Open Justice – Seen to be Done

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Introduction

Walk into any courtroom and there are obvious features that distinguish it from other rooms. There is a bench for the judge, there are bar tables for counsel, there is a place for witnesses to give evidence – all of these things focus on the fact that courts are places where disputes are aired and decisions are made.

There are other features that are often overlooked, but are equally essential to the function of courts. In every courtroom there is a door to the outside world – it admits the parties, but also anyone else who, for whatever reason, wants to observe the proceedings. In every courtroom there is a public gallery – often little used, but even when empty symbolising an essential characteristic of courts – that the work of the courts is, and must always be, performed in the open.

We would all agree that justice is the achievement of fair outcomes by fair means – but that does not distinguish the courts from other decision makers. There are many important administrative decisions about our lives that we expect to be just - the assessment of how much tax we pay, applications for benefits or pensions, the issuing of licenses to drive cars or own a dog. But those decisions, however fair they are, are made in private.

The important characteristic of justice as delivered by courts is that the proceedings occur in public and are presided over by a judge who is completely independent of the parties and of the executive government. The independence of the judiciary is inextricably connected to the openness of the courts.

Yet open justice is something we spend little time thinking or talking about. It is taken for granted as simply an attendant feature of court architecture. Perhaps it is thought of as an anachronism – a hangover from when people flocked to courts

for entertainment. Ask those in the public service with responsibility for administering the courts what open justice means to them and they will likely say that it makes courts more expensive to run and less efficient. Parties to proceedings aren't usually much interested in the public being allowed to watch their cases. In these circumstances the principle of open justice has few active champions and could easily be removed or restricted without anyone much noticing. It is particularly at risk of being seen as dispensable when, for example, there is a public health crisis that makes public attendance at court problematic.

At least twice in the last year a major court building in Perth closed its doors to the public. Those who attended were met with a sign stating that only those with a direct interest in proceedings or who had express permission from a judge would be permitted to enter. The rationale for this was that the State was in lock-down for public health reasons. There was a perceived infection risk in members of the public attending and remaining in court buildings.[1] The courts were seen as just another public venue that had to close – in the same class as cinemas, restaurants and bars. The courts are, however, an essential service in society and some cases continued – though often with the parties attending by video or audio link with no provision for observation by the general public. Should we so readily accept that the business of the courts can be done privately?

What I want to do today is examine the origins and nature of the principle of open justice. I will say something about the possible rationales for the principle. I will consider the application of the principle in this State and then turn to threats to open justice and how they can be met.

Origins and Nature of the Principle of Open Justice

In the Anglo-American tradition of justice (of which Australia is an inheritor) the criminal trial has a long history of being open to all who cared to observe. This has been so since at least the beginning of reliable records. In a report of the Eyre of Kent, a general court held in 1313 to 1314, it was said that:

"the King's will was that all evil doers should be punished after their just deserts, and that justice should be ministered indifferently to rich as to poor; and

[1] There is historical precedent for this. The Black Assizes of the 16th century were so named because outbreaks of the bubonic plague were associated with court sittings (in particular, the Black Assize of Oxford in 1577 after which approximately 300 died)

for the better accomplishing of this, he prayed the community of the county by their attendance there to lend him their aid in the establishing of a happy and certain peace that should be for the honour of the realm and for their own welfare"[2]

In 1565 Sir Thomas Smith wrote that trial proceedings were:

"*done openly in the presence of the judges...the prisoner, and so many as will or can come so near as to hear it, and all depositions and witnesses given aloud, that all men may hear from the mouth of the depositors and witnesses what is said."*[3]

Both Hale[4] in the 17th century and Blackstone[5] in the 18th century referred to openness as being important to ensure the proper functioning of a trial. They mentioned that it gave assurance that the proceedings were conducted fairly to all concerned, it discouraged perjury, discouraged misconduct by the participants and discouraged decisions based on partiality. This remained true in 1829 when the Court of Kings Bench said in *Daubney v Cooper*[6] that the presumption of openness was one of the essential qualities of English justice.

