
MAINTAINING THE PRINCIPLE OF OPEN JUSTICE: PRIVACY AND THE OPEN COURT RULE

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CERTIFICATE OF ORIGINALITY

I certify that this thesis has not already been submitted for any other degree or diploma in any other university or other institute of higher learning, is not being submitted as part of a candidature for any such degree or diploma, and does not contain any material which has been accepted as part of the requirements for any such degree and diploma.

I also certify that the thesis does not contain any material previously published or written by another person, except where due acknowledgement is made in the text.

I also certify that the thesis has been written by me and that, to the best of my knowledge and belief, any help I have received in preparing the thesis, and all sources used, have been acknowledged in the thesis.

Reza Cyrus Vatandoust
Certified on 27 June 2014

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R v Felixstowe Justices; Ex parte Leigh [1987] QB 582

R v Felixstowe Justices; Ex parte Leigh (1987) QB 582; [1987] 1 All ER 551; [1987] 2 WLR 380

R v Glennon [2001] VSCA 17

R v Governor of Lewes Prison; Ex parte Doyle [1917] 2 KB 254

R v Horsham Justices; Ex parte Farquharson [1982] QB 762; [1982] 2 All ER 269

R v Howell [2003] EWCA Crim 486

R v K [2003] NSWCCA 406

R v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254; [1956] ALR 163

R v Kwok [2005] NSWCCA 245 [2005] NSWCCA 245; (2005) 64 NSWLR 335

R v Lodhi [2006] NSWCCA 101; (2006) 65 NSWLR 573

R v Long (2002) 128 A Crim R 11 at 38, 39

R v MacFarlane; Ex parte O'Flanagan and O'Kelly [1923] HCA 39; (1923) 32 CLR 518

R v McLachlan [2000] VSC 215

R v Md Kowser Ali [2008] NSWDC 318

R v Oakes [1986] SCR 103

R v Paddington Valuation Officer ex parte Peachey Property Corporation Ltd (1966) 1 QB 380; [1965] 2 All ER 836 (QB)

R v Perish; Perish & Lawton [2012] NSWSC 355

R v Perish; R v Lawton; R v Perish [2011] NSWSC 1101

R v Peterson [1992] 1 VR 297

R v Richards & Bijkerk [1999] NSWCCA 114; (1999) 107 A Crim R 318

R v Savvas (1989) 43 A Crim R 331

R v Secretary of State for the Home Department ex parte Shingara and Radiom [1997] 3 CMLR 703

R v Smith (1996) 86 A Crim R 308

R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General [1975] QB 637 at 644 per Lord Widgery CJ

R v Sussex Justices; Ex parte Macarthy [1924] 1 KB 256

R v Tait (1979) 46 FLR 386; (1979) 24 ALR 473

R v Young [1999] NSWCCA 166 (7 July 1999)

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Re Guardian News and Media Ltd [2010] UKSC 1

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Re Nolan; Ex Parte Young [1991] HCA 29; (1991) 172 CLR 460 (27 June 1991)

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Rinehart v Welker [2011] NSWCA 403 (7 December 2011)

Rinehart v Welker [2011] NSWCA 425 (21 December 2011)

Rinehart v Welker & Ors [2012] HCATrans 7 (1 February 2012)

Rinehart v Welker and Ors [2011] NSWCA 345 (31 October 2011)

Rinehart v Welker [2012] NSWCA 1 (13 January 2012)

Roberts v Parole Board [2004] EWCA Civ 1031

Robinson v NSW and Others [2013] BC201313210 1398 ((Unreported, NSWSC)

Roe v Wade [1973] USSC 43; 410 U.S. 113; 93 S.Ct. 705

Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327

Russell v Russell [1976] HCA 23; (1976) 134 CLR 495, 520

Russell v Russell; Farrelly v Farrelly (1976) 9 ALR 103

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S and another v United Kingdom (2008) 25 BHRC 557 (App nos 30562/04 and 30566/04)

S and Marper v the United Kingdom, Case 30562/04 [2008] ECHR 1581

Scott v Scott [1913] AC 417

Seven Network (Operations) Limited & Ors v James Warburton (No 1) [2011] NSWSC 385 (5 April 2011)

Showtime Touring Group Pty Ltd v Mosley Touring Inc [2011] NSWSC 1401 (22 November 2011)

Silbert v Director of Public Prosecutions for Western Australia (2004) 217 CLR 181; (2004) 205 ALR 43; (2004) 78 ALJR 464; [2004] HCA 9; BC200400674

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SPM v LWA [2013] QSC 138 - BC201309888

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Southern Pacific Terminal Co v ICC, USSC 36; 219 U.S. 498; 31 S.Ct. 279; 55 L.Ed. 310; Nos. 459, 460 (1911)

State Drug Crime Commission (NSW) v Chapman (1987) 12 NSWLR 447

Sullivan v Moody [2001] HCA 59; (2001) 207 CLR 562; (2001) 183 ALR 404

Tame v New South Wales [2002] HCA 35; 211 CLR 317; 191 ALR 449; 76 ALJR 1348 (5 September 2002)

Taylor v Attorney-General [1975] 2 NZLR 675

TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82; (2002) 54 NSWLR 333

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Thomas v Mowbray [2007] HCA 33 [2007] HCA 33 (2 August 2007)

Tomkins v Civil Aviation Safety Authority [2006] FCA 1253; 91 ALD 645

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United States v McVeigh [1997] USCA 10 282; 106 F.3d 325; 65 USLW 2543, 97 CJ C.A.R. 196 (11 March 1997)

United States v Melendrez [2004] USCA9 751; 389 F.3d 829 (9 November 2004), (United States)

United States v Procter & Gamble Co [1958] USSC 102; 356 U.S. 677; 78 S.Ct. 983; 2 L.Ed.2d 1077; No. 51 (2 June 1958)

United States v R Amodeo Newsday Inc. [1995] USCA2 1300; 71 F.3d 1044; 24 Media L. Rep. 1203 (8 December 1995)

United States v Sells Engineering, Inc [1983] USSC 161; 77 L.Ed.2d 743; 103 S.Ct. 3133; 463 U.S. 418; No. 81-1032 (30 June 1983)

United States Department of Justice, et al., Petitioners v Reporters Committee for Freedom of the Press et al. [1989] 489 US 749

United Telecasters Sydney Ltd v Hardy (1991) 23 NSWLR 323

University of Western Australia v Gray (No 20) (includes corrigendum dated 29 April 2008 and 22 April 2008) [2008] FCA 498 (17 April 2008)

USA v Tariq Hamad [2008] USCA6 715 (13 November 2008) (United States)

A v Hayden (ASIS case) [1984] HCA 67; 156 CLR 532; (1984) 56 ALR 82; (1984) 59 ALJR 6

Victoria Park Racing and Recreation Grounds Co Ltd v Taylor [1937] HCA 45; (1937) 58 CLR 479

Viro v R [1978] HCA 9; (1978) 141 CLR 88

Von Hannover v Germany [2004] ECHR 294

Von Hannover v Germany (no 2) 40660/08 [2012] ECHR 228

Von Hannover v Germany (No 3) - 8772/10 - Chamber Judgment (French Text) [2013] ECHR 835

Wainohu v State of New South Wales (2011) HCA 24; (2011) 278 ALR 1; (2011) 85 ALJR 746; BC201104388

Waterhouse v Broadcasting Station 2GB Pty Ltd (1985) 1 NSWLR 58

Weiss v R [2005] HCA 81; (2005) 224 CLR 300; (2005) 223 ALR 662; (2005) 80 ALJR 444; 158 A Crim R 133

Welker & Ors v Rinehart [2011] NSWSC 1094 (13 September 2011)

Welker & Ors v Rinehart & Anor (No 6) [2012] NSWSC 160 (6 March 2012)

White v Jones [1995] UKHL 5

Wik Peoples v State of Queensland (1996) 187 CLR 181

William Thomas Bartlett v Claire Patricia Weir, Henry J T Rook, Noel E Aikman, Philip Edwards and Michael B Mckay [1994] FCA 1143; (1994) 72 A Crim R 511

Williamson v. Lacy 86 Me. 80, 82, 83, 29 A. 943, 944, 25 L.R.A. 506

Witham v Holloway (1995) 183 CLR 525 (HCA)

Wood v Midgley (1854) 5 De GM & GBy 41; 43 ER 784

Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317

Wright v Western Australia [2010] WASCA 199; (2010) 203 A Crim R 339

"X" v Sydney Children's Hospitals Specialty Network & Anor [2011] NSWSC 1272 (27 October 2011)

Yao Essaie Motto & Ors v Trafigura Ltd and Trafigura Beheer BV [2011] EWHC 90201 (Costs)

Ying v Song [2009] NSWSC 1344

Yuen Kun Yeu v Attorney-General (Hong Kong) [1988] AC 175

Yao Essaie Motto & Ors v Trafigura Ltd and Trafigura Beheer BV [2011] EWHC 90201 (Costs)

Ying v Song [2009] NSWSC 1344

Yuen Kun Yeu v Attorney-General (Hong Kong) [1988] AC 175

ABSTRACT

Transparency and consistency of judicial decision making is a prerequisite to the operation of the principle of open justice in all common law legal systems. However, the rapid implementation of digital law reporting, giving rise to free access to law and its movement, the consequent increased levels of publication and dissemination of legal information on the internet, has brought about unintended consequences for the effective application of that principle. Whereas in the past, the open court rule operated on a theoretical level, where court decisions were effectively available only to legal practitioners and some academic institutions by subscription, today the open court rule operates at a very practical level, where judgments are readily and freely accessible, posing real risks to privacy. One such risk is that once 'published' on the internet, personal information obtained from members of the public and those involved in court proceedings, is published in perpetuity, making the ability to exercise control over personal information impracticable. There is significant potential for misuse and abuse. Powerful search engines are able to instantly locate specific information with minimum effort. This is important, particularly in light of serious issues relating to identity theft, disclosure of personal information to third parties, issues relating to reputation, economic loss and failure to lead a private life.

This thesis examines the interaction of the open court rule and privacy in the context of the digital dissemination of judicial decisions, with a specific focus on the common law and with reference to the free access to law and its movement. It is suggested that the principle of open justice is comprised of a number of important sub-elements or rules working together in symbiosis, two of which are the central focus of this thesis - privacy and the open court rule. This thesis argues that privacy should not be treated as being in conflict with the principle of open justice, but rather is better conceptualised as an exception to the open court rule. There are several important reasons for this, including the fact that privacy has always existed alongside the open court rule and that privacy is not the same as secrecy. The thesis proposes practical and analytical dimensions of privacy protection expressed through the open court rule and in line with the Declaration on Free Access to Law and the Hague Conference Guiding Principles, in order to regulate personal information for the maintenance of the principle of open justice and the rule of law. The thesis does not propose that the principle of open justice be altered. On the contrary, it is essential that a presumption of openness flowing from the open court rule remains in place and that the principle of open justice remains intact. To ensure this outcome and to administer justice, courts may adopt and adhere to policies designed to protect individual privacy regarding the disclosure of judicial information on the world wide web. This thesis suggests such changes at both a practical and theoretical level.

CHAPTER 1

INTRODUCTION

In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial. Jeremy Bentham¹

Law reporting changed forever with the commencement of the free access to law and its subsequent movement (FALM). Free access to law resulted in the wide publication of free public legal information on the world wide web by way of the internet. Free access to law encompasses a number of important factors, including new and improved technology, free access to the internet, and public demand for fast and reliable access to legal information.

At its core, FALM is based on the premise that public legal information from all countries and international organisations is part of the common heritage of humanity, ought to be provided on a non-profit basis and free of charge, and that while the right to publication and dissemination of primary and secondary information is afforded to legal information institutes, the responsibility of ensuring the privacy of litigants and access for republication lies with courts and legislative bodies that create or control² that information.³

FALM originated from the concept that legal information should be accessible freely to everyone with access to the internet, with the Latin maxim *Ignorantia juris non excusat* which translates to 'Ignorance of the law does not excuse'.⁴ From an historical

¹ *The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring, (William Tait, 1838-1843) vol 4, 31.

² See Chapter 3, control in the context of republication. Also see general discussion in Chapters 6-9 regarding the idea of control and the varying degrees of control over personal information as a significant determining factor over the presence of privacy.

³ See Appendix E, 'Declaration of Free Access to Law'.

⁴ Hon. Justice Michael Moore, 'Free Access to Law and the Development of the Rule of Law in Asia' <<http://www.austlii.edu.au/au/journals/FedJSchol/2009/2.html>>.

perspective, the modern idea of free access to law is rooted in the ancient principle of open justice, which was and is integral to the rule of law. As one of the strongest advocates of the principle, Jeremy Bentham argued that open justice guarded against judicial indiscretion, arbitrary exercise of power by judges, and safeguarded against unethical behaviour.⁵

This principle has been fundamental to legal systems at least since Roman times.⁶ At the same time, the open court rule which functions within that principle, has never been absolute.⁷ Bentham expressed the need for exceptions such as the need to keep causes secret for the sake of decency, for the protection of reputation and to preserve the tranquillity and reputation of families from unnecessary vexation from the disclosure of facts prejudicial to their honour.⁸

The principle of open justice, amongst other things,⁹ requires that court proceedings are conducted in the open, before the public. This is known as the open court rule. The identity of parties, along with other personal information revealed by proceedings, is normally published as part of the court decision, as a matter of public record.¹⁰ As such, those seeking access to the open court, are generally not afforded the right of having their identity and associated personal information protected. This idea is underpinned by the notion that law, including the administration and application of laws, must be public and ascertainable or knowable.¹¹

⁵ *The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring, (William Tait, 1838-1843) vol 4, 305, 316-317.

⁶ Sir William Blackstone, *Commentaries on the Laws of England*, Book III, ch. 23, II (Dawson reprint 1966), 373-374.

⁷ *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334, at 56 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See Chapter 3 for detailed discussion and analysis on the exceptions to the open court rule.

⁸ Jeremy Bentham, *Rationale of Judicial Evidence* (Garland Facsimile ed. 1978, 1827), quoted in Garth Nettheim, 'The Principle of Open Justice' (1984) 8(1) *University of Tasmania Law Review* 265.

⁹ The principle contains within it other rights and obligations imposed by the principle on the administration of justice. See Chapter 2, 'The Open Court Rule'.

¹⁰ *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520; *Rinehart v Welker & Ors* [2012] HCATrans 7 (1 February 2012).

¹¹ James J. Spigelman, 'Open Justice and the Internet' (2004) 16(1) *Judicial Officers Bulletin* 5.

A departure from the open court rule is only justified in exceptional circumstances. There are a number of statutory and common law exceptions. Recent legislative developments in New South Wales include the *Court Information Act 2010*,¹² which provides access to court documents for parties and non-parties.¹³ However any legislative attempt to undermine the broad principle will be read narrowly.¹⁴ The open court rule, and the exceptions which guide the court in construing the circumstances whereby it is read narrowly, was recently committed to statute in New South Wales by way of the *Court Suppression and Non-Publication Orders Act 2010*.¹⁵

The grounds recognised at common law which might give rise to the statutory exceptions to the open court rule underpinning the principle of open justice are discussed in Chapter 4. These include: circumstances where children and minors are involved, instances of serious crime, the disclosure of the identity of an individual involving a national security issue, where a sensitive national security issue is concerned,¹⁶ or where there is a requirement that the confidentiality of certain materials be preserved.¹⁷ Other exceptions to the open court rule include circumstances where a secret or technical process would be disclosed, or where a public hearing could "cause an entire destruction of the whole matter in dispute".¹⁸ Other considerations include:

¹² The *Court Information Act 2010* (NSW) faces many serious obstacles before commencement. See Chapter 5 for detailed analysis of the legislation.

¹³ *Ibid*, *Court Information Act*, see Pt. 2, 'Entitlement to Access to Court Information'.

¹⁴ *Rinehart v Welker* [2011] NSWCA 425 (21 December 2011). The Rinehart case presents a good example of judicial discretion being applied where the various public interests are considered. The court did not grant the application of suppression and non-publication pursuant to the *Court Suppression and Non-Publication Orders Act 2010* (NSW), where it was deemed any such suppression would undermine the very important public interest in the open court rule. The court also considered the issue of public v private figures. Ms Rinehart being a significant public figure invoked the public interest test in the open court rule, see *Rinehart v Welker and Ors* [2011] NSWCA 345 (31 October 2011).

¹⁵ *Court Suppression and Non-Publication Orders Act 2010* (NSW) See s 6, 'safeguarding public interest in open justice' and s 8, 'grounds for making an order'. See Chapter 5, the legislation was broadly designed to remove ambiguity regarding recognised grounds for suppression and non-publication.

¹⁶ *A v Hayden (ASIS case)* [1984] HCA 67; 156 CLR 532, per Deane J at 599; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, per Kirby P at 141; *R v Lodhi* [2006] NSWCCA 101; (2006) 65 NSWLR 573, per McClellan CJ at 584-585 [26]; *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254; *Minter Ellison (a Firm) v Raneberg* [2011] SASC 159, at 27; *Thomas v Mowbray* [2007] HCA 33 [2007] HCA 33 (2 August 2007), at 173.

¹⁷ *Minter Ellison (a Firm) v Raneberg* [2011] SASC 159, at 27.

¹⁸ *Andrew v Raeburn* (1874) LR 9 Ch 522, at 523. See also, *Nagle-Gillman v Christopher* (1876) 4 Ch D 173, per Jessel MR at 174; *Mellor v Thompson* (1885) 31 Ch D 55, per Viscount Haldane LC at 443, per Earl of Halsbury at 445, per Lord Atkinson at 450-451, per Lord Shaw of Dunfermline at 482-483 ; *Scott*

suppressing evidence in an action for injunctive relief against an anticipated breach of confidence; suppressing the identity of victims of blackmail¹⁹ and protection of police informants and undercover police officers.²⁰ The categories of cases where suppression and non-publication of information has traditionally been granted are few and will not be easily extended.²¹

One common law corollary of the open court rule is that if the court does not detect any exceptional circumstances, anybody may publish fair and accurate reports of court proceedings, including the names of the parties and witnesses, and the evidence disclosed during the course of the proceedings.²² The seminal case in this regard, is the House of Lords decision in *Scott v Scott*,²³ which is the accepted authority in Australia²⁴ and other Commonwealth jurisdictions.²⁵ *Scott v Scott*, clearly defines the open court rule, but narrows the field of available exceptions to that rule. In recognising the

v Scott [1913] AC 417. Also, recently considered in *Hogan v Hinch* [2011] HCA 4, at 21 and at 27 in *Minter Ellison (a Firm) v Raneberg* [2011] SASC 159.

¹⁹ *R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General* [1975] QB 637, per Lord Widgery CJ at 644 and the relevant comments of Kirby P (discussed in chapter 6) in *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131.

²⁰ *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 246 per McHugh JA; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, per Mahoney JA at 472; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, per Kirby P at 141; *Herald & Weekly Times Ltd v Medical Practitioners Board (Vic)* [1999] 1 VR 267 [1999] 1 VR 267 at 293; *R v Lodhi* [2006] NSWCCA 101; (2006) 65 NSWLR 573, per McClellan CJ at 584 [25]- [26].

²¹ *R v Kwok* [2005] NSWCCA 245 [2005] NSWCCA 245; (2005) 64 NSWLR 335, per Hodgson JA at 343-344 [29]-[31], per Howie J and Rothman J at 345-346 [38]-[39]; *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643, per Mason P at 648 [32]-[38]; *P v D1 [No 3]* [2010] NSWSC 644, at 11- 20.

²² *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450, per Lord Diplock at 450, per Lord Edmund-Davies at 459, per Lord Scarman at 469; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, per Kirby P at 55, per Samuels JA at 61; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, per McHugh JA at 476-477; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, per Toohey J at 43; [1995] HCA 19; *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, per Fitzgerald P and Lee J at 44 ; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, per Gleeson CJ and Gummow J at 335 [15]; [2003] HCA 52; *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344, at 353, per Spigelman CJ at 20.

²³ *Scott v Scott* [1913] AC 417.

²⁴ *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77. The principle of open justice was thereafter recognised as an integral cornerstone of the Australian legal system.

²⁵ *Scott v Scott*, is general authority on the principle of open justice in all common law jurisdictions. In the United States the principle wasn't covered until the United States Supreme Court case of *Gannett Co v DePasquale* [1979] USSC 146; 443 U.S. 368; 99 S.Ct. 2898; 61 L.Ed.2d 608; No. 77-1301 (2 July 1979).

primacy of the principle of open justice²⁶, the Court of Appeal specified that any restrictions placed on the open court rule must be "of necessity".²⁷

Generally, legislation can authorise the exclusion of the public from part of a hearing, or to make orders preventing or restricting publication of parts of the proceedings or of the evidence adduced.²⁸ Furthermore, the principle is found in a number of international treaties such as, the International Covenant on Civil and Political Rights Art. 14 (ICCPR)²⁹ and the European Convention for the Protection of Human Rights, Art. 6 (European Convention).³⁰ The express conjunction of a 'fair and public hearing' in the ICCPR and the European Convention highlights that the principle of open justice is directly related to, and interacts with, the principle of a fair trial. Both treaties deal with the principle as a right expressed as an entitlement to "a fair hearing by an independent and impartial tribunal established by the law".³¹

In recent years, the open court rule, empowered by the ideals of FALM and rapidly evolving technology, has functioned with such effectiveness to a point where it is now seen to be endangering other rights, most notably, privacy. As early as 1890, Louis Brandeis and Samuel Warren, in their seminal article, 'The Right to Privacy'³² argued that the law should recognise a right to privacy and provide protection to that right grounded in tort. The right has since enjoyed greater exposition and understanding.

²⁶ New South Wales Law Reform Commission, *Contempt by publication*, Discussion paper No 43 (2000). See Ch. 10, Suppression Orders at 10.57. There are also legislative and regulatory provisions which are in force throughout Australian jurisdictions where they are applicable based on judicial discretion.

²⁷ *Scott v Scott* [1913] AC 417, per Viscount Haldane LC at 438. In later chapters, the thesis discusses and analyses the areas where the courts have traditionally allowed for restrictions on publication of court decisions.

²⁸ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520, per Gibbs J at 520; *Hogan v Hinch* [2011] HCA 4, see comments of French CJ at 27.

²⁹ 'International Covenant on Civil and Political Rights (ICCPR) entry into force 23 March 1976, in accordance with Article 49', (16 December 1966) UN <<http://www2.ohchr.org/english/law/ccpr.htm>>.

³⁰ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, ETS No 155 (entered into force 1 November 1998). The Convention has further been amended <<http://www.echr.coe.int/echr/en/header/the+court/events+at+the+court/60+years+of+the+convention>> by Protocol No. 14, to come into force on 1 June 2010. The amendment has not affected the wording of Art. 6 of the Convention: 'European Convention on Human Rights' as amended by Protocol No. 14 (2010) European Court of Human Rights.

³¹ See detailed discussion on the treaty in James J. Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2005) 29 *University of New South Wales Law Journal* 147.

³² S. Warren and L. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

Internationally, in the context of information regulation, privacy rights were set out in the Guidelines by the Organisation for Economic Co-operation and Development (OECD).³³ These Guidelines were developed in the late 1970's, when the organisation required immediate access to information for banking and commerce and the implementation of the guidelines by member nation states. In Australia, the Federal *Privacy Act*³⁴ was based on the provisions of the OECD Guidelines.

Whilst Australia has been influenced by European civil developments which recognise privacy, in comparison, it has been slow to recognise privacy at common law and to start the process of developing an organic doctrine of privacy protection. The 2002 High Court of Australia decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*³⁵ (*Lenah Game Meats*) was the first time that the High Court had revisited the issue of privacy, since its decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*³⁶ (*Victoria Park Racing*) which found that a cause of action for breach of privacy did not exist in Australia. In *Lenah Game Meats*, Hayne and Gummow JJ held that the decision in *Victoria Park Racing* should not be seen as an obstructionist view of the development of the tort of invasion of privacy, due the absence of any such view in Australian jurisprudence, but rather due to other factors, such as, the failure of the plaintiff's appeal in that case.³⁷ Kirby P as he then was, referred to this as "legislative inaction"³⁸ which should be construed as the legislature not wishing to take any active steps in developing such laws, as opposed to not being able to, in the absence of clear recognition and development of a tort of breach of privacy at common law.

³³ Organisation for Economic Co-operation and Development (OECD)
<http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html>.

³⁴ *Privacy Act 1988* (Cth).

³⁵ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199, see detailed analysis in Chapter 4, but note the comments of Murphy J at 68 in; *Church of Scientology v Woodward* [1982] HCA 78; (1982) 154 CLR 25; 31 ALR 609; 54 ALJR 542.

³⁶ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45; (1937) 58 CLR 479, see detailed analysis in Chapter 4.

³⁷ *Ibid*, at 106, 107, Kirby P stated that the development of the tort of privacy was a possibility.

³⁸ *Ibid*, See comments of Kirby P at 15 in *Australian Consolidated Press Ltd v Ettingshausen* [13 October 1993] Unreported, Court of Appeal of New South Wales).

