and publicly. The implied constitutional principle of institutional integrity seems to permit courts invested with federal power to guard the common law tradition of openness to some extent. However, a lack of sustained attention to core principles, and a failure to consider how the heterogeneous manifestations of open justice engage those principles differently has led to inconsistencies within the Australian approach to court records and the role of the media. Appellate courts have offered little guidance to trial judges about how best to steer a course between safeguarding open justice and protecting countervailing interests. In contrast, Canadian courts have crafted a more coherent test that seeks to vindicate the principle of open justice in the most challenging cases, while paying careful attention to countervailing interests.

C *The Canadian approach to open justice*

The Supreme Court of Canada has articulated a strong commitment to the principle that any decision to limit public access to courts and court records should not be taken lightly. Canadian judges have sought to articulate a structured approach to balancing

should be closed to the general public when the accused is a child); and s 195 *Evidence Act 2008* (Vic) (prohibiting publication of questions ruled improper or otherwise not permitted by a trial judge. There may well be good reasons to impose blanket – or at least prima facie – prohibitions in such cases.

¹¹⁴ See eg, *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39 (the 'Defence Papers Case'); *In re Guardian News and Media Ltd and others* [2010] 2 AC 697.

open justice principles with countervailing interests. The Canadian approach posits a special role for the media in informing citizens who are unable to attend court about what has transpired there. While this approach has been influenced by the *Charter of Rights and Freedoms*,¹¹⁵ the Supreme Court of Canada has also articulated a common law foundation for its approach to open justice.

In *Attorney General of Nova Scotia v MacIntyre*, the Court identified a common law right to access court records.¹¹⁶ The Court considered whether a journalist could obtain access to a search warrant and associated information.¹¹⁷ The majority identified a number of 'broad policy considerations' at stake, including individual rights to privacy, protection of the administration of justice, the need to implement parliamentary intention with respect to search warrants and 'a strong public policy in favour of "openness" in respect of judicial acts.'¹¹⁸ Rejecting the argument that privacy interests justify routine secrecy in respect of executed search warrants, Dickson J declared that 'covertness is the exception and openness the rule' in relation to court records.¹¹⁹ Open access is accordingly presumptive but this 'right' can be curtailed to the extent necessary to protect an ongoing investigation, for example if a search warrant had not yet been executed. A fruitless search warrant should remain sealed in order to protect the privacy interests of innocent people.

MacIntyre preceded the *Canadian Charter of Rights and Freedoms* by three months, and the common law right identified in that case was soon supplemented with s 2(b) of the *Charter*, which protects the right to freedom of expression, including freedom of the press and other media. In a series of decisions beginning with *Edmonton Journal v Alberta (Attorney General)*,¹²⁰ the Supreme Court of Canada has identified the right to gain access to and communicate information regarding court proceedings as a core aspect of section 2(b). Based on this right, the Court struck down a statutory provision which significantly restricted the information that could be published about divorces and associated proceedings.¹²¹ Writing the leading judgment, Cory J held that 'the courts must be open to public scrutiny and to public criticism of their operation'.¹²² The media were regarded as central to this openness, because freedom of expression incorporates a 'right to information pertaining to public institutions', meaning that those who are unable to attend court have a right to learn what has transpired there.¹²³ Cory J held that this right applies equally to court proceedings and court documents.¹²⁴

In *Dagenais v Canadian Broadcasting Corporation*,¹²⁵ Lamer CJ disapproved the hierarchical common law approach to balancing freedom of expression and the right to

115 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (UK)*, c. 11.

116 *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175.

117 *Ibid* 181.

118 *Ibid* 183.

119 *Ibid* 185.

120 [1989] 2 SCR 1326.

121 *Ibid*.

122 *Ibid* [7].

123 *Ibid* [17].

124 *Ibid*.

125 [1994] 3 SCR 835.

a fair trial, which prioritized the right to a fair trial above countervailing rights.¹²⁶ Lamer CJ held instead that courts must achieve a balance between fair trial and other rights when they come into competition with one another.¹²⁷ The majority emphasized the range and complexity of interests at stake regarding publication bans. This recognition stemmed to a significant extent from the context of the case, which concerned applications by several accused in historical sexual assault cases for orders restraining the Canadian Broadcasting Corporation from airing a fictional program about sexual assault in Catholic orphanages.¹²⁸ The program did not report court proceedings and so did not directly engage the principles of open justice, but the Court's reasoning was quickly applied to non-publication orders and other infringements on open justice. Lamer CJ reformulated the common law rule in which the right to a fair trial had been prioritised over the right to freedom of expression. Restated, the *Charter*-compliant common law rule asks whether a publication ban is necessary to prevent a real and substantial risk to the fairness of the trial or another pressing interest and, if so, whether the salutary effects of the ban (in protecting a fair trial) outweigh its deleterious effects (on freedom of expression, broadly construed by the Court).¹²⁹ The test places the evidentiary and persuasive burden on the party seeking to infringe upon open justice.