Jeremy Bentham was no admirer of the common law, but he did see great value in the openness of courts. He said:

"*Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial*"[7]

Bentham believed that open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public. Most importantly he believed it was the most effective of all possible safeguards from the abuse of power. In his *Rationale of Judicial Evidence* he said:

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[2] W Holdsworth "A History of English Law" 1927, 268
[3] T Smith "De Republica Anglorum" 101 (Alston edition 1972)
[4] M Hale "The History of the Common Law of England" (6th edition 1820) 343 to 345
[5] W Blackstone "Commentaries" 372 to 373
[6] 10 B & C 237, 240; 109 ER 438, 440
[7] J Bowdler (ed) "Works of Jeremy Bentham" (1843) Vol 4, 316-317

"*Without publicity, all other checks are insufficient: in comparison with publicity all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks*."[8]

One can see from this short history that a number of rationales for courts being open were recognised from the earliest times. First, it inspired public confidence in the justice system. If the public could hear the evidence themselves, watch the proceedings and then hear the decision and the reasons for it, they could form their own judgment as to whether the system was operating fairly and delivering just outcomes. Second, it encouraged those working in the system, including the lawyers and the judges to meet the high standards that the public would expect of them. Third, it ensured acceptance of the courts as the fair and appropriate way to resolve disputes and to mete out justice to wrongdoers. This dampened down any desire for recourse to vigilante justice or mob rule. Fourth, it demonstrated to the public the operation of the rule of law. It was practical proof that everyone is subject to the same laws and the same procedures, regardless of their rank or wealth. Fifth, it served to educate the public about the law and how it operated.

One other rationale mentioned by Hale and Blackstone was that public proceedings encouraged witnesses to tell the truth. That one is more open to doubt, I think. The assumption of those learned authors was that it is harder to tell a lie under public scrutiny. This assumption would have difficulty surviving the experience of the last few years of US politics. The fact is that many people are accomplished liars and are encouraged, rather than deterred, by an audience.

The Principle in Modern Times

Whatever the rationale, the principle of open justice had become so deeply ingrained by the early years of the 20th century that it was considered to be of constitutional significance. That was so even in the UK, where of course there is no written constitution.

In 1913 the House of Lords decided the case of *Scott v Scott*.[9] That was a case in which a wife sought a declaration that her marriage was void on the grounds of

[8] J Bentham "Rationale of Judicial Evidence" (1827) 524
[9] *Scott v Scott* [1913] AC 417

her husband's impotence. The application was not contested but was nonetheless held in camera. Sometime later it seems that the ex-husband began spreading rumours about his former wife's sanity and the reasons why their marriage had ended. To contest these rumours she obtained the shorthand notes of the proceedings and sent copies of them to several people. Her ex-husband then sought an order that she be committed to prison for contempt on the grounds that she had disclosed the nature of the proceedings in contravention of the orders of the court. Out of these sordid facts the House of Lords discerned an important principle. Why, they asked, were the proceedings in camera at all?

Viscount Haldane said that the broad general principle was that courts must administer justice in public. He said that there were only a few narrow exceptions that occurred where it was established that justice could not be done if it had to be done in public. Whether proceedings should be held in camera was determined by necessity, not convenience. The default position is that courts are open and a person wishing to close a court carries the burden of showing that it is necessary to do so. It was not enough that the issues were "unsavoury" and far less was it enough that the parties might agree that the court should be closed.[10]

Lord Atkinson, concurring, said:

"*The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."*[11]

Lord Shaw went further saying that closing the court was beyond the power of the first instance judge. He said that publicity of court cases was one of the surest guarantees of liberty. He described the openness of courts as being a constitutional right and not something that fell to the mere exercise of discretion by a judge. His lordship went on to say, when rejecting the proposition that the courts could create new categories of exclusion: "to remit the maintenance of

[10] Viscount Haldane at 437 to 438
[11] Lord Atkinson at 463

constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand".[12]

Perhaps, needless to say, Mrs Scott did not go to prison. Apart from the many important statements of principle in this case, what is also interesting is that this was a matrimonial cause. Unlike criminal trials which had always be held in public, matrimonial proceedings had formerly been conducted by ecclesiastical courts in private. But the House of Lords held that when that jurisdiction was passed to the general courts it was necessarily implied that it would be subject to the principle that it would be exercised in open court.[13]

The tension between open justice and the desire to keep the details of relationships private resulted in other Family Law cases where this issue was raised. In 1936 the Privy Council had to consider the issue in the case of *McPherson v McPherson*[14], an appeal from the Supreme Court of Alberta. In that case the first instance judge had made orders dissolving a marriage whilst sitting in the Judge's Law Library. Entry to the library was gained through a double swing door that opened off a public corridor. The door, whilst unlocked had a brass plate with the word 'Private' in black letters written on it. The word Private was enough to deny the proceedings one of the essential qualities of a judicial trial. The Privy Council stated:

"*Publicity is the authentic hallmark of judicial as distinct from administrative procedure…The court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none*"[15]