In 2003, the District Court of Queensland allowed for damages arising out of breach of privacy in *Grosse v Purvis*.³⁹ This was the first time since the decision in *Lenah Game Meats* that the development of a common law cause of action for invasion of privacy had been taken further. Skoien J, in finding that an individual had a right to privacy, which if invaded, would give rise to a cause of action in tort, relied on the judgment in *Lenah Game Meats* and made the following statement:

In my view, within the individual judgments certain critical propositions can be identified with sufficient clarity to found the existence of a common law cause of action for invasion of privacy. Statements of principle are to be found in those judgments which provide guidance in the formulation of such a cause of action. Academic writings are referred to which also contain statement of relevance,⁴⁰ and the following concluding remarks:

It is a bold step to take, as it seems, the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual to privacy. But I see it as a logical and desirable step in my view that there is such an actionable right.⁴¹

No other action was brought in any other jurisdiction in Australia until 2007,⁴² when the County Court of Victoria in *Jane Doe v Australian Broadcasting Corporation*⁴³ (*Jane Doe v ABC*) found for the plaintiff in the actionable tort of breach of privacy and the action for breach of confidence. This case extends the right to privacy to include protections against unauthorised disclosure of private information. The actionable tort of breach of privacy was linked to the existing statutory regime available under the *Commonwealth Privacy Act*, which deals with regulating personal information in the care and control of private corporations and government agencies. Influenced by the recent United Kingdom House of Lords decisions, the court recognised the relationship between the tort of privacy and of breach of confidence.⁴⁴ The action for breach of

³⁹ *Grosse v Purvis* [2003] QDC 151 (16 June 2003).

⁴⁰ *Ibid*, per Skoien J at 423.

⁴¹ *Ibid*, at 442.

⁴² Although on a number of occasions the High Court of Australia seemed open to the idea of State Courts developing an action for breach of privacy arising out of breaches of confidence, see *Giller v Procopets* [2004] VSCA 236, and; *Kalaba v Commonwealth* [2004] FCA 763.

⁴³ *Jane Doe v Australian Broadcasting Corporation & Ors* [2007] VCC 281 (3 April 2007).

⁴⁴ *Douglas v Hello! Ltd* [2000] EWCA Civ 353; [2001] QB 967; [2001] 2 All ER 289, per Sedley LJ at 120.

confidence has been used to address misuse of private information. In *Douglas v Hello! Ltd* Keene LJ stated:

Breach of confidence is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice.⁴⁵

The need for development in this area of the law in light of technological changes which impact all other facets of society was acknowledged. This was extended by the decision of Nichols LJ in *Campbell v MGM Ltd*.⁴⁶

In its essence, the development for an actionable tort of privacy focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.⁴⁷ As Gleeson CJ stated in *Lenah Game Meats*, "the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity".⁴⁸

The most recent case dealing with this area of the law was the case of *Maynes v Casey*⁴⁹ where the court considered a claim for breach of privacy based upon a claim that the respondents had trespassed on the applicant's property and taken photographs of the property on several occasions.⁵⁰ However, Basten JA could not find for the applicant on the grounds of breach of privacy for two reasons. First, His Honour cited the lack of an established common law tort for breach of privacy in Australia.⁵¹ Second, an action for privacy breach could not be expressed through other established and recognised torts,

⁴⁵ Ibid, per Keene J at 165, noted from *Jane Doe v ABC*, *ibid*, at 105.

⁴⁶ *Campbell v MGM Ltd* [2004] 2 AC 457.

⁴⁷ Ibid, per Hoffman LJ at 31 who referred to the statement of Seddley LJ in *Douglas v Hello! Ltd* [2000] EWCA Civ 353; [2001] QB 967; [2001] 2 All ER 289.

⁴⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199, per Gleeson CJ at 43.

⁴⁹ *Maynes v Casey* [2011] NSWCA 156.

⁵⁰ Ibid, see also; Pam Stewart and Anita Stuhmcke, *Australian Principles of Tort Law* (The Federation Press, 3rd ed, 2012) 98, 99.

⁵¹ *Maynes v Casey* [2011] NSWCA 156, at 34.

such as an action of trespass, since the court found, in fact, that the vehicle had entered the property legitimately.⁵²

In Australia, the *Privacy Act 1988* (Cth) was the first legislative attempt to introduce privacy laws into Australia. The legislation reflects obligations which Australia has under the United Nations International Covenant on Civil and Political Rights (ICCPR)⁵³ and reflects the Organisation for Economic Co-operation and Development Guidelines on the Protection of Privacy and Transborder Flows of Data (OECD Guidelines).⁵⁴ The second reading speech to the Privacy Bill⁵⁵ also referred to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.⁵⁶ The *Privacy Amendment (Private Sector) Act 2000* (Cth)⁵⁷ makes clear that the amendments aimed at the private sector were also designed to satisfy Australia's international obligations, as well as international concerns regarding privacy.⁵⁸ Australian State jurisdictions have followed the Commonwealth to enact data protection laws to protect the handling of personal information.⁵⁹

⁵² Ibid, at 20, The applicants accepted that, absent evidence to the contrary, a person having legitimate business with the owner or occupier of premises will have an implied right to enter and remain on the premises until asked to leave. See also, *Halliday v Nevill* [1984] HCA 80, particularly the relevant comments of Gibbs CJ, Mason, Wilson and Deane JJ at 7.

⁵³ 'International Covenant on Civil and Political Rights (ICCPR) entry into force 23 March 1976, in accordance with Article 49, (16 December 1966) UN <<http://www2.ohchr.org/english/law/ccpr.htm>>. Relevantly to this jurisdiction, it was the Australian Human Rights Commission which oversaw the implementation of the International Covenant on Civil and Political Rights (ICCPR) into the *Privacy Act 1988* (Cth), it is also considered essential to the day to day interactions amongst individuals in a civilised society.

⁵⁴ 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data' (1980) <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>. See also, Appendix C, regarding the role His Honour Kirby J played in the development of the OECD Guidelines which were instrumental in the development of the *Privacy Act 1988* (Cth).

⁵⁵ Privacy Bill 1988 (Cth) a predecessor to the Privacy Bill was introduced into Parliament in 1986, in association with the Australia Card Bill 1986, but both Bills lapsed with the double dissolution of Parliament in 1987. For further details see the ALRC website at *Australian Law Reform Commission (ALRC)*, <<http://www.alrc.gov.au/>>.

⁵⁶ European Council, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data Council of Europe, (28 January 1981) CETS No 108, (entered into force generally on 1 October 1985). See 'ALRC Submission paper on privacy policy', (2006) 68-72 <<http://www.austlii.edu.au/au/other/alrc/publications/issues/31/IP31.pdf>>.

⁵⁷ *Privacy Amendment (Private Sector) Act 2000* (Cth).

⁵⁸ Ibid, 'ALRC Submission paper on privacy policy', (2006).

⁵⁹ It should be noted that the media is exempt from such rules see *Privacy Act 1988* (Cth) s 7B (4).

There is increasing awareness and importance placed on privacy by the public. The Australian government in early 2010 released an 'Exposure Draft of the Australian Privacy Principles'.⁶⁰ These replaced the Information Privacy Principles (IPPs)⁶¹ and the National Privacy Principles (NPPs)⁶² on 12 March 2012. These are the first of these draft provisions intended to amend the *Act*, as the first stage of privacy reforms.⁶³

The second stage of the reforms proposed by the Australian Law Reform Commission includes the introduction of a statutory cause of action for invasion of privacy of a serious nature and notification of information privacy breaches on a serious level.⁶⁴ The proposed statutory cause of action mirrors privacy as a "defining issue of the modern era, especially as new technology provides more opportunities for communication and storage and dissemination of information".⁶⁵

This is particularly relevant in light of the rapid rise in electronic publication and dissemination of judicial decisions after the 1990s. Up to that point there was limited understanding and public exposure to law reporting. This was mainly due to the unavailability of the internet and technology to create digital forms of judicial reports for public use. From the mid 1990s the world wide web introduced publication and dissemination of electronic materials by way of cheap and efficient methods of dissemination of data via the internet. The impact on the scope and scale of the availability of court proceedings was immense. In 1997, the 'Law via Internet' conferences became the starting point whereby co-operation was established to give rise to FALM less than a decade later.⁶⁶

⁶⁰ Exposure Draft-Australian Privacy Amendment Legislation-Australian Privacy Principles 2010 (Cth).

⁶¹ *Privacy Act 1988* (Cth) s 14.

⁶² *Ibid*, Sch. 3.

⁶³ See Chapter 6, 'Impact of Proposed Amendments to Commonwealth Privacy Legislation'.

⁶⁴ ALRC, *For Your Information*, Australian Privacy Law and Practice No 1 (2008) Practice No's 2 and 3.

⁶⁵ See Chapter 6, ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008) 2535-2586.

⁶⁶ Graham Greenleaf, 'Free Access to Legal Information, LIIs, and the Free Access to Law Movement' (20 October 2011) IALL International Handbook of Legal Information Management, R. Danner and J. Winterton (eds), Ashgate, 2011; *UNSW Law Research Paper* No. 2011-40.

The arrival of the free internet access, together with digital publication and dissemination of judicial decisions on the internet and FALM, has led to a dramatic expansion of public access to legal data. Courts have embraced electronic publication services as a means of dissemination and publication of court decisions.⁶⁷ Legal databases such as the Australasian Legal Information Institute (AustLII)⁶⁸ and the Legal Information Institute at Cornell⁶⁹ are available for free to anyone. However, problems arise due to technological advancements and the transformation of accessibility through the internet. Although access to law reports and other court documents was always theoretically guaranteed in the past, it is the transition from that theoretical to the absolute practical access which has given rise to new challenges. This is described as the rapid paradigm transition from theoretical openness and practical obscurity to practical openness and theoretical obscurity. The shift in the theoretical openness and practical obscurity to practical openness and theoretical obscurity was brought on by free access to law, exposing the unregulated proliferation of personal information via judicial decisions on the world wide web as a real impediment to open justice.

In this thesis the term law reporting or the reporting of the law, legal publishing, and publication of judicial decisions are used interchangeably, to mean the publication and dissemination of judicial decisions on the internet.⁷⁰ This practice has played, and continues to play, a major role in the way open justice functions, as well as being a driver for its operation. Conventional paper-based publishing made possible the recording of judicial decisions, and therefore became an important device underpinning the operation of common law legal systems. Electronic publication of law reports and more recently, the free publication and dissemination of judicial decisions over the

⁶⁷ *Report on Access to Court Information, Attorney General's Department* (June 2008); Katherine Biber, 'Evidence from the Archive: Implementing the Court Information Act in NSW' (2011) 33(3) *Sydney Law Review* 575; Court Information Bill 2009 (NSW); Court Information Bill 2010 (NSW); *Court Information Act 2010* (NSW).

⁶⁸ *Australasian Legal Information Institute (AustLII)*, University of Technology, Sydney, Faculty of Law <<http://www.austlii.edu.au/>>.

⁶⁹ *Cornell Legal Information Institute LII* (Cornell), Cornell University Law School <<http://www.law.cornell.edu/>>.

⁷⁰ Legal publishing, law reports/court reports, decisions/judicial decisions and or law reporting, essentially entail the publication and dissemination of legal decisions by the judicature on the internet-either through judicial websites or court-sanctioned legal publishers.

internet has altered the way in which case law can be accessed, and has led to significant changes in the way in which the legal system itself operates, bringing about an effective transformation from practical obscurity to practical accessibility. Whilst practical obscurity delivered some practical privacy rights to litigants due to impediments to access, practical accessibility to law reports has taken those privacy rights away.

THESIS AIM, HYPOTHESIS AND THE RELEVANT RESEARCH QUESTIONS

I. AIM OF THE THESIS

The aim of this thesis is to challenge the common notion that privacy and the open court rule are incompatible, in particular in the context of law reporting. This thesis investigates and analyses the nature of privacy concerns which have come about as a result of advances in technology in the context of electronic law reporting. It is argued that privacy interests ought to be recognised at common law as one of the main exceptions to the open court rule.

The objective of such a significant exception is to introduce a new, and perhaps very wide ranging interest which can be seen as symbiotic with the open court rule. Such recognition will invariably give rise to the revision of the current common law test for suppressing the identities of parties in court proceedings to broaden the field of personal information for privacy protection.

This thesis argues that the open court rule, in the context of widespread free access, requires regulation. Specifically, the absence of the recognition of a tort of breach of privacy at common law necessitates the need for privacy measures designed to prevent the misuse of personal information after publication and dissemination on the world wide web. This is the primary aim of this thesis. To recognise and demonstrate the need for such regulation, particularly in light of the fact that the open court rule works for the betterment of the administration of justice and ultimately for the supremacy of the rule of law.

The thesis proposes practical and analytical mechanisms by which to secure the implementation of appropriate privacy practices for the regulation of personal information by court registries in all Australian jurisdictions.⁷¹

II. HYPOTHESIS AND RESEARCH QUESTION

This thesis explains the following four propositions:

- (1) Free access to law has impacted upon the operation of the open court rule as it operates in the administration of justice;
- (2) The open court rule has been operating without a privacy exception to date;
- (3) The open court rule and privacy are not incompatible and can work together symbiotically to maintain the principle of open justice; and
- (4) It is possible to suggest practical legal and technical measures to address this.

III. APPROACH AND METHODOLOGY

The approach and methodology are as follows:

- (a) review of Free Access to Law Movement literature;
- (b) review of leading high level judicial authorities in Australia, the United Kingdom, the United States of America, Canada, and the European Commission, on the subject of privacy and the open court rule in the broader context, and specifically in the context of electronic law reporting;

⁷¹ Note, s 8(e) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) provides that a suppression order may be made when it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice. However, it does not specifically provide protection for privacy when such a right is not explicitly recognised at common law. It is doubtful that privacy interests would be preferred over other well established exceptions and recognised exceptions to the open court rule. In particular, when privacy interests are non-existent as competing interest to the open court rule. See Chapter 6 for detailed analysis of the section.

- (c) literature review of journal articles and other scholarly papers regarding proposals and debates about strengthening privacy rights in relation to advances in technology;
- (d) analysis and synthesis of the various theories favouring, and opposing, openness and transparency regarding the principle of open justice, privacy rights, and the open court rule; salient judicial authorities; legislation and scholarly articles from Australia; New Zealand; the United Kingdom; Canada; and the United States of America, as well as important international treaties; publications and current non-judicial literature;
- (e) detailed research into the current issues surrounding the open court rule and privacy values; including unintended consequences arising out of privacy breaches, such as, identification theft, tainted juries, and damage to reputation; and
- (f) in-depth synthesis and analysis of the dynamic theories behind privacy and the open court rule with a specific focus on electronic law reporting.

VI. STRUCTURE OF THE THESIS

Chapter 1: Introduction to the thesis explaining the thesis question, the methodology and the significance and innovation of the research.

Chapter 2: discusses and analyses the relationship between the principle of open justice and the open court rule. It provides an exposition from an historical perspective, where the origins of the principle are traced back to ancient legal systems and its evolutionary process, through to modern times. The importance of the open court rule within the mainframe of the principle of open justice with respect to law reporting is considered, where the common practice regarding the presumption of openness dictates that the open court rule applies in all but exceptional circumstances. This is expressed in light of other competing public interests, and the way in which the open court rule gives rise to judicial accountability. The chapter provides analysis into the infrastructural makeup of

the principle of open justice, which is often confused with the open court rule. The open court and the publicity afforded to parties in court, is one important part of the larger principle. This can be further articulated by describing the principle of open justice as containing within it a number of important elements such: judicial accountability; judicial review; integrity of the courts; privacy rights; the open court rule; transparency; the right to be heard; access to law courts; the right of access to court documents; and equality before the law⁷². The practical application of the open court rule is fundamental to the proper operation of the principle of open justice and in turn, the rule of law.

Chapter 3: focuses on and discusses the role and development of law reporting from an historical context. This is done in the context of paper reporting, prior to the printing press, through to the digital application of law reporting on the internet. The theory behind law reporting as explained through an oral tradition, as manifested into the printed form first by written hand, then by the printing press and subsequently by modern day digital publication and dissemination of law reports, is discussed. The functions of law reporting are connected, and its importance emphasised in terms of the exercise of the open court rule in the common law tradition. The Free Access to Law Movement and the establishment of the LII's are discussed, in the context of the rapid changes, as the products of the changing technology and the free and uninhibited access introduced by the world wide web. Finally, data analysis and the use of graphs in regards to establishing a correlation between the rise in law reporting over time and privacy concerns.

Chapter 4: discusses the common law exceptions to the open court rule, in order to investigate what competing interests exist at common law to the open court rule, and whether any of those interests are relevant to privacy protection. Historically, privacy was afforded to the public through practical obscurity; however, the gradual abolishment of any such privacy protection eventuated when the theory of openness became a reality due to technological change. Even though law reporting experienced environmental change and the methods of its operation changed, exceptions to the open

⁷² See Chapter 2, 'The Open Court Rule'.

court rule which guide the courts in its operation remained virtually unchanged. This resulted in the apparent practical limitations of the open court rule operation, and the transition to an era where the courts are experiencing an increasing number of requests for suppression and non-publication orders of law reports, or Prior to the Event measures.⁷³ As a result, a motivational transition is observed. This transition is not only evident in relation to the historical intent underlying law reporting, but also in the intention behind the practice that defines law reporting today. Today commercial interests, as well as the nature of large complex court proceedings, compete against a genuine interest to keep the public informed of the law. This transition has come about predominantly as a result of law courts embracing technology within a relatively short time

Chapter 5: discusses and provides analysis of statutory exceptions currently in place, and shortcomings in regulating the open court rule to prevent the spread of personal information via law reporting. The ideals of the open court rule and the publicity it affords to court proceedings is very important. This importance is compounded by virtue of the fact that a court does not have an inherent jurisdiction to exclude the public from court proceedings.⁷⁴ However, this thesis contends that the open court rule, as expressed through the common law, must give way or accept modification, to ensure that court proceedings are conducted in a manner which serves the overall interests of society. At least, such open proceedings should not be overtly detrimental to participants, by disclosing unnecessary personal information, where there would otherwise be no need for the publication of such information. Such unregulated practices are invariably contributing to a rise in identity theft, disclosure of personal information to third parties, issues relating to reputation, economic loss and failure to

⁷³ Prior to the Event: defined in this thesis as all the steps in place designed to regulate prior to the publication and dissemination of electronic law reports on the world wide web.

⁷⁴ *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344; *Scott v Scott* [1913] AC 417, at 473; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77, at 51; *Daubney v Cooper* [1829] EngR 48; (1829) 10 B & C 237, at 440; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520, at 507 and 520-521, 532.

lead a private life.⁷⁵ A number of important structural exceptions to the open court rule are analysed and connected back to the central thesis.

Chapter 6: discusses privacy with particular focus on the interaction between privacy and the open court rule. A detailed account and analysis of the concept of privacy is provided. Privacy has meant different things to different people throughout the ages and throughout different ethnicities and cultures. However, privacy has generally been recognised as a basic human right. Australia is a signatory to the International Convention of Civil and Political Rights (ICCPR), which specifically recognises a right to privacy. The concept of privacy, as understood today, has only been fully recognised and coherently analysed in recent times. At its most fundamental, it has been defined as a right to be left alone and as such, the right to be protected when such a right is breached. Specifically, that right is described as a right to have information withheld from the public at large by the press. In the context of this thesis, and with respect to the open court rule, privacy is defined as the right to exercise control over one's personal information. This is relevant in regards to the vast amount of personal information disseminated via court decisions.

Chapter 7: discusses privacy values expressed through the open court rule in the absence of any applicable existing legislative and regulatory framework to the open court rule. The thesis cross-compares the application of the relevant provisions of the Information Privacy Principles (IPPs) and the proposed Australian Privacy Principles (APPs) to a number of scenarios in place; the underlying current law reporting practice; and the way in which personal information is impacted by that practice.⁷⁶ These ideas are also considered and analysed with respect to the presumption of openness and its limits. In the context of modern law reporting, the theoretical dynamics underlying that presumption, including Prior to the Event considerations, the right to a fair trial,

⁷⁵ See Chapter 6 on analysis of privacy breaches. See also, discussion on 'Private Life'.

⁷⁶ This thesis considers court registries as public domains pursuant to Part 6 of the *Privacy and Personal Information Protection Act 1998* (NSW) and therefore able to be regulated by the Information Privacy Principle (IPPs) (now replaced by the Australian Privacy Principles (APPs) in the *Privacy Act 1988* (Cth). See Chapter 7.

sentencing remarks, freedom of the press, rapid transition and its impact, and secrecy, are analysed.

Chapter 8: proposes theoretical policies to express privacy measures in law reporting, designed to regulate personal information prior to the dissemination of court decisions. It also provides a theoretical analysis of the underlying dynamics regarding the burden and responsibility for the provision of privacy protection for parties to court proceedings resting with the courts, and the way in which that may be achieved. Possible models to approach the issue of privacy and dissemination of law reports are proposed. The Model (I) proposal is a two-tier privacy protection system model for the implementation and expression of Privacy Procedure Standards (PPS) into the open court rule, to be effective on a Prior to the Event basis, with the possible implementation of automated applications such as NOME and AEF (Machine Learning Technology).

The Model (II) proposal restricts online access to law reports based on a restricted online system or (ROS) which operates based on a classification system. The compatibility of Models (I) and (II) with technological applications involving RES protocols, implemented by courts and law reporters to restrict authorised access, is investigated in this chapter.

Chapter 9: discusses the conclusion of the thesis - that the principle of open justice is able to accommodate both privacy values and the open court rule as part of its judicial function regarding the administration of justice. Privacy protection afforded in open court proceedings by way of practical obscurity has diminished. There is a demonstrative absence of privacy's important role in promoting the principle of open justice in the way judicial decisions are disseminated. This problem is compounded by the modern nature of privacy concerns which have become much more sophisticated with the world wide web, particularly since the computerisation of the law, free access to law and the general mass migration to digital law reporting from paper

CHAPTER 2

THE PRINCIPLE OF OPEN JUSTICE & THE OPEN COURT RULE

The principle of open justice serves as the best security for the pure, impartial, and effective administration of justice, the best means for winning for it public confidence and respect Per Lord Atkinson, *Scott v Scott* [1913] AC 417

It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done. *R v Sussex Justices; Ex parte Macarthy* [1924] 1 KB 256, 259 (*R v Sussex Justices*)

INTRODUCTION

The principle of open justice is a cornerstone of all legal systems with a common law tradition from ancient times to the modern digital era. As this chapter will explain, an important component of the open justice principle is the open court rule, which provides the opportunity for law reporters and the media to report on the activities of the court. The open court rule has been characterised as being fundamental to our society and government⁷⁷ as it is based on the premise that publicity promotes accountability and works as a safeguard against secrecy. The open court rule is generally applicable except in extraordinary circumstances.

This chapter provides analysis and explores the important elements in the makeup of the principal of open justice. A historical exposition is compared and contrasted to its modern application. Furthermore, the distinction between the principle of open justice and the open court rule is highlighted and explained. The theoretical significance of open justice is discussed with respect to the application of the open court rule and other values such as privacy.

⁷⁷ *R v Davis* [1995] FCA 1321, 514, 515.

ORIGINS AND DEFINITION

The precise origin of the principle of open justice is not clear. The principle's historical origins may be traced back to ancient times, where in 528 AD; emperor Justinian began his legal works which resulted in the complete revision of Roman law. Justinian laws are collectively known as the *Corpus juris civilis* or the Code of Justinian.⁷⁸ The Corpus is fundamental in that it constitutes the basis of ecclesiastical Canon law, and is further made up of the *Codex Iustinianus*,⁷⁹ the *Digesta or Pandectae*,⁸⁰ the *Institutiones*,⁸¹ and the *Novellae*.⁸² Due to their heavy borrowing of practical and established laws from competing empires of the day, the Justinian Code of laws was heavily influenced by the Persian legal system at the time of the Persian Empire under the Sasanians, AD 224 to AD 651.⁸³ For instance, the *Hezar Ghaanoon Codex*⁸⁴ or Canon⁸⁵ of one thousand judgments practised by the Persians⁸⁶ and the Babylonian Code of Hammurabi, which

⁷⁸The Corpus was issued between 529 and 534 AD, and forms part of the basis of Latin Jurisprudence (the native language of emperor Justinian was Latin) and ecclesiastical Canon law. See Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History (Translated by: Kelly J. M.)* (Clarendon Press, Oxford, 1966) 168-171.

⁷⁹ Ibid, one of the components of the Corpus Iuris Civilis, the codification of Justinian. The codex includes 4,652 excerpts from imperial ordinances (constitutions) published, beginning with the reign of the emperor Hadrian (2nd century A.D.) and ending with Justinian himself. It consists of 12 books: the first book deals with church law and the obligations of government employees, books 2 through to 8 with private law, including property and other relations, book 9 with criminal law, and books 10 through to 12 with administrative and financial law.

⁸⁰ Ibid, Kunkel, is a name given to a compendium or digest of Roman law, forming part of the Justinian Code of laws.

⁸¹ Ibid, Kunkel, forming part of the Justinian Code, the new Institutions were used as a manual for jurists in training 533 AD onwards and were legally enacted on December 533 along with the Digest.

⁸² The novels are laws enacted after 534 AD, when Justinian promulgated the second edition of the Code, see Timothy G. Kearley, 'The Creation and Transmission of Justinian's Novels (Revised Edition, 2010)' (2009) *University of Wyoming Law Journal*.

⁸³ The Sasanian Dynasty ruled side by side with the Roman Empire for more than 400 years, with open confrontation between the two empires resulting in a number of humiliating defeats for the Romans at the hands of the Persians and the capture and execution of emperor Valerian by the Persians. The first war between Rome and Persia: 229-232 AD, 241-244 AD, 252-261 AD: War with Rome. Decisive Persian victory at Edessa and Capture of Roman emperor Valerian, 283; and War with Rome 296-8, see Richard N. Frye, 'The Political History of Iran under the Sassanians' in Ilya Gershevitch, William Bayne Fisher, Ehsan Yarshater, R. N. Frye, J. A. Boyle, Peter Jackson, Laurence Lockhart, Peter Avery, Gavin Hambly and Charles Melville (ed), *The Cambridge History of Iran* (Cambridge University Press, 1993), 126 and Pat Southern, *The Roman Empire from Severus to Constantine* (Routledge, 2001), 235, 236.