The Court elaborated on achieving proportionality between open justice and countervailing interests in *Canadian Broadcasting Corporation v New Brunswick (Attorney-General)*.¹³⁰ The Court unanimously upheld the constitutionality of a statutory provision which permitted a sentencing judge to exclude members of the public from proceedings where necessary to uphold the proper administration of justice. The Court held that the statutory provision enabled a judge to craft orders which achieved proportionality between competing *Charter* rights to freedom of expression, fair trial and privacy, while promoting the proper administration of justice. The Court emphasised that the proper balance between these interests is context-dependent, and will vary from case to case. In *R v Mentuck*,¹³¹ the Court confirmed the broad application of a proportionality test:

the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner. ... The consideration of unrepresented interests must not be taken lightly.¹³²

The Court emphasised that the trial judge must look for reasonable alternatives to a publication ban, and restrict the scope of any ban as far as possible in order to safeguard open justice.

An express methodology, which starts from the presumption of promoting open justice, has therefore emerged from the Canadian case law. The *Dagenais-Mentuck* test requires the Court to engage in a careful identification of the interests engaged by an

¹²⁶ Reflected, eg, in *Syme v GM-Holden*, [1984] 2 NSWLR 294, 306. The UK may also be moving away from a hierarchical approach — see *Campbell v MGN Ltd* [2004] 2 AC 457 [55]–[56].

¹²⁷ *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835.

¹²⁸ *Ibid* [4]. Compare the limited and critical discussion of public interest provided in *General Television Corporation v DPP (Victoria)* (2008) 19 VR 68, [39]–[43].

¹²⁹ *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835 [52].

¹³⁰ [1996] 3 SCR 480.

¹³¹ *R v Mentuck* [2001] 3 SCR 442.

¹³² *Ibid* [37]–[38]. See also *R v ONE* [2001] 3 SCR 478.

application to limit open justice – including those interests that are not directly represented by any party to the proceeding.¹³³ Next, the necessity of the limit on open justice to protect a substantial countervailing interest must be considered, with explicit attention paid to the availability and reasonableness of alternative measures. If a limit to open justice is necessary, the court considers the salutary effects of the ban and weighs those benefits against its deleterious effects on the interests that were broadly defined in the first step. The limit will be imposed only if its benefits outweigh its harms, and the scope of that limit will be as narrow as is reasonable to achieve the salutary effect. The burden of demonstrating the necessity for a limit on open justice remains with the party seeking that limit throughout the process.

The September 11, 2001 terrorist attacks ushered in a new era of government secrecy, and a heightened sense of the potential risks of openness in court proceedings. In the wake of 9/11, Canada introduced new substantive crimes and special procedures for investigating suspected terrorist offences. One such provision permitted an investigative hearing to take place, in which witnesses were compelled to attend and answer questions about suspected terrorist offences.

The first judge to conduct an investigative hearing ruled that it should presumptively be conducted in camera. The Supreme Court of Canada rejected this presumption. It restated the open court principle as 'a hallmark of a democratic society' and a 'principal component of the legitimacy of the judicial process'.¹³⁴ While a majority accepted that large parts of investigative hearings may necessarily be secret, it held that both the existence of an investigative hearing and as much of the proceedings as possible should be made public.¹³⁵ The burden of proving the need for secrecy remains on the party seeking to close the courtroom. The majority took this opportunity to speak strongly against the temptations of secrecy: 'The unfolding of events in this case also illustrates how antithetical to judicial process secret court hearings are. Courthouses are public places.'¹³⁶ In 2005, perhaps weary of repeating itself, a unanimous Court rejected an application by the Crown to seal search warrants and associated court records: 'This argument is doomed to failure by more than two decades of unwavering decisions in this Court'.¹³⁷

The Court has also upheld limitations on open justice principles, particularly where these limitations are temporary or narrowly drawn. In all cases, such limitations are justified on the strength of countervailing interests. In *Re Vancouver Sun*, Justice Iacobucci concluded that an application for an investigative hearing must necessarily be held in camera and ex parte. In that decision, the majority also acknowledged that applications for search warrants should also be held in camera and ex parte.¹³⁸ In *Vickery v Nova Scotia*,¹³⁹ the Court upheld a decision to deny journalists permission to take a copy of a confession that was excluded from a trial on the grounds that it was involuntarily obtained. In other cases, the Supreme Court of Canada has upheld

133 Compare *Rinehart v Welker* [2011] NSWCA 345.

134 *Re Vancouver Sun* [2004] 2 SCR 332, [23] and [25].