In Australia the High Court was an early adopter of what had been said by the House of Lords in *Scott*. Later in the same year, 1913, the High Court was dealing with an appeal from a decision that a marriage was null and void in the case of

[12] Lord Shaw at 476 to 477
[13] Viscount Haldane at 434
[14] [1936] AC 177
[15] *McPherson v McPherso*n at 200

Dickason v Dickason.[16] The appellant applied for the appeal to be heard in camera. The court unanimously rejected that application. Barton ACJ said that:

"*there is no inherent power in a court of justice to exclude the public, inasmuch as one of the normal attributes of a court is publicity, that is, the admission of the public to attend the proceedings*."[17]

His honour went on to say that power to exclude could be conferred by statute but that there was no such power in the case of the High Court, to the contrary the Judiciary Act shows a clear intention that the jurisdiction of the court should be publicly exercised.

The issue arose again in the High Court in 1976 in the case of *Russell v Russell*.[18] As you may recall in 1975 the Family Law Act had been passed. Initially proceedings continued to be heard in the State Courts in the exercise of federal jurisdiction. One of the sections of the Act as it then stood provided that all proceedings under the Act in State Courts were to be heard in closed court. By majority the High Court held that this was not a law investing State Courts with federal jurisdiction because it purported to alter the essential nature of those courts and was therefore invalid. Gibbs J said that:

"*It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted publicly and in open view. This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that the courts are held openly and not in secret is an essential aspect of their character*"[19]

In 1986 in the NSW Supreme Court case of *Fairfax v Police Tribunal*[20] McHugh JA referred to the limited exceptions to the open justice principle. His Honour said:

[16] (1913) 17 CLR 50
[17] *Dickason v Dickason* at 51
[18] (1976) 134 CLR 495
[19] *Russell v Russell* at 520
[20] (1986) 5 NSWLR 465

"*The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection parliament has modified the open justice rule*" [21]

In the US the seminal case is *Richmond Newspapers v Virginia*[22] in which the Supreme Court held that a closure order in a murder trial was not properly made. The facts are interesting. A man was facing a fourth trial for murder, his conviction after the first trial having been overturned on appeal and two subsequent trials having been aborted. At the start of the fourth trial defence counsel applied for the court to be closed on the basis that there was risk that the evidence would be reported to witnesses who were yet to come. The trial judge made the order, later justifying it on the basis that if he was satisfied that the rights of the accused were infringed in any way and the rights of others were not overridden he could exclude the press and the public. The next day the judge (in closed court) granted a defence motion to exclude prosecution evidence, excused the jury and found the accused not guilty. A local newspaper appealed the closure order.

Chief Justice Burger delivered the leading judgment. He concluded that under the first and fourteenth amendments to the US Constitution the public and the press had a guaranteed right to attend criminal trials. These amendments protect (amongst other things) freedom of speech and freedom of assembly in that country. His honour also noted that criminal trials had long been presumptively open in the English tradition. Besides all the benefits I have previously referred to, he also referred to the therapeutic value of trials, saying;

"*When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help", as indeed they did regularly in the activities of vigilante 'committees' on our frontiers…Civilized*

[21] *Fairfax v Police Tribunal* at 476
[22] 448 US 555

societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner or in any covert manner…People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[23]

I hope I can be forgiven for adding a personal anecdote here. Every couple of years the Supreme Court holds an open day during which the public can tour the building, including what might be called the backstage areas. The judges give short talks and invite questions – some of which can be quite pointed. On one occasion I was asked, with all the powers we have and security of tenure, who were judges accountable to? One answer is to say that first instance judges are accountable to the Court of Appeal. Another might be to say that we can be removed by Parliament in the event of serious misconduct. But my answer was that judges are held accountable every day because we are obliged to do our work in public. There are few, if any, other people in society who are obliged to perform their role in public and to explain, again publicly, every decision we make. Our work is almost uniquely open to scrutiny, public debate and criticism. And this often occurs.

The Application of the Principle in Western Australia

As important as the principle of open justice is, there are two well recognised exceptions to it. First, a court may be closed where it is necessary to do so in order to achieve justice. That is a high bar and the onus falls on the party wanting to close a court to establish that it is necessary to do so. Second, Parliament can (subject to any constitutional limitations) pass laws limiting access to the courts in certain circumstances.

In this State the circumstances in which a court conducting criminal proceedings can be closed is provided for by the *Criminal Procedure Act* 2004. Section 171(2) of that Act states that:

[23] *Richmond Newspapers v Virginia* at 571 to 572

"*Subject to this section, all proceedings in a court are to be in open court and the courtroom where the court sits is to be open to the public unless this Act or the rules of the court or another written law provides otherwise*."