⁸⁴ The Code of a Thousand Laws.

⁸⁵ The word 'Canon' originated from the Persian word *Ghanoon* which literary translates to the word for 'Law'. See Anahit Perikhanian, *The book of a thousand judgements: a Sasanian Law-Book* (Nina Garosian trans, Mazda Publishers, 1997) vol 39.

⁸⁶ Ibid.

were formed in detail prior to the Roman Empire,⁸⁷ had a great impact on the development of Canon laws of Rome. The majority of these ancient laws had their roots in ancient religious orders, such as *Zoroastrianism*, *Mazdaism*, *Manichaeism* and *Mithraism*.⁸⁸ It was therefore no coincidence that the integration of these laws heavily grounded in religion and moral codes once integrated into Roman laws, resulted in the eventual formation of the very Canon laws of Rome, which in-turn evolved into the ecclesiastical laws of Britain.⁸⁹

Canon Law, a body of legal rules and regulations either made or absorbed by ecclesiastical jurisdictions for implementation and enforcement in medieval Europe, and later in Britain, evolved into the ecclesiastical laws of that nation.⁹⁰ A Canon or *Ghaanoon*⁹¹ was a rule in the first instance adopted by a Christian religious order.⁹² These rules formed the basis of Canon law.⁹³ The relationship between the early Justinian Roman law codes which formed the main basis for Roman law proper, and ultimately Cannon law, becomes clear in the 12th century AD, when Roman law was

⁸⁷ Sohrab J. Bulsara, *The laws of the ancient Persians as found in the 'Matiikan E Hazar Datastan'*, or, 'The Digest of a Thousand Points of Law' (K.R. Cama Oriental Institute and Library, 1999). See also, The Hon Michael Kirby AC CMG, 'The rule of law beyond the law of rules' (2010) 33 *Australian Bar Review* 195 n 11, p 136 at p 139 n 8, R McCorquodale in M. Andenas and D. Fairgrieve (eds), 'The Rule of Law Internationally', *Tom Bingham and the Transformation of the Law* (OUP Oxford, 2009)136 at 139 n 8. See also, the codification of Roman law under Justinian's sponsorship, discussed at length in Chapter 2 of George Philip Baker, *Justinian: the last Roman emperor* (Cooper Square Press, 2002).

⁸⁸ Richard N. Frye, *The Golden Age of Persia* (Phoenix Press 2000), p 30 ; Sohrab J. Bulsara, *The laws of the ancient Persians as found in the Matiikan E Hazar Datastan*, or, *The Digest of a Thousand Points of Law* (K.R. Cama Oriental Institute and Library, 1999); Josef Wieshöfer, *Ancient Persia from 550 BC to 650 AD* (Azizeh Azodi trans, I.B. Tauris Publishers, 2001). See *Manichaeism*, at 118, 157, 195, 199-216; *Zoroastrians*, Chapters 10, 11.

⁸⁹ Frederick Pollock and Frederic W. Maitland, *The History of English Law, before the time of Edward I* (Cambridge University Press, 2nd ed, 1968) vol 1, see Ch 1, the dark age in legal history, detailed discussion, 11-24.

⁹⁰ *Ibid*, 11.

⁹¹ See above *Ghaanoon*, literally meaning Law in Persian, see Anahit Perikhanian, *The book of a thousand judgements: a Sasanian Law-Book* (Nina Garosian trans, Mazda Publishers, 1997) vol 39.

⁹² Legal rule in the first instance, derived from the Zoroastrian religious order. See detailed discussions, Sohrab J. Bulsara, *The laws of the ancient Persians as found in the Matiikan E Hazar Datastan*, or, *The Digest of a Thousand Points of Law* (K.R. Cama Oriental Institute and Library, 1999).

⁹³ Frederick Pollock and Frederic W. Maitland, *The History of English Law, before the time of Edward I* (Cambridge University Press, 2nd ed, 1968) vol 1, see Ch 1, the dark age in legal history, fn 1.

discovered in Bologna by *Lafrance the Pavian Lawyer*.⁹⁴ Thereafter, the form, language and spirit of civil law were adopted by Canon law.⁹⁵

English reports indicate the existence of the principle of open justice in the early ecclesiastical justice system,⁹⁶ even though fundamental common law legal documents such as the *Magna Carta*,⁹⁷ the *Petition of Right of 1621*,⁹⁸ and the *United States Bill of Rights*⁹⁹ contain no specific reference to the principle.¹⁰⁰

Sir Edward Coke was able to trace open justice through the *In Curia Domini Regis* (In the King's Court), pursuant to the *Statute of Marlborough of 1267*¹⁰¹ stating the following:

All Causes ought to be heard, ordered, and determined before the Judges of the King's Courts openly in the King's Courts, whither all persons may resort; and in no chambers, or other private places: for the Judges are not Judges of chambers, but of Courts, and therefore in open Court, where the parties Counsel and Attorneys attend, ought orders, rules, awards, and judgments to be made and given, and not in chambers or other private places...Nay, that Judge that ordereth or ruleth a Cause in his chamber, though his order or rule be just, yet offendeth he the law, (as hear it appeareth) because he doth it not in Court.¹⁰²

⁹⁴ Ibid, 77, 78, Lafrance was a great theologian according to Norman records, a great lawyer of world-wide fame and allegedly the most accomplished of pleaders.

⁹⁵ At this point this thesis will not endeavour to investigate this fascinating area of Western legal tradition and development. The brief exposition thusfar has only been to remind us that the rule of law is a principle which was practiced by the Persians and Babylonians who contributed greatly to the development of the Justinian legal codes and the development of Canon law.

⁹⁶ Stephen J. Fitzjames, *A history of the criminal law of England* (London, Macmillan, 1883).

⁹⁷ James C. Holt, *Magna Carta* (Cambridge University Press, 1965); Ivor Jennings, *Magna Carta and its Influence in the World Today* (New York, H.M. Stationery Office, 1965).

⁹⁸ Sir Matthew Hale, *A History of the Common Law of England*, ed. C. M. Gray (University of Chicago Press, 1970).

⁹⁹ M. Radin, 'The Right to a Public Trial' (1932) 6(3) *Temple Law Quarterly* 381, 381.

¹⁰⁰ Although the modern Bill Of Rights which constitutes the first ten (10) Amendments to the US Constitution provides for the presumption of openness in court trials. Specifically, the Sixth Amendment to the U.S. Constitution, guarantees the accused in every criminal case the right to a public trial. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of Counsel for his defence.

¹⁰¹ *Statute of Marlborough 1267* (UK) 1267, 52 c 23.

¹⁰² Edward Coke, *The Second Part of Institutes of Law of England* (London, 1642), 103, 104.

As Coke observes, rendering court processes transparent is an important element of open justice. The publication of court decisions or (law reporting) promotes the concept of publicity of the law. This idea was founded on the well-known statement of Jeremy Bentham, "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".¹⁰³ As such, "it is through publicity, more than to everything else put together, that the English system of procedure owes its existence the least bad system as yet extant, instead of being the worst".¹⁰⁴

In *Scott v Scott*,¹⁰⁵ the House of Lords considered the principle of open justice as attracting such high order and preference, that even when there were no written orders in existence or no references to it in the constitution of a nation, the principle ought to be regarded as of constitutional significance.¹⁰⁶ The case was very important, for it acknowledged the fundamental importance of the principle of open justice in common law jurisprudence at that time, and has contributed to its further expansion and recognition into modern legal thinking.¹⁰⁷ In that decision, the principle was

¹⁰³ John Bowring (ed), *The Works of Jeremy Bentham*, (Bowring, Simpkin, Marshall, & Co, 1843) vol 5.

¹⁰⁴ Elie Halevy, *Growth of Philosophic Radicalism* (Faber & Faber, 1972), 403.

¹⁰⁵ *Scott v Scott* [1913] AC 417.

¹⁰⁶ Though there are statutory exceptions which can override the principle: see for example, *Magistrates Court Act 1989* (Vic) ss 125, 126; *County Court Act 1958* (Vic) s 81; *Supreme Court Act 1986* (Vic) ss 18, 19; *Children, Youth and Families Act 2005* (Vic) s 523; *Adoption Act 1984* (Vic) s 107; *Family Law Act 1975* (Cth) s 97; *Federal Court of Australia Act 1976* (Cth) s 17.

¹⁰⁷ *Russell v Russell; Farrelly v Farrelly* (1976) 9 ALR 103; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450; *R v Tait* (1979) 46 FLR 386; (1979) 24 ALR 473; *Australian Broadcasting Commission v Parish and Others* (1980) 29 ALR 228; *Home Office v Harman* [1981] QB 534; [1981] 2 All ER 349; [1981] 2 WLR 310; *R v Horsham Justices; Ex parte Farquharson* [1982] QB 762; [1982] 2 All ER 269; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303 [1983] 1 AC 280, 303; *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166; *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] 1 QB 227; *Mirror Newspapers Ltd and Another v Waller and Another* (1985) 1 NSWLR 1; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465; *Bankers Trust Australia Limited & Ors v National Companies and Securities Commission* (1989) 15 ACLR 58; *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744; *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344; *Attorney-General for New South Wales v Nationwide News Pty Limited & Anor* [2007] HCATrans 719; *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643; *Aldi Stores (a limited partnership) v Coles Supermarkets Australia Pty Ltd* [2010] FCA 563; *Qantas Airways Ltd v Rolls-Royce PLC* [2010] FCA 1481 - BC201010243; *Hogan v Hinch* [2011] HCA 4; *Momcilovic v R* [2011] HCA 34 (8 September 2011); *Minter Ellison (a Firm) v Raneberg* [2011] SASC 159; *Rinehart v Welker* [2011] NSWCA 425 (21

characterised as so fundamental that it should be considered as constituting a sacred part of the unwritten constitution of a common law jurisdiction and the administration of its justice.¹⁰⁸ The principle has been preserved through ensuring that proceedings are conducted in open court. Theoretically this serves a number of purposes, for example, allowing the public and the press access, to promote accountability and transparency, to foster confidence in the judiciary and to emphasise the independence of the judiciary from the executive and the legislature.¹⁰⁹ Arguably any inconvenience which a litigant experiences as a result should be tolerated, because ultimately such a system provides the best security for the pure, impartial, and efficient administration of justice.¹¹⁰

Sir Mathew Hale commented¹¹¹ on the English practice of providing evidence in public, and justified the reasons behind this practice in English courts as being based in the "excellency of this open course of evidence". He considered that it was important that the ruling by judges on objections to the "competence of the evidence, or the competence or credit of the witness" would be in the public interest,¹¹² "wherein if the judge be partial, his partiality and injustice will be evident to all members present". Furthermore, it obviates the need to maintain checks on judges to ensure that mistakes of law have not occurred.¹¹³

December 2011); *SPM v LWA* [2013] QSC 138 - BC201309888; *Rich v Attorney-General (NSW)* [2013] NSWSC 891 (BC201310712).

¹⁰⁸ *Scott v Scott* [1913] AC 417, at 473. According to Lord Shaw, whom described the principle as 'a sound and very sacred part of the constitution of the land and the administration of justice, extracted from James J. Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2005) 29 *University of New South Wales Law Journal* 147.

¹⁰⁹ *Scott v Scott* [1913] AC 417, at 463 which was approved by the Australian High Court in *Dickason v Dickason* (1913) 17 CLR 50 and *Russell v Russell* (1976) 134 CLR 495.

¹¹⁰ *Polyukhovich v The Commonwealth* (1991) 172 CLR 50; *Nicholas v R* [1998] HCA 9. See relevant commentary in, Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23(2) *Monash University Law Review* 248.

¹¹¹ Sir Matthew Hale, *A History of the Common Law of England*, ed. C. M. Gray (University of Chicago Press, 1970).

¹¹² See Chapter 4, the modern 'public interest test'.

¹¹³ Noting that the judge in his rulings would be subject to a Writ of Error.

The commentary by Hale is important, because it highlighted the public nature of such a system of public trials which provided a system of checks on the performance of judges making decisions.¹¹⁴ He stated:

That it is openly; and not in secret before a commissioner or two, and a couple of clerks, where oftentimes witnesses will deliver that which they will be ashamed to testify publicly....¹¹⁵

The onus also falls on witnesses under public scrutiny being equally effective. Hale also saw that the positives of the witness performing under public gaze, what he/she says together with their demeanour in saying it, provides for a credible witness and protects against lies or fabrications. Compare that to what Hale observed as written deposition of testimonies, inscribed by crafty clerks, commissioners or examiners, who might distort the meaning of statements made by witnesses.¹¹⁶

Similarly Sir William Blackstone citing Hale, emphasised the importance of publicity of trials:

the open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination before an officer or his clerk, in the ecclesiastical courts and all that have borrowed their procedure from the civil law: where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal.¹¹⁷

As stated by one of the most famous advocates of the open court rule, Jeremy Bentham:

Publicity is the very soul of justice. It keeps the judge himself, while trying, under trial. Under the auspices of publicity, the cause in the court of law, and the appeal to the court of public opinion, are going on at the same time. So many bystanders as an unrighteous judge, or rather a judge who would otherwise be unrighteous, beholds attending in his court, so many witnesses he sees of his unrighteousness, so many industrious proclaimers of his sentence. By publicity, the court of law, to which his judgment is appealed from, is secured against any want of evidence of his guilt. It is through publicity alone that justice becomes the mother of security. By publicity, the temple of justice is converted into a school of first order, where the most important branches of morality are enforced, by the most impressive means: into a theatre where sports of the imagination give place to more

¹¹⁴ Sir Matthew Hale, *A History of the Common Law of England*, ed. C. M. Gray (University of Chicago Press, 1970).

¹¹⁵ Ibid.

¹¹⁶ Ibid, 163.

¹¹⁷ Ibid, Radin, 383, fn 5, Commentaries, III, C. 23, II, p. 375, Jones' ed., 1983.

reasonable exhibitions of real life. Nor is publicity less auspicious to the veracity of the witness, than to the probity of the judge. Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of direction, from whence the truth he is struggling to suppress may through some unsuspected connexion burst forth to his confusion".¹¹⁸ "Without publicity, all other checks are fruitless: in comparison of publicity, all other checks are of small account. It is to publicity, more than to everything else put together, that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst."¹¹⁹

The comment goes to the heart of the principle of open justice by elaborating on the role of the open court rule, and that promoting openness to the public was necessary for the normal functioning of justice.

JUDICIAL ACCOUNTABILITY

Judicial accountability is a natural result of the scrutiny that is placed on the courts. Public scrutiny of the courts is an essential means by which society ensures that judges administer justice according to law. The relationship between judicial accountability and the principle of open justice was described well by former High Court of Australia Chief Justice Murray Gleeson,¹²⁰ as one which places great onus on judges to conduct their business in public, and to provide reasons for their decisions, so that they are exposed and are regularly subjected to public comment and criticism.¹²¹ Those attributes, His Honour described, serve as a form of accountability which should not be taken lightly. His Honour also stressed the practical importance of such a system from a decision making perspective, in that there are very few if any decision makers, apart from judges, who are obliged, as a matter of routine, to state in public, the reasons for all their decisions.¹²² Other than judges, His Honour went on to say that most decision makers have a choice whether or not to provide a reason for their judgments.¹²³

¹¹⁸ *The Works of Jeremy Bentham*, (Bowring, Simpkin, Marshall, & Co, 1843) vol 5, 316-317.

¹¹⁹ *Ibid.*

¹²⁰ Murray Gleeson, 'Judicial Accountability' (1995) 2 *The Judicial Review* 117, 123.

¹²¹ *Ibid.*, 122.

¹²² *Ibid.*

¹²³ *Ibid.*

Accountability in the judiciary informs the basis of public confidence in the administration of justice, and is an example of the practical operation of the principle of open justice.¹²⁴ The maintenance of public confidence in the administration of justice supports “the majesty of the law”.¹²⁵ The basic practical application of the rule is to strengthen public confidence in the judiciary.¹²⁶ Such notions were no doubt first raised from the general common law distrust of secret trials. These were ascribed to the notorious use of the practices by the Spanish Inquisition,¹²⁷ to the extremities of the Star Chamber Court of Britain,¹²⁸ and the abuses of the *letter de cachet* of the French monarchy.¹²⁹

Whatever the political inclinations underlying secret trials, the methods of trial mentioned above have been seen in a modern society to be undesirable. The right to an open trial has generally been recognised as a safeguard against attempts to employ law courts as instruments to legitimise unfair or unjust decisions made in secret. In addition

¹²⁴ James J. Spigelman, 'Seen to be Done: The Principle of Open Justice' (2000) 74 *Australian Law Journal* 290.

¹²⁵ *Ibid*, Also see discussion of *Mann v O'Neill* (1997) 191 CLR 204 at 245 per Gummow J (HCA).

¹²⁶ Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 14(7) *Judicial Officers Bulletin* 49, 49.

¹²⁷ M. Radin, 'The Right to a Public Trial' (1932) 6(3) *Temple Law Quarterly* 381, 389. The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who showered praise on the publicity of the common law courts, see: Sir William Blackstone, *Commentaries on the Laws of England, Book III, ch. 23, II* (Dawson reprint 1966); Jeremy Bentham, *Rationale of Judicial Evidence* (Garland Facsimile ed. 1978, 1827).

¹²⁸ *Ibid*, Washburn, 'The Court of Star Chamber' 12 *American Law Review* 21. See also, *Davis v United States*, USSC 119; 417 U.S. 333; 94 S.Ct. 2298; 41 L.Ed.2d 109; No. 72—1454 at 395 (10 June 1974); *Keddington v State* (1918) 19 Ariz 457, 459; *Williamson v. Lacy* 86 Me. 80, 82, 83, 29 A. 943, 944, 25 L.R.A. 506; *Dutton v State* (1914) 123 Md. 373, 387, 91 A. 417, 422; Edward Jenks, *The Book of English Law* (3 ed, 1932) vol 91.

¹²⁹ The *lettre de cachet* was an order of the king that one of his subjects be forthwith imprisoned or exiled without a trial or an opportunity to defend himself. In the eighteenth century they were often issued in blank to local police. Louis XV apparently issued more than 150,000 *lettres de cachet* during his reign. This device was the principal means employed to prosecute crimes of opinion, although it was also used by the royalty as a convenient method of preventing the public airing of intra-family scandals. Voltaire, Mirabeau and Montesquieu, among others denounced the use of the *lettre de cachet*, and it was abolished after the French Revolution in 1789, though later temporarily revived by Napoleon, see: *The Dictionary of English Law* (Earl Jowitt), (Sweet & Maxwell Limited, 1959), 297, see *ibid*, Radin.

to other benefits,¹³⁰ the public's knowledge that court proceedings are subject to judicial review acts as a restraint on the possible abuse of judicial power.¹³¹

An important aspect which should be made clear is that open justice is not necessarily linked to a right of free speech.¹³² In the United States Supreme Court decision of *re Oliver*,¹³³ Justice Black enforced the notion behind judicial accountability by way of reference to the *United States Bill of Rights*, which recognises the open court rule and broadly the principle of open justice, as a right:

The Sixth Amendment is a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.¹³⁴

This was also explained in *Davis v United States*:

The provision (the Sixth Amendment) is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England. The corrective influence of public attendance at trials was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed.¹³⁵

In Australia, the case of *John Fairfax Publications v Ryde Local Court* similarly observed:¹³⁶

The principle of open justice is a fundamental axiom of the Australian legal system. It informs and energises numerous areas of the law as I have sought to show elsewhere.¹³⁷ It is appropriate for the court to have regard to the principle when determining applications

¹³⁰ Public trials come to the attention of key witnesses unknown to the parties, which may then cause these witnesses to voluntarily come forward, see, *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1; (1998) 156 ALR 257.

¹³¹ *Ibid*, *Cowley v Pulsifer* (1884) 137; 50 Am Rep 318 Mass 392, 394.

¹³² See also, Chapter 7 'Freedom of the Press'.

¹³³ *In re Oliver* [1948] USSC 28; 333 U.S. 257; 68 S.Ct. 499; 92 L.Ed. 682; No. 215 (8 March 1948)

¹³⁴ *Ibid*, Amendment VI, 22; *The Constitution of the United States with Index and The Declaration of Independence* 24th Ed. 1789 (United States). See further discussion below.

¹³⁵ *Davis v United States*, USSC 119; 417 U.S. 333; 94 S.Ct. 2298; 41 L.Ed.2d 109; No. 72-1454 (10 June 1974).

¹³⁶ *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* (2005) 62 NSWLR 512, per Spigelman CJ at 60.

¹³⁷ James J. Spigelman, 'Seen to be Done: The Principle of Open Justice' (2000) 74 *Australian Law Journal* 290, 378.

for access under any express or implied power to grant access. In this regard it is, however, pertinent to recognise that the principle has purposes related to the operation of the legal system. Its purposes do not extend to encompass issues of freedom of speech and freedom of the press.¹³⁸

Though much of the confidence and accountability attributed to our legal system flows from the publicity afforded to court proceedings, a system of accountability strengthens public confidence in the administration of justice, as necessitated by the practical operation of the principle of open justice.¹³⁹ Thus, the basic practical application of the rule is to strengthen public confidence,¹⁴⁰ but without the necessity of being utilised for the purposes of freedom of speech and freedom of the press.

THE OPEN COURT RULE

The open court rule is fundamental to the proper operation of the principle of open justice and, in turn, the rule of law. In the traditional sense, open justice promotes and upholds the rule of law through keeping courts open and ensuring proceedings are conducted in public, the impact of which, as already observed, is accountability and a strengthening of public perception that justice is being done in a transparent and credible manner.¹⁴¹ The open court rule also serves to promote fairness and consistency of judicial decision making.¹⁴² A lie stated in public is more likely to be revealed as a lie, because of the exposure it receives, rather than a lie uttered in secret.¹⁴³

¹³⁸ See also, *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303 and *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [1999] 3 VR 231, 248.

¹³⁹ James J. Spiegelman, 'Seen to be Done: The Principle of Open Justice' (2000) 74 *Australian Law Journal* 290.

¹⁴⁰ Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 14(7) *Judicial Officers Bulletin* 49, 49.

¹⁴¹ *Cowley v Pulsifer* (1884) 137; 50 Am Rep 318 Mass 392; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450; *Richmond Newspapers, Inc v Virginia* [1980] USSC 154; 448 U.S. 555, 592, 596; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303 [1983] 1 AC 280, 303; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 300; *Hogan v Hinch* [2011] HCA 4.

¹⁴² *United States v Amodeo*, 71 F 3d 1044, 1048 (2nd Cir, 1995).

¹⁴³ William Blackstone, *Blackstone's Commentaries on the Laws of England* (1768) vol 3, Ch. 23, 373; Jeremy Bentham, *Rationale of Judicial Evidence* (1827) 67, 8; James H. Chadbourne, *Evidence in Trials at Common Law* (revised, 1976 ed, 1834) vol 6; *Edmonton Journal v Alberta (A-G)* [1989] 2 SCR 1326, 1338.

The open court rule provides other obvious broad benefits to the public. It ensures that members of the public are kept abreast of the workings of the courts and the way in which the law applies to them. Indeed, the Full Court of the Federal Court of Australia suggested in *R v Davis*¹⁴⁴ that, as few members of the public have the time, or even the inclination, to attend courts in person, the open court rule demands that the media be free to report the proceedings of the court.¹⁴⁵ The fact that courts function in a manner accepted by the public as being legitimate and credible, in-turn creates confidence in the judiciary and the legal system as a whole. Judicial accountability is directly responsible for the creation of that confidence. The confidence in the open court rule is reflected in other axioms of the larger principle of open justice, which promotes the rule of law and encourages members of the public to respect judicial decision making, rather than taking matters into their own hands.

The principle of open justice is made up of a number of important elements, one of which is the open court rule. The open court and the publicity afforded to parties in court, is one important part of the larger principle. This can be further articulated by describing the principle of open justice as containing within it a number of important elements such: judicial accountability, described as judges being answerable for their actions and decisions to the public as they operate with the principle of open justice;¹⁴⁶ judicial review, described as the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly;¹⁴⁷ integrity of the decision making process, described as decisions arrived at by judges must be based on legal standards and precedent in an open court.¹⁴⁸ This fosters confidence of the public in the courts;¹⁴⁹ privacy rights, afforded

¹⁴⁴ *R v Davis* [1995] FCA 1321 at 514.

¹⁴⁵ *R v Miroslav Jovanovic* [2014] ACTSC 98 at [14].

¹⁴⁶ *Ibid*, Gleeson, 'Judicial Accountability'.

¹⁴⁷ *Church of Scientology v Woodward* [1982] HCA 78; (1982) 154 CLR 25; 31 ALR 609; 54 ALJR 542., see also, E.G. Henderson L.F. Jaffe, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review*, 345; and ch 9; H. W. R. Wade B. Schwartz, *Legal Control of Government: Administrative Law in Britain and the United States* (Oxford: At the Clarendon Press, 1972); *ibid*.