135 *Ibid.* See also *Ruby v Canada (Solicitor-General)* [2002] 4 SCR 3.

136 *Re Vancouver Sun* [2004] 2 SCR 332 [52].

137 *Toronto Star v Ontario* [2005] 2 SCR 188 [30].

138 *Re Vancouver Sun* [2004] 2 SCR 332.

139 [1991] 1 SCR 671.

publication bans on complainants' names in sexual offence cases,¹⁴⁰ and confirmed the constitutionality of court rules that limit court reporters' use of television cameras and interview requests in courthouses.¹⁴¹ Adult defendants' names are often withheld where identifying the defendant would also identify the complainant. However, the Court has consistently overruled more sweeping publication bans.

The upshot of this whirlwind tour of the Canadian approach to open justice is a strong and persistent commitment to the principle that open justice is a right that should not lightly be infringed. The Court has consistently reinforced the starting presumption of openness, and emphasized that exclusion should constitute the exception. The Court has also developed the *Dagenais/Mentuck* test to guide a trial judge's determination of whether open access should be limited in a given case.¹⁴² This principle extends a 'firm guarantee of access' to information about court proceedings, including court records.¹⁴³ In contrast to the somewhat confusing and sometimes contradictory Australian jurisprudence, the Canadian case law has struck a relatively coherent balance between the principle of open justice and countervailing interests, providing clear guidance to trial judges who are tasked with securing open justice, and maintaining a strong sense of independence from legislative and executive impulses towards secrecy. While the *Charter* has played an important role in the development of the *Dagenais/Mentuck* test, the Canadian courts have also identified freestanding common law bases on which to protect open justice.¹⁴⁴

By directing courts to identify and protect the underlying values of open justice while accounting for the diversity of countervailing interests that may arise on a case-by-case basis, the *Dagenais/Mentuck* test offers a structured approach to managing the heterogeneity of open justice. The Court's rejection of any principled distinction between access to court records and access to court proceedings is in keeping with this focus on the underlying purposes and values of open justice. The Canadian approach is designed to achieve maximum protection of open justice while safeguarding pressing countervailing interests such as the privacy of sexual assault complainants.

A key difference between the Canadian and Australian approaches lies in the preparedness of the Supreme Court of Canada to recognise that the benefits of open justice extend well beyond the media's commercial interest in maximising circulation.¹⁴⁵ Canadian jurisprudence tends to focus on the rights of Canadian citizens to participate in discussion about governance, characterising Canadians' 'right to know about the civil or criminal justice system' as the end to which journalistic access to court information is directed.¹⁴⁶ In this regard, the Canadian approach is very like that

¹⁴⁰ See, eg, *Canadian Newspapers Co v Canada (Attorney General)* [1988] 2 SCR 122.

¹⁴¹ *Canadian Broadcasting Corp v Canada (Attorney General)* [2011] 1 SCR 19.

¹⁴² *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835; *R v Mentuck* [2001] 3 SCR 442.

¹⁴³ *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc*, [2001] 2 SCR 743 [72]; *R v Canadian Broadcasting Corp* (2010) 102 OR (3d) 673 (Ontario Court of Appeal).

¹⁴⁴ See especially *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175; *Vickery v Nova Scotia* [1991] 1 SCR 671.

¹⁴⁵ Individual Australian judges have also recognized this special role, as detailed in section 3.b.i. However, other Australian cases challenge this view, and it cannot be said that the Australian case law as a whole recognizes a special role for the media vis-à-vis the purposes of open justice.

¹⁴⁶ *Lac d'Amiante du Québec* [2001] 2 SCR 743; *Edmonton Journal v Alberta* [1989] 2 SCR 1326.

adopted by the UK Supreme Court in *Guardian News and Media*.¹⁴⁷ This approach adopts the values central to open justice as a compass by which one may find the right direction through particular disputes about openness.

IV CONCLUSION

Open justice describes a variety of practices that share a common focus on information about courts and a common goal of enabling informed scrutiny of government institutions. Three key features of open justice were identified in section 2: its purposes are multivalent; it can be exercised in diverse ways; and it is not absolute but must be weighed against other values. While the common law has a longstanding commitment to open courtrooms, and to enabling fair and accurate reporting of court proceedings, access to court records is a more contested dimension of the principles of open justice in Australia.