There are then a series of exceptions, including for orders for witnesses to remain out of the courtroom until they are called. An order can also be made to exclude all persons, or a class of persons, or to prohibit or restrict publication of certain information, if the court is satisfied that it 'is in the interests of justice to do so". Clearly, the operative words here are "the interests of justice" – a judge cannot close a court merely because the parties seek it or because it would be inconvenient to admit the public.

Although the word 'necessary' does not appear in s171 it would be hard to resist a conclusion that there must be a *necessity* to close the court and it must be a necessity arising from the interests of justice (not one that serves some other purpose, however well meaning) – that is to say that justice could not be achieved unless the court is closed. In this way the two exceptions merge.

It is possible to think of circumstances where the issue could arise – in cases involving alleged blackmail or extortion where publicity could achieve the very thing the accused was threatening the victim with. Or cases involving particularly vulnerable witnesses who are likely to be unable to give evidence in public. Or cases involving trade secrets, police methodology or undercover operatives. But often there are things that can be done to ameliorate the risks to justice without completely closing the court. Special witness orders or orders suppressing publicity of names or identifying information, for example.

Like the *Richmond Newspapers* case in the US, the issue has most often been raised in this State by media organisations seeking to resist suppression orders. In *Re Bromfield; Ex Parte West Australian Newspapers*[24] the newspaper sought a prerogative writ to review an order by a magistrate prohibiting publication of evidence at a preliminary hearing. That case established that the newspaper had sufficient interest to establish standing to be heard in opposition to the making of the order and to seek the prerogative relief. Malcolm CJ recognised that the press are effectively representatives of their readers. His honour said:

[24] (1991) WAR 153

"*The administration of justice is a matter of public interest. Not all members of the public are able to attend court proceedings. The public nature of judicial proceedings is facilitated by the publication of fair and accurate reports of the proceedings in our courts….It is in the interests of the administration of justice and in the public interest that the public be fairly and accurately informed of what takes place in our courts. This is also an aspect of free speech*"[25]

In *Bromfield* and the later case of *Re Robins ex parte WA Newspapers*[26] the Full Court recognised that there was a power to suppress publication of evidence from preliminary hearings in order to ensure that the accused person's future trial was not prejudiced. However, the importance of the principle of open justice was so great that no order should go further than was necessary to protect the interests of justice. Accordingly, before any suppression order was made the magistrate was obliged to consider the time that would elapse before any trial was likely to take place and what directions could be given to a jury to prevent prejudice. These cases reveal an intention to read down any statutory provision limiting access to the courts – or at least to interpret such provisions as only limiting such access to an extent which is strictly necessary.

There are a number of things which I would suggest flow from this:

1. The starting point, and default positon, is that all courts (and, in particular, criminal courts) are open to the public;

2. A party wanting a court to be closed bears an onus of establishing that it is necessary to do so in the interest of justice;

3. The interests of justice do not justify closing a court if there is some other means by which the interests of justice can be met (that is, can any concerns about the interests of justice be met in some way other than excluding the public?);

4. A hearing is required to determine whether a court should be closed. The parties affected by the proposed closure must be afforded an opportunity to be heard at that hearing (and that includes the press – who may need to be notified of the application);

[25] *Re Bromfield* at 164
[26] (1999) 20 WAR 511

5. Courts can only be closed by a written law (an Act or subsidiary legislation) or an order of the court.

What must be done to preserve and protect open justice?

If public access to the courts is to remain meaningful it is important that proceedings be understandable. In jury trials this is usually assured because there is a need to conduct the proceedings so that the members of the jury can understand. But in civil trials, appeals, sentencing proceedings and criminal trials by judge alone, there are often steps taken to increase efficiency that effectively exclude understanding by those in the public gallery. For example, the use of witness statements as evidence in chief in civil trials, the tendering of documents that are not displayed or read out, and reliance on written submissions can all have this effect. Whilst I am not suggesting that court proceedings be run for the benefit of those in the public gallery, we do need to bear in mind that the less understandable proceedings are the less likely the public is to attend and the less likely we will be to earn the public confidence that comes with that attendance.

It must also be remembered that some rules developed by the courts and some written laws proceed upon an assumption that the courts are open. I mention but two of these. The rule regarding apprehended bias uses a test that requires the court to consider whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the issue.[27] The other example is s31A of the *Evidence Act* 1906 dealing with the admissibility of propensity evidence which provides that one of the conditions for admissibility is whether fair-minded people would think that the public interest in adducing all relevant evidence must have priority over the risk of an unfair trial.[28] These tests would have an abstract, if not meaningless, quality if the courts were not generally open.