¹⁴⁸ *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, see also, Hon. Justice Michael Kirby AC, 'A Global Approach to Judicial Independence and Integrity' (2001) 21(2) *University of Queensland Law Journal* 147, 148.

to the public seeking access to justice in the form of practical obscurity;¹⁵⁰ the open court rule, described as the functions of a court to operate in full view of the public and to report all court proceedings to the public;¹⁵¹ transparency, described as the flow-on effect of the open court rule and the duty of courts to promote transparency through the open court system;¹⁵² the right to be heard, described as the right of the public to voice their grievances in an open court system;¹⁵³ access to law courts, described as the right to petition the courts in order to conduct an open and public hearing to have the matter heard;¹⁵⁴ the right of access to court documents, described as a right to law reports in order to understand the law and to be able to re-publish judgments;¹⁵⁵ and equality before the law, described as the unqualified treatment of every member of the public equally by courts.¹⁵⁶

Despite growing concerns regarding the publication of law reports, such as those pertaining to Family Court proceedings,¹⁵⁷ the open court rule remains central to the administration of justice. In *Russell v Russell*¹⁵⁸ the High Court of Australia held that s 97 of the *Commonwealth Family Law Act*¹⁵⁹ could not be used to prevent the publication

¹⁴⁹ *Federal Commissioner of Taxation v Westrad Pty Ltd* (1980) 144 CLR 55; (1980) 30 ALR 353; (1980) 54 ALJR 460; (1980) 80 ATC 4357; (1980) 11 ATR 24, at 60; *Kable v DPP (NSW)* [1996] HCA 21; (1996) 189 CLR 5. Decisions arrived at by judges must be based on legal standards and precedent, rather than considerations and notions of fairness. This fosters confidence of the public in the courts.

¹⁵⁰ *United States Department of Justice, et al., Petitioners v Reporters Committee for Freedom of the Press et al.* [1989] 489 US 749, at 762-764. The practical obscurity of the past forms of law reporting in paper form, meant real and practical privacy protection which operated alongside the open court rule. See also, Chapter 4, 'Practical Obscurity'.

¹⁵¹ *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

¹⁵² *Ibid.*

¹⁵³ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, at 55.

¹⁵⁴ *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27; (1981) 36 ALR 425; (1981) 55 ALJR 631, at 5.

¹⁵⁵ *Incorporated Council of Law Reporting (Qld) v FCT* [1971] HCA 44; (1971) 125 CLR 659; [1972] ALR 127; (1971) 2 ATR 515; 45 ALJR 552 Per Windy J.

¹⁵⁶ *R v Binder* [1990] VicRp 50; [1990] VR 563 (11 August 1989); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22.

¹⁵⁷ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Family Law Act 1975* (Cth) s 97. The provision purports, amongst other things, to require the State court judge not to robe themselves as State judges may do, and not to sit in open court as State judges necessarily do, subject to the exercise of certain statutory discretions to close their courts on specific occasions.

of the law report,¹⁶⁰ since the public had a right to know of the operation of the courts.¹⁶¹

In the words of Gibbs J:

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 an 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 the independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for publicity is the authentic hall-mark of judicial, as distinct from administrative, procedure. To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy of confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable as a matter, or part of it, to be held in closed court.¹⁶²

However, the right to an open trial has to be considered against other rights, particularly in light of other interests, such as, privacy to ensure a fair trial. In fact this is a central argument of this thesis. Failure to exercise such a balance might not only undermine a fair trial but also breach individual privacy, which may in turn undermine the very confidence in the administration of justice which the open court rule may be attempting to protect. The maintenance of public confidence in the open court rule is increasingly significant at a time when there are confronting issues relating to changes in technology. If the public confidence in the courts is shaken, individuals seeking justice might take matters into their own hands.¹⁶³

MODERN PRACTICAL APPLICATION

It was not until the mid 1990's that the publication of electronic materials had practical impact on the scope and scale of the availability of court proceedings. As recently as the last decade, the impact of the open court rule has evolved dramatically. This was

¹⁶⁰ The court transcript subject to the application for suppression purportedly contained intimate information regarding the dissolution of marriage and custody proceedings of the five children arising from that marriage.

¹⁶¹ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520, at 518, see also, *Scott v Scott* [1913] AC 417. In that case, the court described the admission of the public to attend proceedings as 'one of the normal attributes of a court', at 532.

¹⁶² *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520, at 520.

¹⁶³ *Jago v The District Court of New South Wales* (1989) 16 CLR 23, per Brennan CJ at 54.

perpetuated with the advent of powerful search engines, coupled with a greater access to the internet, aided by greater education and access to legal material for lawyers and non-lawyers.¹⁶⁴ The wide availability of material has in-turn led to increased discussions related to exceptions to the open court rule, or more commonly, to the broader debate between the right to privacy and the principle of open justice. In subsequent chapters it is demonstrated that the open court rule has worked symbiotically with privacy values, particularly as, this thesis argues, the principle of open justice has always contained privacy as one of its core values. This specific aspect has now changed with the rise of digital law reporting,¹⁶⁵ and it is suggested that privacy values need to be expressed through the open court rule to better maintain the principle of open justice.¹⁶⁶

At a time where the digital era is enabling the uninhibited dissemination of information, exceptions to the open court rule have centred on the evidence being excluded from publication. This was made because the publication of that evidence would have placed, or was likely to place, at risk the fair trial of the accused on the charges before the court. This is particularly evident in criminal proceedings, where the accused would have to face further trials arising out of running proceedings.¹⁶⁷ More broadly it has given rise to discussions as to the kind of circumstances, specifically, where the courts have traditionally considered making orders for suppression or non-publication.

¹⁶⁴ Hon. Justice Michael Moore, 'Free Access to Law and the Development of the Rule of Law in Asia' <<http://www.austlii.edu.au/au/journals/FedJSchol/2009/2.html>>, See also, Clifford Einstein, 'Technology in the Court Room 2001 [Friend or Foe?]' <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_einstein_201101> see 'data asphyxiation', particularly relevant to the idea that information is no longer able to be controlled once it enters the world wide web. See also, James Spigelman, 'The Internet and the Right to a Fair Trial' (2006) 7 *The Judicial Review* 40, 4.

¹⁶⁵ See Chapter 3.

¹⁶⁶ See Chapter 4, 'The dissemination of public legal Information on the Internet and the rise of privacy concerns'. The thesis refers to the Family Court experience in that regard: The Family Court was able to implement measures to protect the identity of parties, that the principle of open justice is not only compatible with privacy values, but that the administration of justice becomes less challenging when privacy considered as part of its natural function. Against that backdrop, Chapter 6 and 7 provide discussion and analysis of the expression of privacy values through the open court rule.

¹⁶⁷ See *R v Glennon* [2001] VSCA 17, where such orders were made not only at the trial stage, but also on appeal, because the applicant was to face three subsequent trials, including a retrial on some of the counts the subject of one appeal, so that in the end publication of the judgment was suspended for over two years.

In the past such orders have been made in circumstances where the end aim of justice requires the concealment of some of the process.¹⁶⁸ When orders for suppression or non-publication are made pursuant to a statutory provision, the provisions are strictly interpreted according to the length and breadth of the intention underlying the legislation, and used only in circumstances which serve the administration of justice.¹⁶⁹ The courts are usually not inclined to make such orders unless it is absolutely necessary. The idea behind that cautious approach, save promoting the open court rule, was that the orders being sought were not prejudicing the administration of justice.¹⁷⁰

The traditional reluctance by courts to grant such applications is further emphasised by the fact that courts refuse orders even where applications concern the preservation of the administration of justice. When an application to grant such orders is to protect the administration of justice, the court must still balance that against the overarching public policy of whether the public has the right to know.¹⁷¹

This is said to be even more significant where courts are attempting to ensure the fair trial of an accused.¹⁷² Certainly, when an application is made for such orders and which application, if not made pursuant to a statutory power, is founded on other considerations, the court must be extremely cautious not to deny the public the fundamental principle of an open trial.¹⁷³

The next chapter examines how well these elements work together given the historical change in law reporting, particularly with respect to the digitisation of law reporting.¹⁷⁴ In subsequent chapters it is suggested that through focusing upon the open court rule,

¹⁶⁸ *Application by Chief Commissioner of Police (Vic) for leave to appeal* [2004] VSCA 3 (12 February 2004), at 30.

¹⁶⁹ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520; *Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344.

¹⁷⁰ *Ibid.* *Application by Chief Commissioner of Police (Vic) for leave to appeal*. See also, the preamble to the new Court Suppression and Non-Publication Orders Act 2010 (NSW).

¹⁷¹ *Russell v Russell; Farrelly v Farrelly* (1976) 9 ALR 103.

¹⁷² *Ibid.* *Application by Chief Commissioner of Police (Vic) for leave to appeal*.

¹⁷³ *Ibid.*

¹⁷⁴ See Chapters 4 and 6.

the principle of open justice is able to avoid any perceived conflicts with privacy values.¹⁷⁵

CONCLUSION

Through its historical development, to its current application, the principle of open justice has operated relatively successfully in order to maintain the administration of justice. As observed, open justice contains important elements necessary for its functioning and maintenance.

The important elements making up the principle of open justice were discussed. The distinction between the principle of open justice and the open court rule signifies other fundamental competing public interests, which work together to maintain the principle of open justice. The central theme of this thesis highlights the relationship between two of those important public interests, namely the open court rule and privacy. The theoretical significance of open justice was discussed with respect to the application of the open court rule and privacy. These give rise to the understanding that in the absence of any of these values, the principle is likely to become unstable and give rise to issues which directly correlate with those values. In later chapters, the thesis discusses the specific issue of increased privacy risks which have come to pass in recent years, due to increased preference for the open court rule by way of law reporting on the internet.

Whilst the rise in technology promotes a number of positive attributes such as, increased transparency by promoting the open court rule, ease of access to the law reports, the convenience of accessing court documents, and so forth, it has also given rise to some unintended consequences, one of which is the central focus of this thesis. The disclosure of personal information through digital law reports, which undermine the public interest in privacy, is one of the more challenging problems of modern times.

In the next chapter the thesis discusses the operational aspect of the open court rule and the the elements involved in the reporting of the law. The chapter reflects upon the

¹⁷⁵ Ibid.

development of law reporting from its humble beginnings to its modern practice of online publication and dissemination, free access to law and internet based law reporters.

CHAPTER 3

THE REPORTING OF LAW

INTRODUCTION

As discussed in the previous chapter, this thesis argues that for the open court rule to operate effectively, it is necessary for the administration of justice to be conducted in full view of the public and to provide the public with the right of access to justice. To that end, it was necessary to discuss the historical context in which the open court rule was founded. Furthermore, it is argued here that the principle of open justice has been operating relatively successfully in theory, from its inception until recent times.

However, the success of open justice was not measured against any particular standard, but rather as an attribute which (at that time) was promoted (in theory) by the courts. The principle of open justice was maintained by virtue of the fact that many of its internal elements were able to coexist without the need of any real practical application. From an operational perspective, the open court rule maintains the principle of open justice by way of law reporting. The principle was initially based on an oral tradition which then manifested into the accessible printed law reporting form, first by written hand, then the printing press and subsequently the modern day digital publication and dissemination on the internet.

In this chapter the thesis discusses the open court rule in the context of the historical development of law reporting, from its origins up to and including its modern day digital operation and its broad application due to free access to law.

The function of law reports is important for the common law tradition. The function behind the reporting of the law is important. It ensures that members of the public, the legal profession and the judicature are informed of judicial decisions, so as to practically give effect to the principle of open justice. The chapter postulates the practice of law

reporting as being important in the context of the provision of information to the public on the conduct of court proceedings, and as part of the overriding public interest that the courts administer justice.¹⁷⁶

THE REPORTING OF LAW

The primary focus of this thesis is on the impact and consequences of the internet on law reporting. It is important to note that when this thesis refers to law reporting, it is referring to the electronic publication of court decisions on the internet. By implication, the practice of law reporting was historically conducted in open courts before members of the public.¹⁷⁷ However, the restraints on access, distribution, accuracy and credibility of the early reports placed severe limitations on the practical impact on the public and the way in which society was kept informed of laws. As such, the idea of law reporting was only relevant in a theoretical sense. As the practice of law reporting evolved to include technology, so did its functions and duty to society become increasingly relevant. Law reports assumed the arduous responsibility of providing detailed accounts of public court proceedings, where the report generated would act as the eyes and ears of the public, as if the public were physically present in the court as part of any proceedings. The practice of law reporting is an ancient practice dating back centuries, which until recently was undertaken exclusively in paper format.

As with law reporting, the internet has had a profound and positive impact in many other areas. It is particularly relevant that the internet has created rights which were not, at least in practice, previously widely available. These include the right to access information, the right to receive education, and the right to take part in cultural life and to enjoy the benefits of science and other human progressive endeavours.¹⁷⁸ In addition, the internet has had an effect on governance in many fields, well beyond the scope of

¹⁷⁶ *R v Young* [1999] NSWCCA 166 (7 July 1999), per Beazely J at 133.

¹⁷⁷ Discussed at length in this Chapter, below.

¹⁷⁸ See Article 13 of the UN International Covenant on Economic, Social and Cultural Rights, 12/08/1999, E/C.12/1999/10, UN Doc (General Comments); Article 15 of the UN International Covenant on Economic, Social and Cultural Rights, 12/08/1999, E/C.12/1999/10, UN Doc General Comments. Discussed on 18, 19 in Lilian Edwards, *Law and the Internet* (Hart Publishing, 3rd ed, 2009).

telecommunication, which the internet was originally developed for.¹⁷⁹ Broadly speaking, technology has forced our legal system to change. This change has come through greater access to legal information via the internet and improved legal research and efficiency. Most importantly, technology has democratised access to law. This process has meant that the public is now made aware of what the law requires of them and is no longer marginalised for any reason.¹⁸⁰ That transition is predominantly apparent in the continuous integration and application of the internet to those jurisdictions with a common law tradition.¹⁸¹

The rise and continuing growth of the internet in a very short space of time, has led to the proliferation (to the public) of vast amounts of court sanctioned information, and without much regulation and judicial oversight¹⁸². Since its introduction, in the early 1990's, electronic court reporting has brought about some unintended consequences. To date, the courts have been reluctant to regulate law reporting and have relied upon the good faith of publishers. Whereas in the past the courts sanctioned the reporting of cases to specified reporters, which then charged a fee and were accessible to members of the legal profession only, today electronic reporting is free, accessible to everyone at any time, and without any restrictions or impediments. Interestingly, the literary description afforded to modern law reporting has many similarities and parallels to the theoretical definition underlying the administration of justice, discussed in Chapter 2.¹⁸³

At the time of drafting this thesis, technology continues to have a real impact on the process of the open court rule. Whilst the courts have been relatively open to the technological change, particularly in regards to promoting the open court rule, they

¹⁷⁹ Ibid, Edwards, 19.

¹⁸⁰ See James Spigelman, 'The Internet and the Right to a Fair Trial' (2006) 7 *The Judicial Review* 403.

¹⁸¹ For example, the modern practice of law reporting and its role in maintaining open justice in the respective jurisdictions, see Graham Greenleaf; Andrew Mowbray and Daniel Lewis, *Australasian Legal Information Handbook* (Butterworths, Australia, 1988), Chapter 1 and the works of organisations such as; Australasian Legal Information Institute (AustLII), University of Technology, Sydney, Faculty of Law <<http://www.austlii.edu.au/>> and particularly the role such organisations play in providing access to the law on a global scale, see Graham Greenleaf; Andrew Mowbray and Philip Chung, 'AustLII: Thinking Locally, Acting Globally' (21 October 2011) *Australian Law Librarian*, 101-116, 2011; *UNSW Law Research Paper* No. 2011-41.

¹⁸² See also, Figures 1 and 3 below.

¹⁸³ See Chapter 4, 'Theoretical Openness v Practical Openness'.

developed very little (if any) meaningful policies to regulate the downstream affects¹⁸⁴ of law reporting on the internet.¹⁸⁵ To better understand the conservative nature of courts in that regard, it is important that we look at some of the key historical developments in the English law reporting heritage.

ORIGINS AND DEVELOPMENT OF ENGLISH LAW REPORTING

The English tradition of law reporting draws its roots from ancient legal systems which helped develop the common law. Here the thesis discusses some significant aspects of the origins of English law reporting, in order to better appreciate the relationship and traditions of common law courts and the way in which law reporting has developed and evolved over many centuries.

Since its adoption from Roman law into English law, as early as 600 AD, law reporting has evolved to shape the way in which the public is made aware of common law court proceedings.¹⁸⁶ In its earliest form, law reporting began when the *dooms judgments* was written by King Ethelbert of Kent in 600 AD,¹⁸⁷ in the Roman fashion *juxta exempla Romanorum* (the Dooms).¹⁸⁸ Ethelbert was thus heavily influenced by the conservative Roman Church in that regard, and predominantly guided by the Roman Empire in its application.¹⁸⁹

¹⁸⁴ See Chapter 5 and 7, Following the Event consequences, including identity theft, prejudice to ongoing proceedings and lack of control over personal information.

¹⁸⁵ Andrew Cannon, 'Policies to control electronic access to court databases', *Computerisation of the Law: Global Challenges the transformation of justice* (UTS Law Review) (Halstead Press, 2005) vol 6, 39-45.

¹⁸⁶ Frederick Pollock and Frederic W. Maitland, *The History of English Law, before the time of Edward I* (Cambridge University Press, 2nd ed, 1968) vol 1.

¹⁸⁷ Ibid, Pollock, *The History of English Law, before the time of Edward I* 'The dark age in legal history', 11

¹⁸⁸ A. W. Ward and A. R. Waller, *The Cambridge History of English and American Literature* (New York: G.P. Putnam's Sons; Cambridge, England: University Press, 1901), see, XIII. Legal Literature, 2. The Laws of Ethelbert of Kent and other Early Kings.

¹⁸⁹ The Doms were heavily influenced by the Justinian codex. Though it is likely that the early forms of law reporting, as practiced by the Ancient Persians and Babylonians in their respective legal systems, around the time Justinian adopted his codex, were directly adopted by way of the dooms into English Legal jurisprudence: see Anahit Perikhanian, *The book of a thousand judgements: a Sasanian Law-Book* (Nina Garosian trans, Mazda Publishers, 1997) vol 39, 216: if we search out the origins of Roman law, we must study Babylon, 1, ch.1, the dark age in legal history; see Frederick Pollock and Frederic W. Maitland, *The History of English Law, before the time of Edward I* (Cambridge University Press, 2nd ed, 1968) vol1.

The written language of law reports also changed, evolving to include Germanic laws practiced by priests, bishops, and the church for the protection of the property of God, which were written entirely in the ancient German language.¹⁹⁰ The conquest of the Normans in 1066 AD saw the language of judicial records and courts transform largely into Latin. This was so because it allowed the bishops and clergy to have access to the law. This was indicative of the restricted access to justice which was afforded only to the religious institutions at the time. The actual court proceedings, when they did run had their pleadings drafted in French.¹⁹¹ It was not until 1731 that English became the official written language of the law courts.¹⁹²

The first law reports of English courts appeared during the end of the reign of Henry III, when the first collections of reports of cases being heard during terms in the Common Bench¹⁹³ and of cases heard during eyre¹⁹⁴ sessions were compiled.¹⁹⁵ The earliest law report in English comes from the *Michaelmas*¹⁹⁶ term¹⁹⁷ in 1268. The report contained the description of a case brought by writ of entry in the Common Bench. The judicial

¹⁹⁰ Ibid, Pollock, *The dark age in legal history*, 11.

¹⁹¹ Frederick Pollock and Frederic W. Maitland, *The History of English Law, before the time of Edward I* (Cambridge University Press, 2nd ed, 1968) vol 1, England under the Norman Kings, 83.

¹⁹² Ibid.

¹⁹³ The Common Bench was name used to refer to the Court of Common pleas. Thus the Common Bench Reports are the reports of the cases decided in the Court of Common pleas. The Court of Common Pleas was one of the courts into which the Curia Regis divided itself. It was considered a separate court in the way it operated, having a separate Chief Justice of the Common Pleas and detached from the King's Court (Aula Regis) as early as the reign of Richard I, and Magna Carta, 1215, s 14. The jurisdiction of the Common Bench was confined to civil matters, see, *The Dictionary of English Law (Earl Jowitt)*, (Sweet & Maxwell Limited, 1959), 426, 427.

¹⁹⁴ The 'eyre' or 'eire', were the court of justices itinerant or justices in eyre, who were regularly established, if not first appointed, by the parliament of Northhampton, 1176, with a delegated power from the King's great court or Aula Regia, considered as members thereof; they made their circuit round the kingdom once in seven years, for the purpose of trying causes. They are called the Bracton justiciarios itinerantes. Afterwards they were directed by Magna Carta to be sent into every country once a year. As the power of the justices of assize increased, so these justices itinerant gradually disappeared: see *ibid*, 773,774.

¹⁹⁵ Chantal Stebbings, *Law Reporting in Britain* (The Hambledon Press, 1995), Ch. 1, 'The beginning of English Law Reporting', 1-3.

¹⁹⁶ September 29, the feast of the Archangel Michael and All Angels. It is one of the customary quarter-days, and gives its name to the autumn sittings of the High Court, though they commence on October 1, and to the Michaelman term of the Inns, though it commences on November 5, see, *The Dictionary of English Law (Earl Jowitt)*, (Sweet & Maxwell Limited, 1959), 1170.

¹⁹⁷ This began on November 2 and ended on November 25. The division of the legal year into terms was abolished so far as regards the administration of justice by the Judicature Act, 1873, s 26. See *ibid*.

officers or sergeants¹⁹⁸ and the judges were not named, with the only description provided being the venue where the matter was heard.¹⁹⁹ The report contained records of exchanges between the parties by way of indirect reporting of speeches ascribed to the parties involved, the same as plea roll enrolment.²⁰⁰ These reports were in Latin.²⁰¹ The other main language used in drafting early law reports was French, which was far less formal than the Latin and as such was used to transcribe direct speeches by the parties to the proceedings, rather than the serjeants actually speaking for them. In these reports, the names of judges were anonymised. The first such reported case was heard in 1272 in Lincolnshire Eyre,²⁰² and continued to be common up to 1290.²⁰³ A number of reports of a similar nature also exist, the distinction being that the speaker of a single speech was identified as a particular serjeant or justice.²⁰⁴ The early forms of law reporting faced major initial problems, including duplication in many of the reports, which undermined their integrity and reliability.

ORAL TRADITION

As discussed in the previous chapter, one of the main elements forming part of the principle of open justice is the right to be heard, which was expressed along with other elements including the open court rule. Initially, the trend in reporting was based purely

¹⁹⁸ A type of judicial officer with powers similar to a judge in the city of London, who attended the Lord Mayor and Court Alderman on court days, acting as one of the judges of the Central Criminal Court. Also, serjeants at law were barristers of superior degree, to which they were called by writ under the Great Seal. They formed an Inn Called Serjeants' Inn. See, *The Dictionary of English Law (Earl Jowitt)*, (Sweet & Maxwell Limited, 1959), 1614, 1615.

¹⁹⁹ The heading identifies the case as having been heard in the fifty-second regnal year of Henry III, before Martin of Littlebury. See, Chantal Stebbings, *Law Reporting in Britain* (The Hambledon Press, 1995), 3 fn 7, 8.

²⁰⁰ As found in *The Earliest English Law Reports 1268 vol. I*. All other such references are likely found as published in vol. II of the *Earliest English Law Reports*. See, *ibid*, fn 8.

²⁰¹ Although not the smooth Latin of the clerks who made the plea roll enrolments. See, *ibid*, 3.

²⁰² *Casus Placitorum*, Collection I, no. 9, 65-67. It is not identified by Dunham but is a report of the case enrolled on JUST 1/483, m. 40d. See, Chantal Stebbings, *Law Reporting in Britain* (The Hambledon Press, 1995), fn 15, at 4.

²⁰³ Common Bench cases of this type, see 1274.1; 1274.2; 1275.2; 1275.4; 1275.5 (i), (ii); 1277.3; 1277.5; pre-1279.1; pre-1279.3 (ii); 1279.3; 1283.3; 1285.5; 1287-89.17 (ii). Of these 1275.5 (i), 1277.5 and 1278-89.17 (ii) also have preliminary explanations of the relevant facts; 1279.3 has a single speech ascribed to 'le contur Willem'. See *ibid*, fn 16.

²⁰⁴ Common Bench reports of this kind see 1276.4 (single speech ascribed to Alan of Walkingham); 1277.1 (single speech ascribed to Master Roger of Seaton); 1283.5 (i) (single speech ascribed to William of Barford); 1283.9 (judgment ascribed to Brompton); 1284.5 (single speech ascribed to Bocking); 1288.3 (single speech ascribed to Thomas Weyland); 1278-89.79 judgment ascribed to Weyand). See *ibid*, fn 17.

on that which was heard and captured by the first law scribes in court proceedings. In Early England, by the time of the 13th and 14th centuries, some of the court reports were apparently compiled from notes made in court by the presiding judges over the case. The notes were compiled by enrolling clerks before drafting the original record in the plea roll,²⁰⁵ and by lawyers hearing the case. Apart from that, it appears that access to independent reporting was otherwise limited.

Historically, the principle of open justice provides glimpses of what was traditionally the only way pleadings used to be heard: by word of mouth alone. As such, the lawyer or judicial officer had to rely on their memory of what took place in court proceedings in order to utilise the decision as "reliable" precedent. The way pleadings used to be captured and utilised by the early reporters was largely derived from reliance on hearing and memory of the early reporters.²⁰⁶ This often meant that each scribe had a differing version to report of the same proceedings. However, not all proceedings were subject to this practice. For example, the practice was exempted in criminal cases, and later superseded by written pleadings in the reign of Edward III who sought to bring more certainty in relation to records of court proceedings.²⁰⁷ However, the challenges of capturing accurate accounts of oral pleadings in court continued to remain a problem for sometime thereafter.