Contemporary judicial pronouncements in Canada and England suggest a strong commitment to open justice. This is especially true of Canada, where the *Dagenais/Mentuck* test applies to any measure taken to infringe open justice and adopts an expansive interpretation of activities protected by that 'right'. The primary benefit of the Canadian approach is that it accounts for the variety of interests at stake when open justice is engaged, with particular attention to the public interest in knowing about court processes and government action; and provides guidance to trial judges who must decide applications to limit open justice. Rather than adopting a binary approach to granting access, Canadian courts have crafted outcomes which maximise the openness of justice while safeguarding pressing countervailing interests such as the privacy of sexual assault complainants. A key dimension of the Canadian approach is a resistance to categorical reasoning in favour of a recognition that the diverse principles of open justice, and the range of countervailing interests that may potentially be engaged, require careful analysis on a case-by-case basis. The *Dagenais/Mentuck* test structures that analysis in a manner that ensures that no single interest is prioritised without regard to others. Under the Canadian approach, the sphere of conflict between open justice and countervailing principles is carefully delineated before any decision to limit open justice is contemplated. When a direct conflict arises the court first decides whether the public interest requires that open justice should yield to a countervailing interest in the particular circumstances and, if so, seeks to achieve a resolution that impairs open justice as little as possible while safeguarding the prioritised interest. This approach provides a helpful template for Australian courts.

In Australia, the status of some open justice principles is considerably more uncertain. The High Court of Australia has not offered clear guidance about open justice, although it seemingly now considers some aspects of open courts to be an essential characteristic of the judicial process. Older case law emphasises parliament's power to limit the principle of open justice, but emerging Chapter III case law provides a potential foundation from which to challenge the margins of that power. Judgments suggest that statutes may vest judges with discretion to limit open justice but also hold that parliament must not mandate closed courts.¹⁴⁸ Very little case law addresses how trial judges should exercise a broadly phrased statutory discretion to limit open justice,

¹⁴⁷ *In re Guardian News and Media Ltd and others* [2010] 2 AC 697.

¹⁴⁸ *Russell v Russell* (1976) 134 CLR 495; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Hogan v Hinch* (2011) 243 CLR 506.

and it is unclear whether courts possess an inherent power to issue non-publication orders that bind non-parties. The prevailing common law approach to limits on open justice seemingly turns on whether an application fits within a rigid set of pre-existing categories, or their analogues. This approach steers judges away from substantive engagement with the values protected by open justice, and those that stand opposed to it. However, the discussion provided in section 2 of this article suggests that open justice is too fundamental to judicial integrity and the separation of powers to be rendered vulnerable to parliamentary or executive control and too chimeric to be reduced to ossified categories of exclusion and inclusion. The Canadian approach to balancing the principle of open justice against competing values is to be preferred.

One common theme is the role of the media vis-a-vis the principle of open justice. The public interest in knowing about courts provides compelling reasons to adopt a robust system of open justice. However, Australian judges have expressed concern about the extent to which media outlets can be trusted to discharge their obligations to provide fair and accurate reporting of court proceedings. In cases where access is denied or non-publication orders are issued, judges in both jurisdictions often cite a concern about whether media reports of a proceeding will be inflammatory or simply misunderstood. This concern is arguably well-founded, and it is particularly acute in respect of jury trials prior to the commencement of a trial. However, general concern about media trustworthiness should not, in the absence of more specific evidence, compel non-publication orders or denials of access to court records.

The public interest in obtaining access to detailed and knowledgeable information about court processes should never be curtailed without careful consideration. In the absence of detailed and accurate information, misconception and prejudice is likely to flourish. Media can report court proceedings more accurately (and thereby be held to correspondingly higher standards) if they have access to better information. The need to ensure good information is particularly acute in cases which depend on a detailed documentary record or which turn on technical arguments. An increase in lengthy and complicated cases, coupled with a growing reliance on documentary records, highlights the need for effective public access to court records.

Judges and legal academics share an interest in encouraging informed debate and discussion about the judicial system:

The law, of course, largely controls the degree to which the open court principle is respected. 'Legal culture', however, has as much to do with the fortunes of the 'open court principle' as does the law. The law often provides only standards – not clear answers. The extent to which the open court principle is respected therefore comes down to attitude or the commitment to it among justice system participants.¹⁴⁹

Although there are risks inherent in openness, retreating to covertness holds tremendous dangers for the justice system and for democratic governance. Australia deserves a more fully reasoned judicial commitment to open justice than it has, in recent years, received.

¹⁴⁹ Paciocco, above n 14, 386.