So if the courts are required to remain open, and indeed it is desirable that they be so – what does this mean in pragmatic terms? What practical obligations do the courts and the executive have in ensuring that the public continue to have

[27] *Michael Wilson and Partners Ltd v Nichols* (2011) 244 CLR 427 [31]
[28] See s31A(2)(b)

access to the courts? "Open" in this context must mean more than whether or not there is a sign on the door.

I would suggest that openness must have the following attributes:

1. Notification – it must be possible for any person to determine what cases are being dealt with in the courts at any particular time. Court lists must be comprehensive, accurate and posted in places where they are easily found. They must also be posted at least the day before so that those who want to attend particular proceedings receive sufficient notification;

2. Accessibility – the room in which proceedings should be held should be reasonably accessible to all who want to attend. There should be no unreasonable impediment to attending. Any security checks or register of attendance (such as the SafeWA app) should be proportional and not such as to prevent or unreasonably restrict or deter attendance;

3. Accommodation – the courtroom should have a public gallery that allows for the public to clearly hear and see what occurs. That may require electronic screens near the gallery so that they can see any witnesses or evidence that is projected on them. If those who want to attend exceed the seating capacity then consideration should be given to using remote galleries, live-streaming or posting recordings on the internet. This is also relevant to accessibility – given that many people are unable to attend and are more likely to rely on other ways of obtaining information;

4. Transparency – to the extent possible the proceedings should be understandable by any member of the public who attends. That is, the relevant evidence and arguments should be exposed in open court so that anyone can see what the dispute is about and how it is resolved;

5. Publication of Reasons – where a decision is reserved and written reasons given, those reasons should be published and made available to anyone who wishes to read them. The best way of achieving this in the

> modern age is to put them on the internet on an open access site (for example the Department of Justice portal or AustLII).

It is apparent from this that judges have to be vigilant in maintaining the openness of the courts. The parties may not care much or might even be in agreement that they would rather the court be closed – but it is not their right to attend that is in issue. The press certainly have a role to play and have the resources to challenge orders on occasions – but reporters are increasingly thin on the ground and the public should not have to rely on commercial media organizations to vindicate their right to attend. Nor is allowing only the press in to court a substitute for public access.

This brings me back to the topical issue of the public health crisis and the rules and regulations put in place at various times in the last 12 months to deal with that. Understandably those regulations had a public health focus. Concern to ensure that the health and safety of everyone was adequately protected was the paramount consideration. But in the desire to act swiftly and decisively was the importance of open courts as a fundamental principle of our justice system overlooked, or given sufficient attention?

As it happens, at the time of the first lock-down I was presiding over a trial that had attracted a great deal of public interest. I was not in favour of locking out the public. In my view it was vital that the public be allowed to attend to ensure public confidence in the process and the outcome. Although numbers were limited by the need to maintain social distancing the court room in which I conducted that trial was never closed. Increased cleaning and hand sanitiser stations were provided. I also recognised that many people were unable to attend because movements were restricted so I authorised the placing of recordings of each day's proceedings on the court website. Unfortunately live-streaming was impossible because there were some names suppressed which had to be edited from the recordings before they were posted.

I don't mention this for any reason other than to say it is incumbent on us all to ensure that the courts remain open. Even in a crisis where attendance at court by the public is difficult, dangerous or ill-advised, there are often ways to ensure that public access is maintained. We are often all too ready to give up or suspend our

rights in a crisis. The institutions of a democratic society can wither away if we forget the rationale for them.

In a post-Covid world there will be pressure for more interactions to occur electronically rather than in person – this could easily lead to court proceedings that no-one other than the parties will see or hear or study or even know about. Court rooms could become redundant and open justice a mere relic of a bygone age. If that happens the independence and integrity of the judiciary as a separate arm of government will be threatened.

To paraphrase Chief Justice Burger, justice will not function in the dark. Nor will it survive behind closed doors.[29]

[29] A more detailed consideration of the issues raised in this paper can be found in papers published by The Honourable JJ Spigelman AC, see "The Principle of Open Justice: A Comparative Perspective" (2006) UNSW Law Journal, Volume 29(2) p147 and "Seen to be Done: The Principle of Open Justice" Parts 1 and 2, (2000) Australian Law Journal, Volume 74 p290 and 378