DUPLICATION AND RELIABILITY OF EARLY LAW REPORTS

Early law reporting faced a serious challenge to credibility, where multiple versions of the same case were reported and where they would be very different in content.²⁰⁸ Additionally, several independent reports of the same Common Bench cases would exist at the conclusion of court proceedings. For example, General Eyre cases in two or three independent versions survive, even though they were reporting the exact same

²⁰⁵ Ibid, Paul Brand, *Observing and Recording the Medieval Bar and Bench at Work, The origins of Law Reporting in England* (Selden Society Lecture Delivered in the Old Hall of Lincoln's Inn (Hardback), 1998) 15-17.

²⁰⁶ S. F. Milsom, *Historical Foundations of the Common Law* (London, 2 ed, 1981), 45.

²⁰⁷ *The Dictionary of English Law (Earl Jowitt)*, (Sweet & Maxwell Limited, 1959), oral pleadings, 1272.

²⁰⁸ Hon. Justice Ruth McColl, 'I.T. in the Courtroom from Both Sides of the Bench - the Transformation of Justice (UTS Law Review)', *Computerisation of the Law: Global Challenges* (Halstead Press, 2004) vol 6, 13, 17. This practice did not cease with the advent of the printing press either (see below).

case. There is also an example in Northampton shire Eyre, where seven different versions from the same case were reported.²⁰⁹

These reports were not considered to be official court sanctioned reports of the proceedings, as they were not accounts of the proceedings as entered on the plea roll.²¹⁰ The plea roll or the judgment roll, allowed for the official judgment to be recorded, according to the decision which the court had reached. These rolls were replaced by the cause book and the books in which judgments were entered.²¹¹

The precursor to these early reports may be traced back to two educational publications from the mid thirteenth century, titled *Casus placitorum and Brevia placitata*.²¹² The former script is comprised of a miscellaneous collection of legal notes contained in a number of different manuscripts. These scripts contain some common material but are generally very different from each other. Some notes in the *Casus* are derived directly from cases and contain arguments or allegations of fact and law. Other versions of the *Casus* contain evidence of the eventual judgment relegated to a particular judge. However, the *Casus* notes seem to contain snapshots rather than a faithful account of court proceedings.²¹³

Much closer to what we would recognise as court reporting was the *Brevaria placitata*, where the ascribed notes contain courtroom dialogue in the form of exchanges between the parties. These were apparently based on real cases, although they were heavily edited.²¹⁴ Unfortunately, these were not reliable in order to identify a specific case because the dialogue was generic and could have applied to any case. In any event,

²⁰⁹ Ibid, 7; Paul Brand, *Observing and Recording the Medieval Bar and Bench at Work, The origins of Law Reporting in England* (Selden Society Lecture Delivered in the Old Hall of Lincoln's Inn (Hardback), 1998).

²¹⁰ Ibid, 8.

²¹¹ Ibid, fn 15, see *The Dictionary of English Law* (Earl Jowitt), (Sweet & Maxwell Limited, 1959) 1567.

²¹² See, J. H. Baker, Records, reports and the origins of case-law in England, in *Judicial Records, Law Reports, and the Growth of Case Law* (Duncker & Humblot, 1989) at 15-45, from fn 30 in Chantal Stebbings, *Law Reporting in Britain* (The Hambledon Press, 1995).

²¹³ Chantal Stebbings, *Law Reporting in Britain* (The Hambledon Press, 1995), 6.

²¹⁴ Ibid. See also, ibid, Baker, Records, reports and the origins of case-law in England, in *Judicial Records, Law Reports, and the Growth of Case Law*, 18.

much of the plea rolls for the mid to later thirteenth century did not survive to prove the occurrence of those cases.²¹⁵ What is important for legal historians and for this thesis is the role of these reports in the development of a system of law reporting. It is significant in the context of the open court rule that a real attempt was made to report actual court activity, so that the public would be privy to the administration of justice on a day to day basis.

Law reporting further evolved in the later part of the thirteenth century, when greater resources were provided to courts, in the form of apprentices whose task it was to physically sit in court and to observe and report upon the proceedings.²¹⁶ Law reporting quality and coverage greatly improved from the second half of Edward I's reign.²¹⁷ Shortly after 1290, the first surviving collections of reports belonging to a particular Common Bench term or particular sessions of General Eyre appear.²¹⁸ From that period up to around the sixteenth century, law was reported in the year books.²¹⁹ This practice allowed for the compilation of a complete set of law reports from 1292 up to the present time. As time passed and improvements in quality and reporting increased, the practice of duplicate reporting diminished by the fourteenth century, resulting in a single more accurate publication of court proceedings.²²⁰

During the 13th and 14th centuries, some of the court reports were still compiled by apprentices of the court (although the majority of the independent reports were

²¹⁵ Ibid.

²¹⁶ Paul Brand, *Observing and Recording the Medieval Bar and Bench at Work, The origins of Law Reporting in England* (Selden Society Lecture Delivered in the Old Hall of Lincoln's Inn (Hardback), 1998) 3,8, 15, *ibid*, Computerisation of the law at 17, fn 16.

²¹⁷ Chantal Stebbings, *Law Reporting in Britain* (The Hambledon Press, 1995), 9.

²¹⁸ Ibid.

²¹⁹ Year Books, or Books of Years and Terms, reports, in a regular series, from the time of Edward II to Henry VIII. Year books are a series of reports of cases written in the Anglo-Norman language, commencing in the thirteenth century and extant either in manuscript copies or in print from 1290 to 1535, with a few gaps. There has been a considerable controversy as to their origin. It is sometimes said that they were taken by the prothonotaries or chief scribes of the courts, at the expense of the Crown, and published annually; hence their denomination, see *The Dictionary of English Law* (Earl Jowitt), (Sweet & Maxwell Limited, 1959), 1889.

²²⁰ See Hon. Justice Ruth McColl, 'I.T. in the courtroom from both sides of the bench - the transformation of justice (UTS Law Review)', *Computerisation of the Law: Global Challenges* (Halstead Press, 2004) vol 6, 13, 17; S. F. Milsom, *Historical Foundations of the Common Law* (London, 2 ed, 1981), 392-400.

apparently compiled from notes made in court by the presiding judges over the case). The notes were compiled by enrolling clerks to make notes before drafting the original record in the plea roll,²²¹ and by lawyers hearing the case. Apart from that, it appears that access to independent reporting was otherwise limited. The common practice was that lawyers and other judicial officers of the court would have had to remember from memory as to what was said in a case.²²² In a practical sense however, despite early law reporting efforts and improvements, the work of lawyers remained an arduous task, particularly when it concerned the accuracy of law reports. The reality remained that lawyers and judicial officers still often had to rely on their memory of what took place in court proceedings in order to utilise the decision as precedent, due to the lack of uniform and reliable records. This was changed with the invention of the printing press.

THE PRINTING PRESS

A most significant development in the history of law reporting came about with the introduction of the printing press for the publishing of law reports. The inception of the printing press did for law reporting what radio did for the reporting of news in the early twentieth century, and what the internet has done for the proliferation and dissemination of information in modern times. The first law book, entitled *Littleton's Tenures*, was printed in 1480.²²³ This heralded a significant change in the way law could be reported. The way in which legal information was thereafter prepared, published, presented and disseminated to the public took on a unique format by taking a leap from previous methods of printing. Everything was changed, from the outline of the text, to the number of words per page, to the font and format used by the primitive ink presses. This was a great leap from the ancient practice of scribes using quills to draft law reports on special scripts of the plea roll. More importantly, the printed versions had uniformity to

²²¹ Ibid, Paul Brand, *Observing and Recording the Medieval Bar and Bench at Work, The origins of Law Reporting in England* (Selden Society Lecture Delivered in the Old Hall of Lincoln's Inn (Hardback), 1998), 15-17.

²²² Ibid, McColl at 17, fn 18, S. F. Milsom, *Historical Foundations of the Common Law* (London, 2 ed, 1981), at 22.15, see also, 'Oral Tradition' discussed below.

²²³ J.H. Baker, *An Introduction to English History* (Butterworths, Third ed, 1990) 207.

them. With all their faults²²⁴ these early mechanically printed documents had the practical advantage of providing the legal profession with reports of accepted authenticity, because larger volumes were published and there were no variations between the actual copies. Additionally, the copies could be relied on to carry the law relatively accurately with a standard method of citation.²²⁵

The printing press gave practical meaning to the transparency and accountability of common law courts and energised the open court rule. The early impacts of the printing press, and indeed early printed law, has best been commented on by Sir John Baker:

The advent of the printing press affected a great, though silent, revolution in law, as it did in every department of learning. It widely disseminated legal knowledge; it greatly facilitated the standardising of justice throughout the country; it provided politicians with an armoury of those juristic weapons with which they fought the battle of English liberty in the seventeenth century. The first hundred years, however, of the era of the printing press did not witness the production and publication of any new work in English legal literature to be compared in merit or importance with either Fortescue or Littleton. Lawyers seemed to be content if they received from the press a steady supply of old authorities—registers of writs, books of entries, year books, abridgments, statutes and court keepers' guides.²²⁶

This literary sterility may have been due to the fact that English common law was out of favour in high places. The Tudors leaned towards courts like the *Star Chamber*, in which not common law but something very different was administered. English common law, indeed, was during the first half of the sixteenth century, in almost as grave danger of losing its supremacy as was the English parliament. It was saved, however, by the Inns of Court, and by the weapons which the printing-press put into the hands of these organised champions of precedent.²²⁷

In the next section, the thesis discusses the impacts of the early printing press and law reporting generally, on judicial accountability. The thesis contends that the positive effects of law reporting through the printing press were instrumental in forming the

²²⁴ Ibid, 208. For instance, judges are on record passing judgment and making commentary following their death and other chronological impossibilities. Other anomalies included to court reports which were printed and presented as different but related cases, or as successive arguments in the same case, were in fact reports of the very same arguments by different hands.

²²⁵ Ibid, 208.

²²⁶ Ibid, A. W. Ward and A. R. Waller, *The Cambridge History of English and American Literature* (New York: G.P. Putnam's Sons; Cambridge, England: University Press, 1901), accessed at: <<http://www.bartleby.com/218/1311.html>>.

²²⁷ Ibid.

public acceptance of judicial authority and accountability. This important element has subsequently become a crucial part of the open court rule, designed to maintain the principle of open justice.

JUDICIAL AUTHORITY AND ACCOUNTABILITY OF LAW REPORTING

Judicial authority and accountability result from law reporting, as subsequent public scrutiny requires careful consideration of decisions prior to their publication.²²⁸ Historically, law reporting impacted only a very small segment of the population. Apart from distinguished members of the legal profession, such as lawyers and judicial officers, only the elite and wealthy had access to law reports. This was also true of education in general, where only the wealthy and privileged had access to education. Access to education was directly correlated with access to justice, neither of which the underprivileged had access to. As a result, any semblance of what could be termed as 'access to justice' was restricted.²²⁹

The increased transparency brought on by improving technology also forced other changes. Judges presiding in open court proceedings not only ensured a better recording of proceedings, but also formulated ways in which the reports could be improved for a better audience. These related to the length of judgments drafted by the scribes, succinctness of the reports marked for publication, the content confined to the facts alone, or an exposition of all the surrounding issues and laws of the land, or a decision designed to act as guidance for future judges. This not only allowed for improved

²²⁸ *Macdougall v Knight* (1889) 14 App Cas 194 at 200 (see also the earlier proceedings in the Court of Appeal, reported at (1886) 17 QBD 636 at 639-640, *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58, at 58 to 63. See also, David Neuberger, 'Law Reporting and the Doctrine of Precedent: The Past the Present and the Future' (2007) *Halsbury's Laws of England Centenary Essays*, 71-73.

²²⁹ Paul Brand, *Observing and Recording the Medieval Bar and Bench at Work, The origins of Law Reporting in England* (Selden Society Lecture Delivered in the Old Hall of Lincoln's Inn (Hardback), 1998), 17. The pattern of subscription only access to legal information continued until very recently. This was certainly the case prior to free access to law, see Greenleaf, Graham, 'Free Access to Legal Information, LIIs, and the Free Access to Law Movement' (20 October 2011) *IALL International Handbook of Legal Information Management*, R. Danner and J. Winterton, eds., Ashgate, 2011; *UNSW Law Research Paper* No. 2011-40.

judgments but also reduced judicial errors, as it forced judges to consider their judgments and issues of law closely, prior to granting publication.²³⁰

Additionally, the conceptual impact of law reporting should not be underestimated, in relation to the maintenance of open justice both in the past and present. As law reporting and its technology evolved, so did the conciseness and clarity of the reports. As the nineteenth century approached, law reporting became more significant as a means by which some account of the day to day activities of the courts could be seen.

Consequently, the idea of an open court system and broadly, the principle of open justice became promoted through law reports, at least in theory. This had an important impact on the legal system as a whole. It became one thing to disagree with a judgment, to disagree with particular legislative provision and to rally for change in the law, but it was entirely a different matter to misquote or mis-state the contents of a judgment, or to mis-state the law.²³¹ Particular emphasis is made in this thesis on the importance and significance of the practical applications of access to justice.²³²

In modern times, public scrutiny is directly correlated with the authority that the judicature exercises, and because of the rapid advances in technology, access to justice and the various limitations which were prevalent in the past, are no longer a relevant issue.²³³ In the next section, the thesis takes a closer look at and discusses the particulars of the shortcomings in the early law reports previously mentioned.

²³⁰ See the comments of Lord Carnith, 'Judicial Precedent-Taming the Common Law, Lord Carnwath of Notting Hill JSC' (2012) *NMLR Annual Lecture Series*, 4, 5, Lord David Neuberger, 'Law Reporting and the Doctrine of Precedent: The Past the Present and the Future' (2007) *Halsbury's Laws of England Centenary Essays*, 71-73.

²³¹ Paul Brand, *Observing and Recording the Medieval Bar and Bench at Work, The origins of Law Reporting in England* (Selden Society Lecture Delivered in the Old Hall of Lincoln's Inn (Hardback), 1998) 17.

²³² See Chapter 4, 'Theoretical Openness v Practical Openness'.

²³³ See Chapter 4, 'Practical Limitations on the Open Court Rule'.

EARLY SHORTCOMINGS

Despite the advent of printed law reports, a number of problems remained. As Blackstone noted, reporters, whether intentionally or through lack of skill, published: Very crude and imperfect (perhaps contradictory) accounts of one and the same determination.²³⁴ However, Blackstone's remark did not apply to all reporters. Amongst the exceptions some of the more respected included: the Commentaries of Edmund Plowden, Sir Edward Coke, and Edward Bulstrode.²³⁵ Early English literature in Plowden's commentaries also included cases from 1550-1570 which were quite detailed in their description of court proceedings. In fact, Plowden went to great lengths to confirm the details of briefed counsels and presiding judges and magistrates. Most importantly, he was able to draft detailed transcripts of the record.²³⁶ Relevant to law reporting at the time, he also selected publications of cases dealing only with questions of law for solemn argument upon demurrer,²³⁷ special verdict,²³⁸ or motion in banc,²³⁹ ensuring that he edited them carefully with references and commentary of his own.

The works of Plowden were subsequently taken up by Sir Edward Coke, who edited eleven volumes of reports between 1600-1616 and produced other reports in manuscript format which were printed in part in 1658 and 1659.²⁴⁰ However, one particular flaw of

²³⁴ Lord David Neuberger, 'Law Reporting and the Doctrine of Precedent: The Past the Present and the Future' (2007) *Halsbury's Laws of England Centenary Essays*, 72. See Robert Carnwath, 'Judicial Precedent-Taming the Common Law, Lord Carnwath of Notting Hill JSC' (2012) *NMLR Annual Lecture Series*, 4.

²³⁵ J.H. Baker, *An Introduction to English History* (Butterworths, Third ed, 1990), 209, these were the Commentaries of Edmund Plowden (d. 1585), Commentaries of Sir Edward Coke (d. 1634) and Edward Bulstrode (d. 1659).

²³⁶ *Ibid*, 22.

²³⁷ A pleading by which a party admitted the facts as stated in pleading of his opponent, and referring the law arising thereon to the judgment of the court, waited until by such judgment of the court decided whether he was bound to answer. The office of a demurrer was simply to state that the plaintiff had not made a sufficient case to entitle him to relief: *The Dictionary of English Law (Earl Jowitt)*, (Sweet & Maxwell Limited, 1959) 609, 44; *Wood v Midgley* (1854) 5 De GM & GBy 41; 43 ER 784.

²³⁸ A special finding of the facts of the case, leaving to the court the application of the law to the facts thus found. For instance of a special verdict in a criminal case (which is very rare): *ibid*, Jowitt, 1662, see *R v Dudley and Stephens* (1884) 14 QBD 273; (1884) 54 LJMC 32.

²³⁹ Banc (or Banco), sitting in bancus, a seat or bench of justice. The sitting in banc, or in banco, were those which, before the Judicature Acts, 1873-75, were held at Westminster by the judges of the Queen's Bench, the Common Pleas, and the Exchequer for the purpose of determining questions of law. Motion in banc dealt with a motion designed to deal with a question of law, thus when sitting in banc, the judges dealt only with questions of law: *ibid*, Jowitt, 200.

²⁴⁰ *Ibid*, Baker, 210.

the editing style of Coke was that he added a tremendous amount of notes to the reports and did not distinguish his own views from those he was reporting.²⁴¹ Like Plowden, Coke believed that his reports were unbiased and designed to be treated as instructional law books based on actual cases. What distinguished Coke from his predecessor was that he enjoyed personal credibility, and his authority gave him license to carry on with that particular style of law reporting.²⁴² Coke's volumes were cited simply as 'The Reports' and have been the most influential in English legal history.²⁴³

The third series was that of a Welsh Judge, Edward Bulstrode, who three years before dying, edited three large volumes of King's Bench reports which were compiled under James I and Charles I.²⁴⁴ Though the Bulstrode reports were not and have never been as distinguished as the reports of Plowden and Coke, who published in the French language, they did enjoy a similar advantage to those of Plowden's. Bulstrode's reports were comprised of careful and detailed reporting, and were the first reports to have actually been published by their author in English.²⁴⁵ This was also significant because, for the first time, law reports were circulated amongst non lawyers.

The sixteenth and seventeenth century were also periods where reporting was unregulated by any single judicial or authoritative source. Evidence from surviving commentary suggests that the judicature was displeased at the quality of the reports.²⁴⁶ Despite the fine works of Coke and Plowden, there was no uniform standard of reporting, and few of them were of any accuracy and repute.²⁴⁷ Many of them were collected for private use and instruction and were never intended for publication at all.²⁴⁸ There was however a marked improvement in the quality of the reports in the eighteenth century, with some

²⁴¹ Ibid.

²⁴² Ibid, *Sir Edward Coke's* style of law reporting was nevertheless controversial, and was strongly criticised by contemporary figures such as Lord Ellesmere, who disapproved of his opinions.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Prior to the mid 17th Century in Britain, all reports were in old Law French. An English statute of 1650 required law books to be printed in English. See earlier discussion on the topic in this Chapter.

²⁴⁶ Carleton Kemp Allen, *Law in the making* (Oxford University Press, 7th ed, 1964) 226.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

of most important treatises to follow, culminating in the commentaries of the eighteenth century judge, William Blackstone.²⁴⁹

In 1704 Holt CJ, protested against "these scrambling reports", which "will make us to appear to posterity for a parcel of blockheads".²⁵⁰ In *Bird v Brown* (1849), the quality of the reporting was apparently so poor that Lord Macnaghten's "confidence in the infallibility of reports" was shaken as he made the following comment:

[The case] was heard by four judges. Only one judgment was given. The Exchequer reports attribute the judgment to Rolfe B. The Law Journal ascribes it to Park B. The Jurist puts it in the mouth of Pollock CB. No one gives it to the fourth judge; but then there were only three sets of reports current at the time.²⁵¹

The first regular series to be published with reported cases were Durnford and East's Term Reports (King's Bench, 1785 - 1800), Henry Blackstone (Common Pleas, 1788-96), Vesey Junior (Chancery, 1789-1817) and Anstruther (Exchequer, 1792-97).²⁵² These series were thereafter maintained by a number of professional law reporters until the Council of Law Reporting was established to produce the Law Reports.²⁵³

In the next section the thesis discusses initial impacts of the first incorporated law reporter on the evolution of law reporting and the open court rule.

INCORPORATED COUNCIL OF LAW REPORTING

The shortcomings and lack of accuracy discussed in the previous section went largely unattended until 1863. In a letter to the Solicitor General, William Daniel QC stated his concerns exposing the state of the law reporting at the time:

²⁴⁹ No radical changes occurred, even during Blackstone's reporting until the appearance of the reports of Sir James Burrow (d. 1782), Sylvester Douglas (1778-84) and Henry Cowper (1774-78), which after so much dross were regarded as formidable in accuracy and authority, and constituted the most important event since Coke and Plowden in the history of English law reporting. For more details see: *ibid*, 225-230.

²⁵⁰ *Ibid*, 228. Also commentary from the same page, quoting Holt C.J, see *Slater v May* (1704) 1 Ld Raym 1071, 1072.

²⁵¹ *Ibid*, Neuberger, 'Law Reporting and the Doctrine of Precedent', 4, see also, Robert Megarry, *A New Miscellany at Law: Yet Another Diversion for Lawyers and Others* (Hart Publishing, 2005), quoted from; *Keighley v Durant* [1901] AC 240.

²⁵² J.H. Baker, *An Introduction to English History* (Butterworths, Third ed, 1990) 211.

²⁵³ *Ibid*.

To these I would add a further evil....That of reporting cases indiscriminately without reference to their fitness or usefulness as precedents; merely because, having been reported by rivals, the omission of them might prejudice circulation and consequently diminish profit.²⁵⁴

Daniel pointed to fundamental issues such as costs involved in producing a single report, time delays, and the lack of accuracy and credibility prevalent at the time. Subsequently, he proposed the Incorporated Council of Law Reporting (ICLR) to be responsible for the appointment of editors and reporters, and sale and management of law reports. In addition the ICLR would be conducted by qualified individuals. In 1865 the first ICLR meeting was held and the first volumes of the law reports were published and distributed in 1866. Right from the start access to justice was defined as a commercial exercise, where access to ICLR reports was exclusive and based on a subscription. At the time there were over (400) subscriptions at (5) guineas per annum.²⁵⁵ In 1870, the ICLR registered as a company in Britain with the following description:

The preparation and publication, in a convenient form, at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England.²⁵⁶

As an entity the ICLR was not designed to make profits, and only charged enough fees to maintain its independence from government interference and to be able to function and produce law reports independently. As a result in 1870, the ICLR registered as a

²⁵⁴ Robert Carnwath, 'Judicial Precedent-Taming the Common Law, Lord Carnwath of Notting Hill JSC' (2012) *NMLR Annual Lecture Series*, 4 and 5.

²⁵⁵ Carol Ellis, 'The History of the Incorporated Council of Law Reporting for England and Wales', See also <<http://iclr.co.uk/>>; Hon. Justice Ruth McColl, 'I.T. in the courtroom from both sides of the bench - the transformation of justice (UTS Law Review)' *Computerisation of the Law: Global Challenges* (Halstead Press, 2004) vol 6, 13. Also see detailed timeline here: 'The Law Reports of the Incorporated Council of Law Reporting for England and Wales (Harvard Law School Publishing) <http://www.law.harvard.edu/library/research/guides/int_foreign/uk/law-reports-of-the-incorporated-council-of-law.html>.

²⁵⁶ Ibid.

charity.²⁵⁷ Compared to today's modern law reporters, most were charity-based entities and relied on government and non-government donations to survive.²⁵⁸

The most important outcome from the establishment of the ICLR was that the reports became more practically useful to legal practitioners. Each report had clear headnotes, identifying the legal points decided, with summaries of the facts and procedural history and verbatim reports of the judgment.²⁵⁹

In the next section, the thesis transitions to the early Australian jurisdiction, in particular New South Wales, and discusses the way in which law reporting historically developed in Australia.

LAW REPORTING IN COLONIAL AUSTRALIA

In Australia, early reporting was not conducted just to report the law.²⁶⁰ Rather, it represented a means by which the early forms of media and newspapers made headlines and provided a means by which the open court rule was put to the test. The inception of law reporting commenced in New South Wales in 1788.

Law reports were first published in the early 19th century by three of Sydney's largest newspapers, which dedicated their main columns to law reporting.²⁶¹ This is indicative of the early aspects of the open court rule and the tradition of open justice expressed in the young colony through the printing press. No continuous law reports existed at the time until reports of cases argued and determined in the Supreme Court of New South

²⁵⁷ Ibid.

²⁵⁸ For instance, an organisation like the Australasian Legal Information Institute (AustLII), is based on the ICLR model, in that it uses moneys donated to function as an independent arm of the judiciary, free from government interference and functions and publishes law reports independently, see AustLII charter found at *Australasian Legal Information Institute (AustLII)*, University of Technology, Sydney, Faculty of Law <<http://www.austlii.edu.au/>>.

²⁵⁹ Robert Carnwath, 'Judicial Precedent-Taming the Common Law, Lord Carnwath of Notting Hill JSC' (2012) *NMLR Annual Lecture Series*, 5.

²⁶⁰ Bruce Kercher, 'Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project' (2000) 18(3) *Law and History Review*.

²⁶¹ See History of law reporting in NSW found at *New South Wales Law Report*, <<http://nswlr.com.au/nsw-law-reports-overview/history/>>; Publishing in the NSW colony found at *Australian Government*, <<http://australia.gov.au/about-australia/australian-story/birth-of-the-newspaper>>

Wales started to appear later in the century. This was a thirteen volume series constituting mostly of newspaper accounts.

Like most law reporting at the time, there was little by way of accuracy and credibility in the early reports. One of the most famous of these, and a good example to demonstrate the impact of such reporting on the Australian legal system, flows from the decision in the case of *R v Murrell* (1836).²⁶² In *R v Murrell*, it was reported that the court held that there was no such thing as Aboriginal law or sovereignty, and that only one system of law exists in Australia which was adopted from the British legal system. In fact, that law report was misleading.²⁶³ The newspaper publishing the report only published it more than sixty years following the decision. The report was based on a newspaper account of the decision at the time, but was not confirmed against the transcript of the judge's decision.

In 1879, the New South Wales Law Reports commenced. This was largely done to reduce misunderstandings of and errors in, law reporting in Australia. Towards the end of the nineteenth century Gordon Legge published two volumes of NSW cases going back to 1830. Legge's reports, like those reports of cases argued and determined in the Supreme Court of New South Wales, covered cases from 1863 to 1879. These were also based on newspaper accounts of court proceedings. The oldest case reported from Legge's first volume is dated 1830. Again, that report was published six years after the establishment of the Supreme Court of New South Wales and forty years following the establishment of the colony in 1788. In fact, thousands of judgments were made by the court's first Chief Justice, Sir Francis Forbes, who sat on the bench from 1824 to 1836; but only seven of Forbe's decisions ever appeared in the Legge volumes.²⁶⁴

²⁶² *R v Murrell* (1836) 1 Legge 72. In April 1836, the three judges of the Supreme Court of New South Wales decided that the court had power to try a murder case in which both the victim and the defendant were Aborigines, see *R. v Wedge* (1976) 1 New South Wales Law Reports, 581-584; *Wik Peoples v State of Queensland* (1996) 187 CLR 181. The decision in *R v Murrell* (1836) 1 Legge 72, is still cited as authority for the proposition that the Australian common law courts have jurisdiction over Aborigines.

²⁶³ *Ibid*, Kercher.

²⁶⁴ For further details, see Bruce Kercher, 'Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project' (2000) 18(3) *Law and History Review*; Hon. Justice Ruth McColl, 'I.T. in

From 1875 to 1940, law reporting developed further, with certain distinct changes. The length of judgments increased over that period of time, with an average fourfold increase of each report. It was the length of the reasoning for judgments that increased, whilst a Professor Stephen Hedley observed, citations to foreign cases and civilian sources, such as textbooks (particularly if the author was still alive) decreased.²⁶⁵

The distinction between authorised, unauthorised and unreported law reports also started to emerge. The distinction is relatively simple to understand. As the name suggests, authorised reports were carefully reviewed prior to publication and contained precedent and general principles of law. Unauthorised reports began to emerge as a cheaper, faster alternative to the authorised reports, because they did not go through the same types of rigorous processes of review prior to publication. Naturally, there was a preference for citations from authorised reports.²⁶⁶

In the next sections the thesis discusses the origins of the establishment of the first electronic commercial law reporter and the transition to internet based law reporting.

ELECTRONIC REPORTING OF LAW

The changing technological landscape of the twentieth century led to the inception of modern law reporting. By the middle of the 20th century, commercial entities began to establish a basis for operation and to offer electronic versions of their reports. The first mainstream commercial legal information system²⁶⁷ was established in 1969 by the Ohio

the courtroom from both sides of the bench - the transformation of justice (UTS Law Review), *Computerisation of the Law: Global Challenges* (Halstead Press, 2004) vol 6, 13.

²⁶⁵ Chantal Stebbings, *Law Reporting in Britain* (The Hambledon Press, 1995), see Chapter 10, Steve Hedley, 'Words, Words, Words: Making Sense of Legal Judgments', 1875-1940, 169-171.

²⁶⁶ For general information and further details see the website of the NSW LR on, *New South Wales Law Reports* <<http://nswlr.com.au/>>. With the advent of computerisation there was a trend towards an increase in the use of unauthorised law reports approved. For instance, by 1895 there were approximately 1,800 volumes of law reports in the United Kingdom,²⁶⁶ whereas at the time of drafting this thesis AustLII databases contained 4.3 million indexed cases, law reform documents and journal articles, see LawCite website as of 13 April 2013, *LawCite*, <<http://www.austlii.edu.au/lawcite/>>.

²⁶⁷ *Ohio Bar Association Repository (OBAR)* <<http://ead.ohiolink.edu/xtf-ead/view?docId=ead/OCIW-L0008.xml;query=;brand=default>>.

Bar Association.²⁶⁸ The system was acquired by Mead Data Central Incorporated which shortly after upgraded its legal data retrieval system and released it as the commercial system, known as Lexis.

This system was significant because it opened the way for the inclusion of the complete and authentic texts of documents in computerised information retrieval systems or, as referred to in this thesis: Electronic Legal Information Retrieval System (ELIRS). ELIRS has subsequently become the main identifying feature of legal information retrieval, and one of the few areas of computing science where lawyers have played a significant role.²⁶⁹ ELIRS aid the operation of the open court rule and in turn maintains the principle of open justice.²⁷⁰ Essentially ELIRS automated systems consisting of computer codes designed to recognise and extract words and other data based on heuristics. ELIRS is able to find and extract legal information with outstanding speed and efficiency and, thanks to modern search engines, accuracy. It allows for access to legal information more efficiently by being specific and time efficient. Although ELIRS offers many advantages for both the user and the interface application, it is efficient to a fault. ELIRS has presented some challenges and created the potential for misuse.²⁷¹

Seeing its phenomenal commercial application very early on, ELIRS were integrated into the main user system of Lexis. It allowed Lexis to become the largest commercial free text database system in the world. In 1994, Reed Elsevier PLC²⁷² acquired Mead Data Central Inc. and changed the name of Lexis to Lexis-Nexis.²⁷³ Modern search engines are essentially Electronic Information Retrieval Systems, referred to in this

²⁶⁸ Daniel Lewis, Graham Greenleaf and Andrew Mowbray, *Australasian Legal Information Handbook* (Butterworths, Australia, 1988).

²⁶⁹ Ibid.

²⁷⁰ See Chapter 2.

²⁷¹ The scope and limitations of the legal application of ELIRS is discussed in Chapters 5 and 6.

²⁷² Reed Elsevier is a British-Dutch PLC publisher and information provider operating in the science, medical, legal, risk and business sectors. It is listed on several of the world's major stock exchanges: *Reed Elsevier* <<http://www.reedelsevier.com/aboutus/OurHistory/Pages/Home.aspx>>.

²⁷³ See 'Company news; a name change is planned for Mead Data Central' (1994) <<http://www.nytimes.com/1994/12/02/business/company-news-a-name-change-is-planned-for-mead-data-central.html?src=pm>>; Edward A. Gargan, 'The Media Business; Reed-Elsevier Building Big Presence in the U.S.' (1994) <<http://www.nytimes.com/1994/10/06/business/the-media-business-reed-elsevier-building-big-presence-in-the-us.html?src=pm>>

thesis as 'EIRS'. As the name suggests, EIRS is differentiated from ELIRS, on the basis that the later is specific to legal information while the former relates to data in general.

Another major US based ELIRS, Westlaw was established by the major U.S. legal publisher West Publishing Company in 1976. These moves demonstrate that technological advances were rapidly embraced by entities which did not have any significant presence in the paper-based law reporting market, but which identified a niche in electronic law reporting with the applicability of ELIRS. Many of the commercial law reporters, such as Lexis and Westlaw were not independent entities, but were owned by larger conglomerates that operated in multiple jurisdictions, and which were not necessarily bound by any single governmental rule and regulation.²⁷⁴ This is particularly relevant to note the distinction this thesis makes between commercial and free access to law.

In the next section the thesis discusses the establishment of electronic law reporting in Australia and the way in which it operates.

THE BEGINNING OF ELECTRONIC LAW REPORTING IN AUSTRALIA

Public electronic access to legal information in Australia started in early 1973, when the first Committee on Computerisation of Legal data was established by the Commonwealth Attorney-General. One of the main roles allocated to the Committee by the Federal Attorney-General's department, headed by the Hon. Lionel Murphy at that time, was to investigate and report on the "logistics, time scale and finance necessary for the computerisation of legal data".²⁷⁵ In other words, the transitional policy required for the computerisation of the law.²⁷⁶

In 1974, that Committee drafted a report which contained the blueprint for the guidelines of electronic law reporting in Australia. Its recommendations were that: the

²⁷⁴ Ibid, Gargan.

²⁷⁵ Ibid, Mowbray, 8, 9, see Chapter 7 for further details regarding early developments, see also, J. Bing, *Handbook of Legal Information Retrieval* (Elsevier Science Publishers B.V., 1984).

²⁷⁶ Ibid.

Commonwealth Attorney-General's Department establish a system for storage and retrieval of primary legal information;²⁷⁷ an interim system be established by the end of 1974 to include Commonwealth legislation; that the system be extended to include Commonwealth Regulation, Australian Capital Territory and Northern Territory Ordinances and Regulations as well as some case law; interested parties outside of the Department be given access to the system; that the data be stored in full text, but that catchwords and head-notes should be also included; and the software platform should be based on the commercial IBM STAIRS free text retrieval platform.²⁷⁸

The introduction of ELIRS into the Australian legal system facilitated the above transition, by adopting a methodology of including "catchwords and head-notes", which allowed ELIRS to function and to be able to utilise more advanced heuristic systems. This is seen being implemented in modern open court rule applications, such as those used by LexisNexis, AGIS²⁷⁹ and AustLII.²⁸⁰

From 1981 to 1996, Australia experienced a new legal information system named SCALE, which stood for "Statutes and Cases Automated Legal Enquiry". The acronym was deliberately chosen so that it might indicate some association with the 'scales of justice'²⁸¹, a universally recognised symbol of law. The system was designed to handle both statute and case law material²⁸² and was relatively easy to set up. All the relevant State and Commonwealth statutes and case law were loaded on the system and coded to find the tagged specific catchwords and head-notes.²⁸³ This was essentially ELIRS

²⁷⁷ Ibid, 10, see also, Commonwealth of Australia, *Report of the Committee on Computerisation of Legal Data (March 1974)*, Parl Paper No 55 (1975).

²⁷⁸ IBM developed the Storage And Information Retrieval System software, which could also be modified by commercial operators under license, see *IBM search manager 370* <<http://www-01.ibm.com/software/data/sm370/about.html>>.

²⁷⁹ *The Attorney-General's Information Service (AGIS)*, <<http://www.ag.gov.au/Publications/Pages/AGISTheAttorneyGeneralsInformationService.aspx>>.

²⁸⁰ Jer Lang Hong, Eu-Gene Siew and Simon Egerton, 'Information extraction for search engines using fast heuristic techniques' (2010) 69(2) *Data & Knowledge Engineering* 169.

²⁸¹ P.J. Ward, 'Computerisation of Legal Materials in Australia' (1981) 1(2) *Journal of Law, Information and Science* 162, see *ibid*.

²⁸² *Ibid*, 165.

²⁸³ See Legal information retrieval in Australia, <<http://www2.austlii.edu.au/cal/guides/index-4.html#Heading85>>.

customised to Commonwealth and State application. Access was limited only to lawyers and the early objectives of the system placed heavy emphasis on the acceptance of the system by legal practitioners for access and publication of legal materials, previously reserved and utilised only through paper-based subscriptions. This was particularly challenging as the acceptance of the system depended largely on a conservative profession run by conservative lawyers, and that the current manual system of research by them was well-established and understood.²⁸⁴

An important issue of the time was whether lawyers would be able to successfully use ELIRS for research purposes in a practical sense, or whether they would always require someone else trained specifically for the task to perform research on their behalf.²⁸⁵ A further challenge involved determining the most efficient method of material capture for the system, in particular the mechanism for conversion of original sources from paper volumes and other texts.²⁸⁶ The total estimated cost for the establishment of SCALE was approximately \$5.2 million in 1977.²⁸⁷

The only initial set-back to the ELIRS early operation was the limitations posed by the technology of the day. The system was practically only accessible from a small number of terminals operating over leased lines.²⁸⁸

MONOPOLIES, COMMERCIALISATION, MOTIVATIONAL TRANSITION

During the early years of the establishment of electronic publication, the Standing Committee of Attorneys-General (SCAG)²⁸⁹ was concerned that unless a commercial monopoly was provided to a single supplier, that Australian legal information would be

²⁸⁴ P.J. Ward, 'Computerisation of Legal Materials in Australia' (1981) 1(2) *Journal of Law, Information and Science* 162, 165.

²⁸⁵ This remains true till this day, where lawyers, particularly those from the older generations have secretaries and professional researchers in their employ.

²⁸⁶ This was recognised as being particularly challenging, since there were no other computers around to capture its by-product.

²⁸⁷ D. Grainger, 'SCALE's Twenty Years of Computerised Law in the Public Sector Proceedings of the 1st *AustLII* Conference on Computerisation of Law via the *Internet*' (1997) 25-27, see, *ibid* Mowbray, 11.

²⁸⁸ *Ibid*, Mowbray, 12, 'Early Limitations'.

²⁸⁹ Recently changing its title to '*Standing Committee on Law and Justice (SCLJ)*', <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_index>.

subsumed as part of Lexis or another international database. The official justification provided by SCAG was that they thought that no commercial provider would be willing to invest the time and money that would be necessary to provide comprehensive access to State law, unless it was given a head start on the competition which would allow it to achieve market share.²⁹⁰ It was felt that if the market was left to operate freely, operators would target only high demand areas, such as unreported judgments. It is suggested that this may be the first evidence of the Attorney General's department attempting to exercise control over electronic publication of law reports and, more broadly, the open court rule.

From an historical context, as discussed in the previous section, NSW was the first operational jurisdiction, where the Supreme Court of NSW was first established in 1824. Australia was a penal colony, which included the entire eastern part of mainland Australia. Initially, that colony went through its own rapid transition from military to civilian, which in-turn meant civilian law courts, instead of military courts. The Chief Justice of New South Wales made an interesting statement regarding the fact that some Governors of the colony at the time had difficulty coming to terms with that transition, in the context of an independent court system and judicial impartiality, free from control. He observed that:

The notion of control is inconsistent with the nature of a Supreme Court; the judicial office stands uncontrolled and independent, and bowing to no power but the supremacy of law.²⁹¹

If it is agreed that as a citizen in a democratic society, the essence of the rule of law is that all authority is subject to and limited by the rule of law,²⁹² then it should also be agreed that without such a system, there is a serious likelihood that a dictatorial system would have control over society. The former is advocating that the law be in control, rather than placing the law at the disposal of a single individual or a party to wield

²⁹⁰ See *ibid*, Mowbray, 13.

²⁹¹ Murray Gleeson, 'Courts and the rule of law' (2001) *The Rule of Law Series*, see footnote 3 <http://www.highcourt.gov.au/speeches/cj/cj_ruleoflaw.htm#_ednref16>.

²⁹² *Ibid*, at fn 5. See also, Keith Mason, *'The Rule of Law' in Essays on Law and Government* (Finn P, 1995).

control. In societies where the rule of law is able to function without any impediments and caveats, the law is essentially in control. It is able to control and regulate society, provide fairness and justice²⁹³ and be expressed as an inherent right of all individuals, compatible with Human Rights.²⁹⁴

In the early 1990s, some universities and organisations began using the internet to publish legal materials. In the United States, the Supreme Court²⁹⁵ started publishing its decisions on the internet. By 1993, the world wide web had been developed and began to be used as the standard basis for electronic publication over the internet.²⁹⁶ This underpinned a new era of publication and dissemination of court proceedings. More importantly it allowed ELIRS to operate freely across a large area of connectivity across the internet, and to be able to capture a broader range of legal data, wherever specific catchwords or headings were utilised.

As previously mentioned, the potential for the applications offered by EIRS were limitless. This was due to the ability to retrieve selective information very quickly and accurately. However, many applications were not realised until law reporters began seriously contemplating utilising the internet for law reporting. The application of ELIRS via the internet brought a motivational change. In the past, the law was published solely for the purpose of publishing precedent and to some limited, albeit theoretical extent, effecting the open court rule for the maintenance of the principle of open justice. Today, law reporting is undertaken for more than just reporting the law. Access to law reports is viewed by the public as an inherent right perceived as flowing from constitutional powers afforded to the judiciary.²⁹⁷ Today, from an operational sense, law reporting is undertaken as a methodical duty by automation in order to enable the open court rule to function expeditiously and without any restrictions.

²⁹³ Ibid, Gleeson fn 6, see also J.A.G. Griffith, 'The Common Law and the Political Constitution' (Pt 17) (2001) *Law Quarterly Review* 42, 46. See also, detailed discussion in Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195.

²⁹⁴ *Momcilovic v R* [2011] HCA 34 (8 September 2011).

²⁹⁵ *Supreme Court of the United States* <<http://www.supremecourt.gov/>>.

²⁹⁶ See fn 305.

²⁹⁷ Lord David Neuberger, 'Law Reporting and the Doctrine of Precedent: The Past the Present and the Future' (2007) *Halsbury's Laws of England Centenary Essays*.

THE LEGAL INFORMATION INSTITUTE (LII) & THE FREE ACCESS TO LAW MOVEMENT (FALM)

The first legal information institute began at Cornell University in July 1992 and was named LII (Cornell), and represents one of the earliest initiatives to publish significant quantities of legal material over the internet on a free access basis.²⁹⁸ Its objectives were to establish "an open-ended experimental venture in electronic publishing and research".²⁹⁹ The LII (Cornell) was the first organisation to practically implement the Free Access to Law Movement (FALM) objective.

In the words of Professor Peter Martin of Cornell Law School:

The legal information industry in the U.S. in the mid 90s had focused totally on judges and lawyers and hadn't paid attention to the information needs of others. One of our powerful early discoveries was how much demand outside those professional sectors there was - ordinary citizens trying to make sense of laws that impinge on their lives.³⁰⁰

Eventually, within a short space of time, the LII (Cornell) experimental model was to give rise to the many other legal information institutes. These are discussed further below.

From the mid 1990s the world wide web introduced publication and dissemination of electronic materials by way of cheap and efficient methods of dissemination of data via the internet. The impact on the scope and scale of the availability of court proceedings was immediately felt. In 1997, the 'Law via Internet' conferences became the starting point whereby co-operation was established to give rise to what was to become FALM less than a decade later.³⁰¹

Free access to law was born out of the idea that legal information should be accessible freely to everyone with access to the internet, with the Latin maxim *Ignorantia juris non*

²⁹⁸ Ibid, Mowbray, 24.

²⁹⁹ Linda Myers, 'CU Law institute web site has latest legal information, from Miranda to Elian' (2000) *Cornell Chronicle* <http://www.news.cornell.edu/Chronicle/00/4.27.00/Legal_Info_Inst.html>.

³⁰⁰ Ibid.

³⁰¹ Graham Greenleaf, 'Free Access to Legal Information, LIIs, and the Free Access to Law Movement' (20 October 2011) *IALL International Handbook of Legal Information Management*, R. Danner and J. Winterton (eds), Ashgate, 2011; UNSW Law Research Paper No. 2011-40.

excusat which translates to 'ignorance of the law does not excuse'.³⁰² Free access to law in effect, empowered the practical expression of that maxim by advocating that all our laws, written or unwritten, be made accessible to the public, at any moment, as a right.³⁰³ This was also an important philosophical transition. This involved the transition from the concept of access to legal information as a privilege, to the idea of access to legal information as a right. Two significant reasons are cited for this transition. The first being the liberating effects brought on by the introduction of free internet access³⁰⁴. Free internet access meant uninhibited quantities of data became available to everyone instantly. The internet broke down all walls and all barriers and in a sense brought people together. The second reason was because of demand from the public. Public perception changed (and continues to change) because access to legal information is perceived as a right and not a privilege.

At its core, free access to law and FALM, is constituted on the idea that public legal information from all countries and international organisations is part of the common heritage of humanity, ought to be provided on a non-profit basis and free of charge³⁰⁵, and while the right to publication and dissemination of primary and secondary information is afforded to legal Information Institutes,³⁰⁶ subject to local privacy laws,³⁰⁷ the responsibility of ensuring access for re-publication lies with courts and legislative bodies that create or control³⁰⁸ that information.³⁰⁹

³⁰² Hon. Justice Michael Moore, 'Free Access to Law and the Development of the Rule of Law in Asia' <<http://www.austlii.edu.au/au/journals/FedJSchol/2009/2.html>>.

³⁰³ *Ibid.*

³⁰⁴ See Graham Greenleaf, Andrew Mowbray and Philip Chung, 'The meaning of 'free access to legal information': A twenty year evolution' (2013) 1(1) *Journal of Open Access Law*, 5 <<http://ojs.law.cornell.edu/index.php/joal/article/view/11>>. See also, Graham Greenleaf, 'Free access to legal information, LIIs, and the Free Access to Law Movement', Chapter in Danner, R and Winterton, J (eds) *IALL International Handbook of Legal Information Management* (2011).

³⁰⁵ See Appendix F, 'Declaration on Free Access to Law'.

³⁰⁶ For example the work of *Cornell Legal Information Institute LII (Cornell)*, Cornell University Law School <<http://www.law.cornell.edu/>>; *Australasian Legal Information Institute (AustLII)*, University of Technology, Sydney, Faculty of Law <<http://www.austlii.edu.au/>>.

³⁰⁷ See Appendix G, GP 11.

³⁰⁸ The idea of control and the varying degrees of control over personal information as significant determining factor over the presence of privacy is discussed in later chapters, see Chapters 6, 7 and 9.

³⁰⁹ See *ibid.*, Appendix F.

Therefore, increasing the uninhibited access to that information can only benefit the administration of justice and the rule of law.³¹⁰ This raises some important issues in relation to the operation of the open court rule in the context of law reporting and free access to law. The first issue being that the open court rule has by and large been operating without a privacy exception until now. In other words, privacy is not in itself considered as a competing interest to the open court rule to prevent partial or complete restriction of law reporting to protect personal information.³¹¹ This is despite the fact that the very organisations responsible for making free access to law a reality³¹² declared early on that the onus should be on the courts to ensure access for republication to law reports³¹³ subject to local privacy laws.³¹⁴ This demonstrates that the open court rule, operating in a digital environment, was never intended or designed to operate without a privacy exception. The second issue to raise here is relevant to the idea of control, which is discussed both in the context of privacy and/or the ability to exercise control over personal information, and the lack thereof, on the world wide web.

Technically, FALM is a movement rising out of the Declaration on Free Access to Law in 2002 (declaration).³¹⁵ This declaration was made at the Law via the Internet Conference in Montreal, Canada in 2002, brought on by several stake holders including, the Cornell Legal Information Institute LII (Cornell), the Australasian Legal Information Institute (AustLII) and the Canadian Legal Information Institute (CanLII). The declaration was comprised of a number of proposed principles considered as the basis of free access to legal information. These principles have a common thread

³¹⁰ Ibid, note that the declaration defines public legal information as meaning: legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.

³¹¹ Personal information able to be used to identify the individual and therefore breach their privacy. See Appendix A, 'Privacy Protection Principles (PPS)' and Chapter 8, regarding the definitions of Primary to Quinary data pursuant to the proposed PPS model.

³¹² See *ibid*, LII (Cornell), AustLII, CanLII, BAILII, PacLII.

³¹³ See Appendix F, 'The Declaration on Free Access to Law'.

³¹⁴ See Appendix G, 'Hague Conference Guiding Principles', GP 11: Online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymised in order to make them available for free access.

³¹⁵ *Ibid*.

running through them, and whether they originate from government or NGOs (such as the LIIs) maintain similar practices when it concerns access, publication and dissemination of legal data.³¹⁶

However, the role of the State³¹⁷ was clearly defined as carrying the responsibility of providing access, publication and dissemination of judicial decisions and legislation. The most important of these are summed up as the following points which act as the modern representation of FALM. These include: ensuring free access to the law, assisting and removing impediments for law reporters in the publication and dissemination of judicial decisions (both infrastructural and policy), ensuring that any judicial decision earmarked for publication and dissemination respects local privacy laws³¹⁸, ensuring that the legal material is authoritative, ensuring the preservation of historical legal documents, to ensure that neutral methods of citation are used,³¹⁹ and to ensure open formats of data including metadata is provided.³²⁰ The other main objective of the principles was to prevent monopolies concerning the publication and dissemination of judicial decisions (law reporting) or legislation. In contrast to primary legal material (case law and legislation),³²¹ secondary judicial commentary provided by commercial organisations do not fall in that category.

The third point mentioned above highlights the two main issues covered in this thesis. The first being that in the Australian jurisdiction there is no tort of breach of privacy. As a result, any breach of privacy cannot be prosecuted as a result of the failure of the courts to provide judicial decisions to court sanctioned law reporters which fail to meet

³¹⁶ See Chapter 6, 'Australian Information Privacy', Appendix F, Appendix G, 'Joint Conference of the European Commission and the Hague Conference on Access to Foreign Law in Civil and Commercial Matters' (2012) <http://www.hcch.net/upload/xs2foreignlaw_rpt.pdf>.

³¹⁷ Government legislative bodies and law courts where the legal information (whether case law or legislation) originates from, see Appendix F.

³¹⁸ Interpreted in this thesis as comprising of both State and Federal privacy laws.

³¹⁹ Citations assigned by courts to judgments, which allow the identification of cases without reference to the paper-based reporter. A neutral citation usually includes the year the decision was made, the jurisdiction and level of the court, and the number of decisions the court has made that year.

³²⁰ See 'Joint Conference of the European Commission and the Hague Conference on Access to Foreign Law in Civil and Commercial Matters' (2012) <http://www.hcch.net/upload/xs2foreignlaw_rpt.pdf>.

³²¹ See Annexure E.

local privacy law standards.³²² The second point is that, because of the absence of such a tort of breach of privacy, and despite what FALM experts and the European Commission have proposed and endorsed in 2012, regarding the application of local privacy laws to law reporting, Australian courts do not recognise privacy as one of the competing interests to the open court rule capable of being invoked to restrict the publication and dissemination of judicial decisions (in any form).³²³

While other recognised competing interests to the open court rule are sometimes invoked by applicants, including national security issues, commercially sensitive issues, that confidentiality of certain materials be preserved, secret technical processes, and where it is required for the administration of justice, privacy is not.³²⁴

At a local level, inspired by the work at LII (Cornell), the Australasian Legal Information Institute (AustLII) began to formally publish Australian materials in 1995. This was, and to a large extent today still is, funded by the Australian Research Council (ARC),³²⁵ the Law and Justice Foundation of NSW,³²⁶ the University of Technology, Sydney³²⁷ and the University of New South Wales.³²⁸ Initially the main goal was to establish a "national primary materials collection", which was to contain court decisions from all the superior courts and legislation from the nine Australian jurisdictions.³²⁹

Such interrelated co-operation between the various institutions helped pave the way for a change in the method of access and the formation of a new culture, where information could practically and quickly and freely be accessed by the public. As a result the principle of free public access to public legal information became very much part of the

³²² The publication and dissemination of judicial decisions must be undertaken subject to local privacy laws, with the onus of ensuring privacy compliance and funding for such compliance falling on the State, see Appendix G, GP 11.

³²³ See *Hogan v Hinch* [2011] HCA 4 at 90 referring to the comments of Gibbs J in *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, at 520; *Rinehart v Welker* [2011] NSWCA 403 (7 December 2011)

³²⁴ See Chapter 4, 'Practical Limitations to the Open Court Rule'.

³²⁵ *Australian Research Council (ARC)*, <<http://www.arc.gov.au/>>.

³²⁶ *Law and Justice Foundation of NSW*, <<http://www.lawfoundation.net.au/>>.

³²⁷ *University of Technology, Sydney (UTS)*, <<http://www.uts.edu.au/>>.

³²⁸ *University of New South Wales (UNSW)*, <<http://www.unsw.edu.au/>>.

³²⁹ Once the federal (Commonwealth) jurisdiction and New Zealand are added, AustLII covers 10 jurisdictions.

Australian legal information scene.³³⁰ In Australia, there is now general acceptance by both the legal profession and the public that access to the law should be free.³³¹ Evidence of this is the fact that AustLII is today Asia Pacific's largest and most used law reporter, which has an ELIRS freely at the disposal of the public. This research observes that AustLII and its partner legal information institutes play a significant role in the publication of court documents on the internet.³³²

ELECTRONIC LAW REPORTING AND THE OPEN COURT RULE

As discussed previously, free access to law reporters such as LII(Cornell), AustLII, CanLII and more recently PacLII³³³, helped change the nature of law reporting, and helped bring about an evolution in the general perception of both the private and public sectors regarding the dissemination of legal information. This was in stark contrast to the way in which legal information was published, and which had been the tradition, until the early 1990s. Most importantly it changed the attitudes of the general reform process for the dissemination of public legal information in Australia.³³⁴

Legal Information Institute (LII) services, and more importantly free internet access, introduced new means of public dissemination of legal information and changed the format in which that Australian legal information was handled. Prior to the LII, electronic access to the law was tightly regulated and so expensive and difficult to use

³³⁰ Ibid, Greenleaf, 'Free Access to Legal Information, LIIs, and the Free Access to Law Movement'. The Declaration on Free Access to Law (2002) sets out FALM's aims as 'the primary role of local initiatives in free access publishing of their own national legal information' and secondly that 'All legal information institutes are encouraged to participate in regional or global free access to law networks'.

³³¹ For further detailed description of the involvement of AustLII and its partner organisations see, 'The Australasian Legal Information Institute (AustLII) - A Snapshot at Age 15', (Pt AustLII) (2010) <<http://www.austlii.edu.au/austlii/publications/2010/1.pdf>>.

³³² In Australia alone, *AustLII's* logs show that it obtains about 600,000 page accesses per day. Monthly reports from the *Internet* ratings agency 'Hitwise' show that *AustLII* has at least three times the market share of the top three legal commercial publishers combined (LexisNexis, Thomson and CCH), and similar market share to all government sources of legal research materials combined. See, *ibid*.

³³³ *Pacific Islands Legal Information Institute (PacLII)*, <<http://www.paclii.org/>>.

³³⁴ Daniel Lewis, Graham Greenleaf and Andrew Mowbray, *Australasian Legal Information Handbook* (Butterworths, Australia, 1988).

as to exclude most of the people who would have liked to access it and who had a right to do so.³³⁵

In collaboration with other jurisdictions, AustLII helped build and host on its website other Legal Information Institutes, which formed an integral part of the globalised FALM, involving participating jurisdictions. These include BAILII³³⁶ for the five United Kingdom and Irish jurisdictions; the PacLII which is operated by the University of the South Pacific School of Law in Vanuatu, covering 17 Pacific Island nations plus Papua New Guinea; HKLII³³⁷; SAFLII³³⁸ which covers all English or Portuguese speaking countries in southern and eastern Africa and LII of India.³³⁹ The most significant issue transcending through these developments is that all of these legal information institutes utilise the same open source code for the ELIRS, called Sino.³⁴⁰ Today AustLII continues to provide technical upgrades and innovations, and assistance as requested. These LIIs are also AustLII's closest collaborators in the operation of WorldLII,³⁴¹ CommonLII,³⁴² and AsianLII,³⁴³ which have similar governmental funding from their various branches.

Few people, including legal practitioners and the courts, actually had a clear idea of the scope and the practical effect the computerisation of the law would have on the operation of the open court rule. As the idea of access to law and in particular, Free Access to Law took hold, so the courts, including law reporters, had to adapt to this

³³⁵ Andrew Mowbray, *The AustLII Project: Changing the Nature of the Dissemination of Public Legal Information Technology* (Masters Thesis, University of Technology, Sydney, 1999) 5.

³³⁶ *British and Irish Legal Information Institute*, <<http://www.bailii.org/>>.

³³⁷ *Hong Kong Legal Information Institute*, <<http://www.hklii.hk/eng/>>.

³³⁸ *Southern African Legal Information Institute*, <<http://www.saflii.org/>>.

³³⁹ *Legal Information Institute of India (LIIofIndia)*, <<http://www.liiofindia.org/>>.

³⁴⁰ *Ibid*, Mowbray, 62-66, the centre-piece of AustLII system software created by Professor Mowbray, with the acronym Sino: 'Size is no object'. The software was named-so because it could handle very large text databases. It was designed for simplicity and speed.

³⁴¹ *World Legal Information Institute (WorldLII)*, *University of Technology, Sydney* <<http://www.worldlii.org/>>.

³⁴² *Commonwealth Legal Information Institute (CommonLII)*, *University of Technology, Sydney* <<http://www.commonlii.org/>>.

³⁴³ *Asian Legal Information Institute*, <<http://www.asianlii.org/>>.

rapid change. For instance, in the early outset, AustLII developed its free access to law policy principles to maximise the public's access to the law reports.³⁴⁴

Today, law reporters such as AustLII wield enormous power over the practical application of the open court rule, by providing for the uninhibited and free expression of the fundamental principles underlying the free access to law movement through the application of modern technology. Indeed, the principles are in the form of a declaration of a commitment to free public access to law:

Independent non-profit organisations have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published.³⁴⁵

From the very outset "in order to be truly open, publication could not have been restricted under any condition. These restrictions also encompassed subsequent use or re-publication of the documents, except for conditions needed to ensure accuracy".³⁴⁶ Furtherance of access and publication to the public was seen as a necessity without equivalence in importance, and necessary for the smooth and proper operation of open justice and the rule of law.

Today electronic publication of judicial decisions on the internet is common-place, with paper-based publication still taking place in some limited form, albeit performing a canonical rather than a practical function.³⁴⁷ In terms of open justice, the main function of law reports remains critical to supporting the open court rule and, broadly speaking, the rule of law. Most significantly the reports ensure that both members of the legal profession and the public are informed of court decisions.

³⁴⁴ See Appendix G.

³⁴⁵ See Graham Greenleaf, 'Jon Bing and the History of Computerised Legal Research – Some Missing Links, from a chapter in Olav Torvund; Lee Bygrave, *Et tilbakeblikk på fremtiden (Looking back at the future)* (Institutt for rettsinformatikk, 2004).

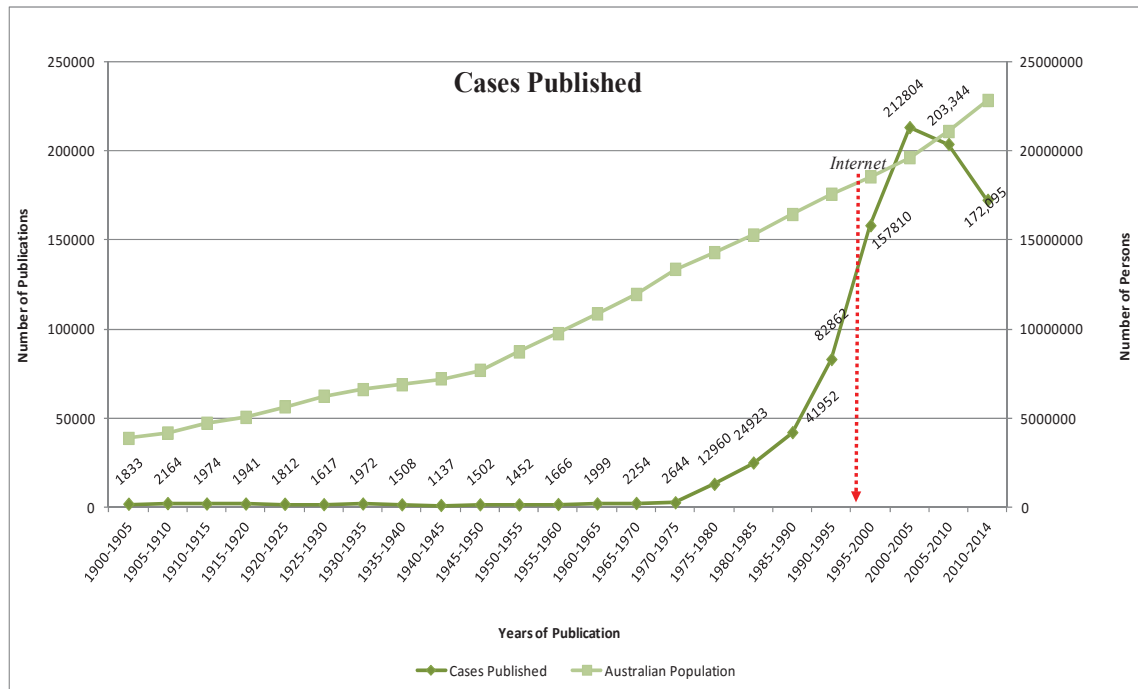
³⁴⁶ Ibid, Greenleaf, 9, and also Daniel Poulin, 'Open Access to Law in Developing Countries' (2003) *Computerisation of Law Resource* <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/CompLRes/2003/1.html?query=>>>.

³⁴⁷ This still takes place to a large extent by way of subscription (e.g. Westlaw, Lexis, CCH Publications).

CORRELATION BETWEEN LAW REPORTING AND PRIVACY

Figure 1 below contains two sets of data; the first represents cases published and the second Australian population growth between 1905 and 2014. The figures for the cases published span over a period of more than 114 years in all Australian jurisdictions with a 5 year lapse in between each node. The graph for Australian population shows the median rise in the Australian population over the same period. The figure disproves the hypothesis that the rise in population is directly correlated with a rise in law reporting. This is particularly obvious during the period from 1905 to 1975 where although there is a median rise of over 9 million persons, the rise in law reporting remains stagnant whereas from 1905 to 1975 there is a rise of only 811 law reports being published. While there is a rise of approximately 68% in the population growth, there is only a growth of 44% in law reporting. From 1975 to 2014 there is a population increase of just over 9.5 million (representing just under 42%) with a small spike starting to appear from 1980. However, over the same period the growth in law reporting is a staggering 175,000 cases representing an increase of 102%.

Figure 1: The number of cases published in the last 100 years³⁴⁸ Australian population growth³⁴⁹



³⁴⁸ Data courtesy of *LawCite*, <<http://www.austlii.edu.au/lawcite/>> (November 2014).

³⁴⁹ Data courtesy of *Australian Bureau of Statistics, Table 1. Population Change, Summary-Australia ('000)* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3101.0Mar%202014?OpenDocument>>

The significant rise from about 1995 - 2000 is due to several important factors. Firstly, advances in technology meant that the law was being reported electronically. Secondly, the use of the internet to publish and disseminate law reports meant mass electronic publication of law which became accessible to large sectors of the public without much restriction. Thirdly, commencement of free access to law and free internet access meant uninhibited quantities of data became available to everyone instantly. Tied in to that point is the way the legal profession and the public were accessing and using the law changed and changed very fast from 1998 onwards.

Figure 2: Cases with privacy as part of judgment³⁵⁰

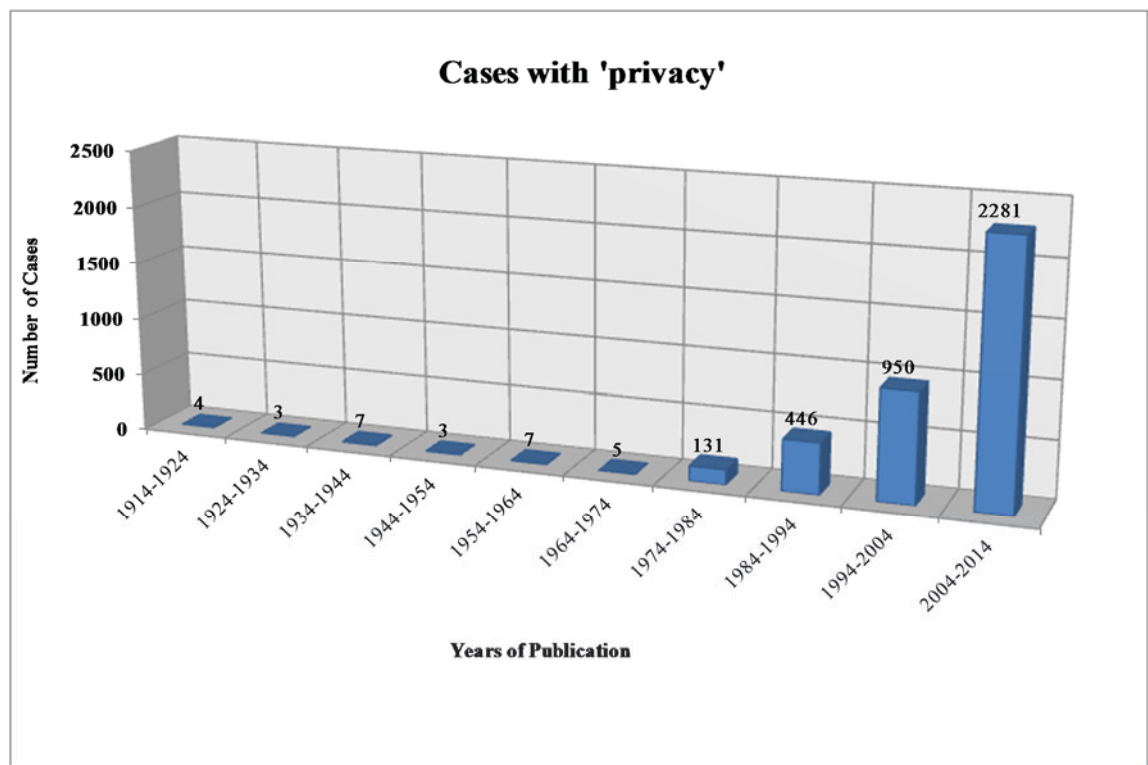


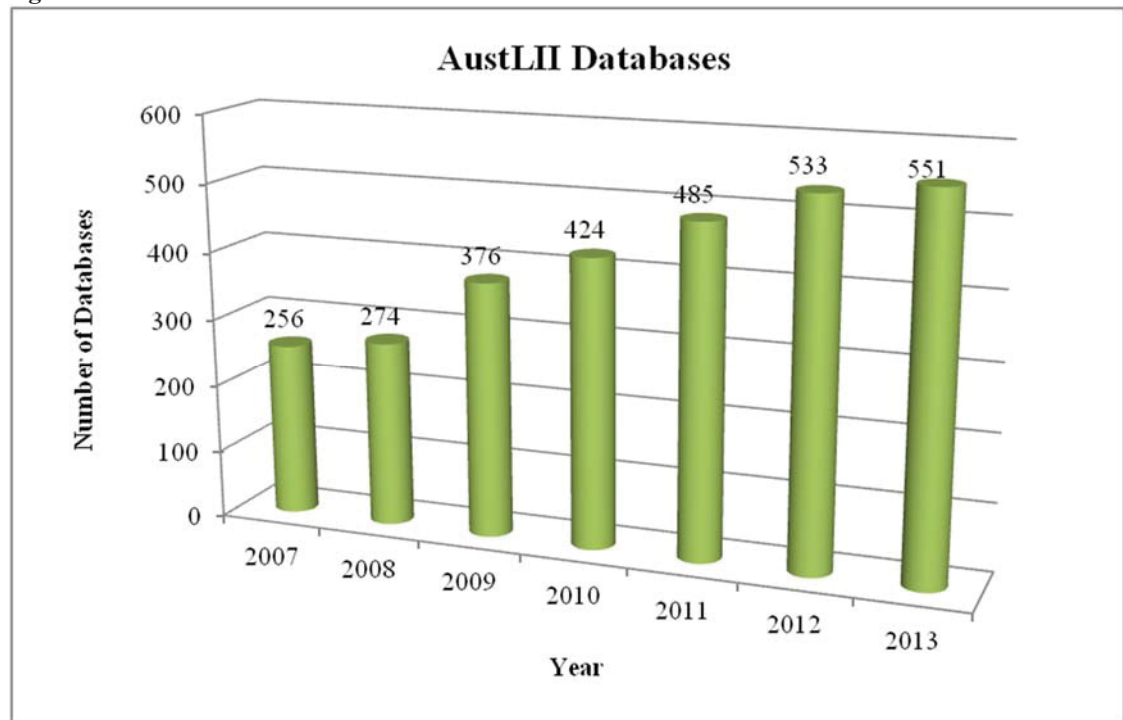
Figure 2 above shows the number of cases published in the last 100 years in all Australian jurisdictions. From 1924 to 1974 there is only an increase of 1 case published. In fact 1924-1934, 1944-1954 saw the number decrease from previous years, From 1974 - 1984 there is a slight rise due to improving technology and the start of what would become electronic law reporting discussed at length in Chapter 3. The low

³⁵⁰ Data provided courtesy of LexisNexis, *CaseBase*, <<http://www.lexisnexis.com.au/au-AU/Products/casebase-case-citator-online.page?gclid=CLWR59TzyKkCFcYZHAodWgvxNQ>> (November 2014).

number of cases with privacy is also attributed to the fact that privacy is a relatively new concept as a right and was only recognised and codified in Australia in the early 1980s. That together with practical obscurity of traditional methods of publication may have ensured that privacy was seldom an issue in Australian jurisdictions until 1984-1994.

However, from the mid 1990s onward, we see greater number of cases being published regarding privacy. As mentioned in Fig. 1 above, technology, free internet access and free access to law ensured that greater number of cases was being reported. This is also evident in Fig. 2 with an increase of 94% in the number of privacy related cases reported in the period from 1984-1994 to 2004-2014.

Figure 3: Number of AustLII Databases³⁵¹



³⁵¹ See '2007 AustLII Foundation Limited Annual Report' (2007) <http://www.austlii.edu.au/austlii.edu.au/austlii/reports/2007/AustLII_AR_2007.pdf>; '2008 AustLII Foundation Limited Annual Report' (2008) <http://www.austlii.edu.au/austlii/reports/2008/AustLII_AR_2008-34.pdf>; '2009 Year in Review AustLII Foundation Limited Annual Report' (2009) <http://www.austlii.edu.au/austlii/reports/2009/AustLII_YiR_2009.pdf>; '2010 Year in Review: AustLII Foundation Limited Annual Report' (2010) <http://www.austlii.edu.au/austlii/reports/2010/AustLII_YiR_2010.pdf>; '2011 Year in Review: AustLII Foundation Limited Annual Report' (2011) <http://www.austlii.edu.au/austlii/reports/2011/AustLII_YiR_2011.pdf>; '2012 Year in Review: AustLII Foundation Limited Annual Report' (2012) <http://www.austlii.edu.au/austlii/reports/2012/AustLII_YiR_2012.pdf>; '2013 Year in Review: AustLII Foundation Limited Annual Report' (2013) <http://www.austlii.edu.au/austlii/reports/2013/AustLII_YiR_2013.pdf>, found at

Figure 3 above shows the number of databases that have been added to AustLII from 2007 to 2013. The growth in databases is significant because since 2007, the number of judgments on AustLII databases has more than doubled. AustLII databases include reported cases and legislation from all Australian jurisdictions. Not only is the progressive increase indicative of the rise in law reporting by free access to law organisations, but also that access to law reports has increased. In 2013, overall, access to case law collections in most jurisdictions increased.³⁵²

Technology has, and continues to have, a great impact on our legal system. Since electronic law reporting began in the mid 1990s, it is apparent that courts have struggled to absorb the full impact and to fully appreciate the practice.³⁵³

CONCLUSION

The electronic publication of judicial decisions on the internet has evolved, and continues to evolve, with new technology. Whilst it had shortcomings and limited practical application throughout its historical development, law reporting was altered forever with the effective implementation of ELIRS to legal information. Together with the emergence of the internet, and in particular free access to the internet, ELIRS helped give rise to the idea that legal information should be made available to the public for free.

Today law reports are freely accessible to everyone at any time, without any restrictions or impediments. Electronic publication and dissemination of judicial decisions has mostly replaced paper-based reporting, which is becoming obsolete with the passage of time. Free access to law has given rise to some profound advantages to the open court rule, such as uninhibited access to legal information, at very little cost and at very high speeds. However, there are disadvantages in the form of unintended negative

Australasian Legal Information Institute (AustLII), <<http://www.austlii.edu.au/>>.

³⁵² See '2013 Year in Review: AustLII Foundation Limited Annual Report' (2013)

<http://www.austlii.edu.au/austlii/reports/2013/AustLII_YiR_2013.pdf>, found at *Australasian Legal Information Institute (AustLII)*, <<http://www.austlii.edu.au/>>, 13, 14.

³⁵³ See the discussion on the scope and limitations of responses to date in Chapter 4.

consequences, which are adverse to privacy and have arisen from that 'uninhibited' dissemination of personal information which flow from this system. These issues are explored further in this thesis. In particular, this thesis will explore the need for the courts to implement the Declaration on Free Access to Law (Appendix F) together with FALM principles proposed in 2008 and endorsed in 2012 (Appendix G).

In the next chapter the thesis discusses the scope and limitations of the open court rule and the way in which its practical application, particularly in law reporting on the internet, has broadened its scope but also demonstrated its limitations, particularly in regards to privacy.

CHAPTER 4

COMMON LAW EXCEPTIONS TO THE OPEN COURT RULE

If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case. *Justice Kirby, John Fairfax Group Pty Ltd v Local Court of New South Wales (1991)*³⁵⁴

INTRODUCTION

As discussed in the previous chapter, law reporting has evolved as part of the effective practice of implementing the open court rule. The comprehensive implementation and adoption of authentic texts of legal documents in electronic legal retrieval systems completely transformed the way in which the open court rule is realised. ELIRS are able to find and extract legal information with outstanding speed, efficiency and accuracy. Access to such digital law reporting techniques on the internet greatly increased access to law reports, but also contributed to the rise in tensions in the operation of the open court rule and the practice of law reporting on the internet.

Notwithstanding the common law and statutory exceptions to the open court rule, discussed in this and the next chapters, the majority of court decisions are now published on the internet. Most of these reports usually contain credible³⁵⁵ personal information. The presumption is in favour of openness. Anyone wishing to suppress or redact publication generally bears the onus of establishing grounds as to why a decision

³⁵⁴ *John Fairfax Group Pty Ltd v Local Court of New South Wales (1991)* 26 NSWLR 131, per Kirby J, at 141.

³⁵⁵ Personal information contained in court decisions is considered credible because of the normal meticulous process of verification by a court registry prior to accepting any application for commencement of court proceedings or to join existing proceedings. See Chapters 7 and 8 for further discussion.

should not be published.³⁵⁶ As such, potential litigants must consider the need for disclosure of personal information in order to gain access to justice.³⁵⁷ Problems arise where personal information and other sensitive data associated with the individual's past is so embarrassing, detrimental or defamatory, that it brings real damage to the person in the event that information becomes public. Such negative consequences of online law reporting may act as a deterrent for people to seek access to justice through the open court.³⁵⁸

This chapter discusses significant areas relevant to law reporting founded on common law exceptions to the open court rule. In the past real privacy was afforded to the public through practical obscurity.³⁵⁹ The gradual abolition of any such privacy protection came about when the theory of openness became a reality due to technological change. Even though law reporting experienced environmental change and the methods of its operation changed, exceptions to the open court rule which guided the operation of courts have remained virtually unchanged. As a direct result, practical limitations in the operation of the open court rule became apparent, culminating in the transition to an era where law courts are witnessing an increasing number of requests for suppression and non-publication of law reports (or Prior to the Event privacy measures).³⁶⁰ As a result, there has been a motivational transition underlying the practice of law reporting. This change pertains to the modern motivation behind the practice of law reporting as it is done today, as opposed to the practice from an historical perspective. The catalyst for that change ultimately trickles down to the embracing of technology by law courts.

³⁵⁶ *Russell v Russell; Farrelly v Farrelly* (1976) 9 ALR 103.

³⁵⁷ Once the information, whether general, confidential or private, is published as part of the court report on the internet, it automatically becomes public information. See detailed discussion regarding the public vs private nature of the internet in Chapter 6.

³⁵⁸ *Ibid*, discussions on the same themes.

³⁵⁹ *United States Department of Justice, et al., Petitioners v Reporters Committee for Freedom of the Press et al.* [1989] 489 US 749, at 762-764.

³⁶⁰ Privacy measures designed to regulate prior to the publication and dissemination of electronic law reports on the world wide web.

PRACTICAL OBSCURITY

Computerised files and databases have largely replaced paper documents in most court proceedings particularly when reporting decisions. This has not only changed the way court generated information is accessed by the public, but also the way in which it is used by the courts. The 'practical obscurity'³⁶¹ inherent in print publication prior to the internet played an important role in limiting access to personal information. The analysis linking the idea of privacy and practical obscurity is drawn from the very important 1989 Supreme Court of the United States case of *Justice v Reporters Committee for Freedom of the Press*³⁶² which analysed the concept of practical obscurity. In that case, the way in which paper-based court documents were accessed in the past was considered. That practice provided some practical obscurity because the interested party had to attend the court registry, make a formal request in order to obtain the document.

The impact of internet-based publishing of decisions has been gradual. Although law reports were available online from mid 1990,³⁶³ there was still some practical usage for paper law reports, found in many firms and educational institutions. These have slowly dwindled in recent years, and some institutions are now completely paperless.³⁶⁴

When courts initially embraced technology, it was partly with the aim of extending public access to judicial decision-making and was largely seen as furthering and enhancing the open court rule³⁶⁵. Fundamentally, the open court rule is that judicial proceedings must be conducted in an open court where the public and the media have

³⁶¹ *United States Department of Justice, et al., Petitioners v Reporters Committee for Freedom of the Press et al.* [1989] 489 US 749; and which was considered in *Florida Star v B J F* [1989] USSC 123; 491 U.S. 524; 109 S.Ct. 2603; 105 L.Ed.2d 443; No. 87-329 (21 June 1989).

³⁶² *Ibid, United States Department of Justice, et al., Petitioners v Reporters Committee for Freedom of the Press et al.*

³⁶³ See below, 'Practical Limitations Exposed'.

³⁶⁴ See for example, *Cornell Legal Information Institute LII (Cornell) Cornell University Law School* <<http://www.law.cornell.edu/>>; *Australasian Legal Information Institute (AustLII), University of Technology Sydney, Faculty of Law* <<http://www.austlii.edu.au/>>; *Canadian Legal Information Institute (CanLII)* <<http://www.canlii.org/>>; *Pacific Islands Legal Information Institute (PacLII)* <<http://www.paclii.org/>>, complete automated systems, electronic legal information retrieval system in use by court sanctioned law reporters.

³⁶⁵ See Hon. Justice Ruth McColl, 'I.T. in the courtroom from both sides of the bench - the transformation of justice (UTS Law Review)', *Computerisation of the Law: Global Challenges* (Halstead Press, 2004) vol 6, 13, and Einstein, Clifford, 'Technology in the Court Room 2001 [Friend or Foe?]', <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_einstein_201101>

access.³⁶⁶ Inadvertently, that action exposed a new set of problems in how the open court rule operates in the digital era. This is explained by highlighting the quick and unsteady transition from practical obscurity to the theoretical or digital openness.³⁶⁷

Absence of practical obscurity is not necessarily exclusively due to the rise of digital law reporting. The catalyst for the removal of practical privacy protection was effected partly because the open court rule treated digital documents (and continues to do so) in the same manner as paper documents. It is argued here that this method is fundamentally flawed. It is flawed as it demonstrates a lack of understanding of the nature of the internet and the way information (in general) is disseminated in cyberspace as opposed to the traditional methods involved in paper-based publication.³⁶⁸ The very nature of publishing something on paper is restrictive on the basis of availability, circulation, accessibility, manipulation, alteration and storage. In contrast, electronic publication has no impediments to the level of its circulation and availability, no restraint on space for storage, no restraints on speed of access, and manipulation.

Paper like all things natural, comes with an expiry date. Eventually paper will decompose and the information published on the paper will need to be transferred to new paper or else it will certainly be lost. The practical obscurity provided by old court reports works in exactly the same manner and as such creates a legitimate expectation of privacy, where the passage of time and the healing process which comes with it is considered very important.³⁶⁹ Electronic law reports live forever; they do not discompose, and as such exists in perpetuity in cyberspace. Law reports published on the internet will outlive convictions. A rehabilitated criminal offender will always be confronted by their past.³⁷⁰ In particular, those who publish information on the world

³⁶⁶ See *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; *McPherson v McPherson* [1936] AC 177; *Russell v Russell* (1976) 134 CLR 495.

³⁶⁷ See Chapter 3, 'The Begnining of Electronic Law Reporting in Australia', Monopolies, Commercialisation, Motivational transition', and 'The Legal Information Institute (LII) and the Free Access to Law Movement (FALM)'.

³⁶⁸ Claire M. Germain, 'Digitizing the World's Laws' (2010) *Cornell Law Faculty Working Papers* Paper 72.

³⁶⁹ See *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 36, 44 (Cal. 1971) holding that a truthful publication of an eleven-year old criminal conviction constitutes a valid cause of action for invasion of privacy, see Peter A. Winn, 'Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information' (2004) 39 *Washington Law Review* 307, 316, fn 52.

³⁷⁰ *Ibid.*, 317, fn 56.

wide web, know or ought to know that the information they make available is available to all with very little restriction.

The nature of the internet dictates not only the continuous and endless dissemination of information (indeed all data), but also the interdependency of the internet on data (itself) to evolve. As technology evolves and becomes more advanced, so does its capacity to handle larger and more sophisticated data. This is evidenced by the continuously changing nature of both data and the interface in which it is broadcast from the various digital interfaces available in cyberspace.³⁷¹

It also highlights an interesting aspect of the way the judiciary treats such technology. An ideological stance, rather than a pragmatic stance has been adopted in that regard. The ideological point of view represents the notion that all information should be made available and should not be restricted in any way.³⁷² However, this discounts the very important responsibility that courts have - not only to the litigants - but to all parties to the proceedings in regards to the disclosure of personal information. Parties to proceedings include, litigants, witnesses, jurors, victims, and others involved in the court proceedings. The responsibility of the courts is to assess the extent of harm the disclosure of such information might bring to the individual. When law reports first transcended the boundary between paper to digital and were placed on the internet, personal information contained in those reports became immediately accessible, downloadable, searchable, able to be compiled, aggregated and disseminated for purposes not intended by any of the parties to the proceedings.³⁷³

On the other hand, the pragmatic view suggests that in order to effectively ensure the maintenance of the principle of open justice (which maintains the administration of justice), the important public interest in privacy should also be maintained. This thesis argues that such strengthening of privacy rights does not have to come at the expense of the open court rule, but rather, technological policies implemented through the open

³⁷¹ Ibid.

³⁷² Unregulated open court rule, subject to well established exceptions on publication, *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *McPherson v McPherson* [1936] AC 177; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

³⁷³ Daniel J. Solove, 'Access and Aggregation: Public Records, Privacy and the Constitution' (2001-2002) 86(6) *Minnesota Law Review* 1137, 1149-52.

court may achieve a viable equilibrium, in order to preserve the administration of justice.

As discussed, not all information earmarked for publication ought to be made available and disseminated on the internet. This exercise is not to the benefit of the principle of open justice. Indeed, such activity does the opposite and is perceived as undermining the principle of open justice, thus undermining individual privacy.³⁷⁴ The principle of open justice may be maintained by exercising privacy through the open court rule. Publishing everything, including sensitive personal information, exposes the individual to harm. It commercialises information and exposes law reports to electronic exploitation. The report, once online, is dismantled and information within it cannibalised and extracted for various reasons (non-related to law reporting).³⁷⁵ This may have little to do with the administration of justice.

The solutions to this problem are complex. One approach is to restrict access to digital law reports. The thesis discusses how this may be achieved.³⁷⁶ The way in which digital information is handled, stored and accessed has changed the way in which access to the law operates. Law reporting on the internet and the way in which that digital information is accessed, has altered the operational aspect of law reporting, such that, digital law reports should not be treated in the same manner as paper reports. This has been the *modus operandi* of common law courts until now. Just because it is technically possible for digital reports to be provided, it does not necessarily mean that they should be. Indeed, unfettered access to law reports which contain personal information, particularly to commercial entities and data miners, may be incompatible with the spirit and intention for which law reporting was created.³⁷⁷ Furthermore, this practice may be incompatible with the principle of open justice itself, as it might dissuade applicants from seeking access to the open courts because of the various risks they might expose

³⁷⁴ See Chapter 8 for detailed analysis of examples of the types of personal information able to be withheld from publication, without compromising the public's right to know the law.

³⁷⁵ Daniel J. Solove, 'Data Mining and the Security-Liberty Debate' (2008) 75(1) *University of Chicago Law Review*; Jules Polonetsky Omer Tene, 'Privacy in the Age of Big Data-A Time for Big Decisions' (2012) 64(63) *Stanford Law Review* <<http://www.stanfordlawreview.org/online/privacy-paradox/big-data>>.

³⁷⁶ See Chapter 8, model II.

³⁷⁷ See below, 'Motivational Transition: Law Reporting'.

themselves to, including unwanted public exposure, identity theft,³⁷⁸ and privacy breaches.³⁷⁹

THEORETICAL OPENNESS V PRACTICAL OPENNESS

The publication and dissemination of up to date and accurate judicial decisions are some of the main functions of the open court rule. In a metaphorical sense, this function affords the public the ability or the capacity to be present in the courtroom. This is a corollary of the open court rule as part of the principle of open justice. It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.³⁸⁰ Additionally, in the past, this system of reporting was limited by its nature and technology of the day, and it was unlikely that general members of the public or media would be able to easily find judgments. Hence, the open court rule was only seen to be implemented in a theoretical sense, rather than a practical one.

The digital impact highlighting the distinction between the theoretical and practical sides of the open court rule is described herein as the paradigm transition from theoretical openness and practical obscurity to practical openness and theoretical obscurity. Practical openness, as opposed to theoretical openness of courts, provides theoretical obscurity but is void of actual privacy protection for individuals. Perhaps this was the intention behind the way in which the courts embraced technology for law reporting. Perhaps it was to further provide legal surety and judicial accountability. Or perhaps the enthusiastic embrace was so that practical openness might somehow provide quick and effective transparency, which would in turn provide real protection for other human rights values. Although these might sound cynical in the context of the rapid change, it is important to note that digital law reports have given tremendous

³⁷⁸ See Chapter 5.

³⁷⁹ There is no way to retain regulation and control of personal information once it is proliferated on the Internet, and as such the risks for misuse and commercialisation of such information rapidly increases, see Daniel J. Solove, 'Access and Aggregation: Public Records, Privacy and the Constitution' (2001-2002) 86(6) *Minnesota Law Review* 1137, 1148. See also, Chapter 5, discussion on *R v Perish*; *R v Lawton*; *R v Perish* [2011] NSWSC 1101.

³⁸⁰ *R v Sussex Justices; Ex parte Macarthy* [1924] 1 KB 256, per Lord Chief Justice Hewart at 259.

momentum to the open court rule in a real sense by shifting its scope of operation from the theoretical to the practical.³⁸¹

Practical obscurity arose from paper-based law reporting, which provided certain privacy protection for individuals. It is also apparent that technology has done for the open court - with the application of state of the art search engines and sophisticated computer software - what the open court rule could not have ever envisaged. In some respects, the comparisons and practical effects are similar to what the printing press did to law reporting, when it was first introduced.³⁸²

Presently, if one's intention is to seek justice through the open court system, one may find that details of the dispute, in addition to the identity of the individuals involved (including the identity of their parties), are published on the internet. This rule, however, does not apply to all jurisdictions.³⁸³ For example, in the early 90's, the Family Court of Australia adopted a policy of anonymisation to restrict the disclosure of personal information flowing from electronic law reporting of its cases on the internet.³⁸⁴

In modern times, obscurity is virtually non-existent by virtue of the fact that members of the public require all relevant legal information pertaining to any public proceedings to gain an understanding of the law: i.e. generally, judgments are published on the court's case law website shortly after they are delivered. Exceptions include, judgments arising from *voir dire*, bail or interlocutory proceedings.³⁸⁵ Court transcripts destined for publication are usually summarised to form judgments for publication on the internet. Judgment summaries essentially include personal information or private stories which

³⁸¹ Abdul Paliwala, 'Digital Divide: Globalisation and Legal Regulation (UTS Law Review)', *Computerisation of the Law: Global Challenges* (Halstead Press, 2004) vol 6, 26, see in particular, the discussions on digital and social divide, 27-29.

³⁸² See Chapter 3, 'The Printing Press'.

³⁸³ See for example, Family Court of Australia and the The Migration Review Tribunal (the MRT) and the Refugee Review Tribunal (the RRT).

³⁸⁴ See Chapter 5, 'Modern Exceptions'.

³⁸⁵ See Supreme Court of NSW Media Resources, <http://www.supremecourt.justice.nsw.gov.au/supremecourt/media_resources.html>.

form parts of the case and which are published regarding the proceedings. Hence, the reference to practical obscurity being only available at a theoretical level.

Proponents of increased openness argue that privacy concerns should not impede law reporting in any way, and that it is otherwise irrelevant in modern times. They argue that in an age where fast access, coupled with large downloadable quantities of information, holds prevalence, it is more or less unnecessary to dwell on privacy concerns.³⁸⁶ To that end, when asked about increased privacy concerns relating to digital law reporting, proponents of further openness, argue that, "if you have nothing to hide you have nothing to fear".³⁸⁷ In this case, the same phrase is repeated over and over, even when posed with questions relating to data mining and increased surveillance on the internet.³⁸⁸ Though increasingly used in modern times,³⁸⁹ this argument is not new. In 1888, 'The Reverberator', a character in a novel by Henry James states:

If these people had done bad things they ought to be ashamed of themselves and he couldn't pity them, and if they hadn't done them there was no need of making such rumpus about other people knowing.³⁹⁰

Theoretical openness, on the other hand, provides for practical obscurity, because it is the opposite of practical openness. Theoretical openness related to the way in which the open court rule (and in a broader sense) the principle of open justice, was perceived by the public. In reality, the open court rule functioned in a limited capacity through paper-based law reports. The people in the courts were usually the same group of lawyers and judicial staff with the occasional defendant or two, and the law reports were identical in

³⁸⁶ Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007), 65, 67.

³⁸⁷ Daniel J. Solove, 'I've Got Nothing to Hide and Other Misunderstandings of Privacy' (2007) 44(4) *San Diego Law Review*, 748.

³⁸⁸ *Ibid*, 749.

³⁸⁹ Karl T. Muth, 'Googlestroika: Privatizing Privacy' (2009) 47 *Duquesne Law Review* 337, 345. Google Inc. is much more than a search company. They intend to first desensitize people to privacy and then make privacy a commodity worth paying for. See also media publications taken from direct quotes in the same context: Alex Jones, 'Google CEO: Secrets Are for Filthy People' (2009) <<http://www.infowars.com/google-ceo-secrets-are-for-filthy-people/>>.

³⁹⁰ Henry James, *The Reverberator* (reprinted in *NOVELS 1886-1880, 1888*), cited from *ibid*, Solove, 749.

their formats, save a few facts adjusted here and there.³⁹¹ This could explain why, for instance, the early New South Wales court proceedings were reported by newspapers.³⁹²

Similarly, theoretical obscurity fails to provide practical obscurity, due to the searchability of the internet and the development of ever-more powerful EIRS³⁹³ using heuristic automation.³⁹⁴ Personal information is now able to be harvested and used due to the effective application of EIRS. The coding behind such software was never designed to discriminate between private and public information. All information is captured based on the specific search request.

As discussed in Chapter 1, one of the aims of this thesis is to propose policies which might address the limitations of the open court rule brought on by free access to law and advancements in technology.³⁹⁵ The Family Court example (discussed in Chapter 5), challenges this mindset, that all information is required for the public to understand the law.³⁹⁶ That jurisdiction has met with very few obstacles by way of opponents of the system of suppressing specific court information. Seemingly, the public interest in publicity of court proceedings has not been undermined, to date, by the anonymisation practices of that jurisdiction.³⁹⁷ However, it is argued that although such information may add some flavour to case law, it has no substantive or probative value in the context of communicating the law or an important precedent of law in relation to the

³⁹¹ See Chapter 3.

³⁹² Bruce Kercher, 'Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project' (2000) 18(3) *Law and History Review*.

³⁹³ Electronic Information Retrieval Systems (EIRS), see Chapter 3, 'Electronic Reporting of Law'.

³⁹⁴ Jer Lang Hong, Eu-Gene Siew and Simon Egerton, 'Information extraction for search engines using fast heuristic techniques' (2010) 69(2) *Data & Knowledge Engineering* 169, 171 to 173. The paper provides a comprehensive analysis of modern methods incorporating a series of data filters developed using Heuristic techniques to remove irrelevant data records from the HTML page. The use of Heuristic techniques to extract data is virtually embedded into search engines using EIRS.

³⁹⁵ See Chapter 8.

³⁹⁶ See the discussion and analysis into the implementation of s 121 of the *Family Law Act 1975* in Chapter 5.

³⁹⁷ Although this thesis argues that the long established Family Court of Australia practice of anonymising law reports by replacing names of parties with initials, may no longer suffice, in light of advances in ELIRS technology due the risk of Quaternary and Quinary data being used to establish the identity. This issue poses serious privacy and security questions. See Chapter 8.

very important public interest in publicity of proceedings.³⁹⁸ The fundamental objection this thesis puts forward to publishing personal information as part of the current law reporting practice is that if published on the internet, it might threaten the privacy values of the public and ultimately undermine and deter access to open justice.³⁹⁹

In the next section the thesis discusses and analyses the exceptions to the open court rule.

EXCEPTIONS ARE FEW AND STRICTLY DEFINED

Jeremy Bentham, one of the best known advocates of the principle of open justice, was also one of its staunchest critics. Whilst supporting the law reporting process to the public, he also highlighted exceptional circumstances where law reporting might not be appropriate.⁴⁰⁰ He wrote of cases demanding a certain degree of restriction in the context of law reporting and subject to absolute publicity, each for an appropriate mode and degree. He identified these on the following grounds:⁴⁰¹ (1) to preserve the peace and good order of the proceedings: to protect the judge, the parties and all other persons present, against annoyance;⁴⁰² (2) to prevent the receipt of mendacity-serving information; (3) to prevent the receipt of information subservient to the evasion of justifiability in respect of person or property; (4) to preserve the tranquillity and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour,⁴⁰³ or liable to be productive of uneasiness or disagreements among themselves; (5) to preserve individuals and families from unnecessary vexation, producible by the unnecessary disclosure of their pecuniary circumstances;⁴⁰⁴ (6) to preserve public decency from violation; (7) to preserve the secrets of state from

³⁹⁸ Even if, personal information in reports add some value, that particular value has to be considered in light of the very important public interest in privacy protection, as discussed in Chapter 6.

³⁹⁹ See Chapter 6.

⁴⁰⁰ Jeremy Bentham, *Rationale of Judicial Evidence* (Garland Facsimile ed. 1978, 1827), 511-601.

⁴⁰¹ *Ibid.*

⁴⁰² For the protection and preservation of the administration of justice, see: *Russell v Russell*; *Farrelly v Farrelly* (1976) 9 ALR 103; *Hogan v Hinch* [2011] HCA 4.

⁴⁰³ Early exposition of individual privacy rights and the right to keep certain facts out of the public domain for the protection of reputation and other rights, see: S. Warren and L. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193. Also for the preservation of the administration of justice: *Ibid.*

⁴⁰⁴ *Ibid.*

disclosure;⁴⁰⁵ and (8) so far as concerns the taking of active measures for publication, the avoidance of the expense necessary to the purchase of that security, where the inconvenience of the expense is preponderant (as in all but here and there a particular case will be) over the advantage referable to the direct ends of justice.⁴⁰⁶

Bentham's sentiments were not greeted favourably as they were perceived as departing from the sacred open court rule, the rule that insists on the open court system being exercised at all times.⁴⁰⁷ Hearings which might give rise to embarrassment,⁴⁰⁸ distress or ridicule,⁴⁰⁹ or where a professional be defamed both personally and or commercially,⁴¹⁰ were also not immune from the open court rule. It was deemed necessary that such rights and sentiments be sacrificed for the sacred public interest⁴¹¹ in the open court rule.⁴¹² The burden lay with those seeking restrictions on the open court rule to demonstrate that it is "of necessity".⁴¹³ Generally, the only time where such exceptions might be tolerated would be for the administration of justice.⁴¹⁴

In *R v Horsham Justices; ex parte Farquharson*,⁴¹⁵ Lord Denning stated:

It is of the first importance that justice should be done openly in public: ...that any newspaper should be entitled to publish a fair and accurate report of the proceedings, without fear of libel action or proceedings for contempt of court. Even though the report

⁴⁰⁵ National Security is one of the established grounds which judges often cite as forming one of the main exceptions to publication of certain facts to the public, see commentary of Deane J at 599 in *A v Hayden (ASIS case)* [1984] HCA 67; 156 CLR 532. See also relevant commentary on why certain facts pertaining to governmental secrets should be barred from publication, Adam M. Samaha, 'Government Secret, Constitutional Law and Platforms for Judicial Intervention' (2006) 53(4) *UCLA Law Review* 909, 921.

⁴⁰⁶ *Ibid*, Bentham, 541, 542.

⁴⁰⁷ *Scott v Scott* [1913] AC 417, at 463; *R v Sussex Justices; Ex parte Macarthy* [1924] 1 KB 256. See in particular, the comment from Lord Chief Justice Hewart: It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done at 259.

⁴⁰⁸ *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] 1 QB 227.

⁴⁰⁹ *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, per Fitzgerald P and Lee JJ's at 45.

⁴¹⁰ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, at 58, 61, 63.

⁴¹¹ *Attorney-General for the United Kingdom v Wellington Newspapers Ltd (No 2)* CA 203/87 [1988] NZCA 41; [1988] 1 NZLR 180, per McMullin J at 129, 178, defined 'public interest' as something more than that which catches one's curiosity or merely raises the interest of the gossip. When something is considered as being of a real concern to the public.

⁴¹² *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, per Kirby P.

⁴¹³ *Scott v Scott* [1913] AC 417, per Viscount Haldane LC at 438.

⁴¹⁴ See Chapter 2 for a general discussion of the administration of justice within the context of this thesis.

⁴¹⁵ *R v Horsham Justices; Ex parte Farquharson* [1982] QB 762; [1982] 2 All ER 269, at 288.

may be most damaging to the reputation of individuals, even though it may be embarrassing ...nevertheless it can be published freely, so long as it is part of a fair and accurate report.⁴¹⁶

Although, the implied⁴¹⁷ and/or inherent jurisdiction of courts in Australia provide for restrictions on publication of names and other personal information, including court documents,⁴¹⁸ the narrowly interpreted necessity test enunciated in *Scott v Scott* and other Australian cases since,⁴¹⁹ must be met before any application for suppression or non-publication of a court decision is considered by a court.

Despite the changes introduced by free access to law, the advancements in technology brought on by the internet and the practice of law reporting brought on by ELIRS (which has tremendously impacted the open court rule and limited the scope of open justice) courts remain strongly opposed to any restriction on publication. Courts will consider exceptions on a case by case basis and apply them only when it is for the good of the administration of justice. This is founded on the inherent jurisdiction or implied

⁴¹⁶ Ibid.

⁴¹⁷ *Grassby v The Queen* (1989) 168 CLR 1 at 16–17; *John Fairfax Group Pty Ltd v Local Court of NSW* (1992) 26 NSWLR 131 at 147; *Parsons v Martin* (1984–5) FCA 408 (19 December 1984).

⁴¹⁸ Pleadings, evidence, submissions and other documents.

⁴¹⁹ *Russell v Russell; Farrelly v Farrelly* (1976) 9 ALR 103; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450; *R v Tait* (1979) 46 FLR 386; (1979) 24 ALR 473; *Australian Broadcasting Commission v Parish and Others* (1980) 29 ALR 228; *Home Office v Harman* [1981] QB 534; [1981] 2 All ER 349; [1981] 2 WLR 310; *R v Horsham Justices; Ex parte Farquharson* [1982] QB 762; [1982] 2 All ER 269; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303 [1983] 1 AC 280, 303; *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166; *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] 1 QB 227; *Mirror Newspapers Ltd and Another v Waller and Another* (1985) 1 NSWLR 1; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465; *Bankers Trust Australia Limited & Ors v National Companies and Securities Commission* (1989) 15 ACLR 58; *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744; *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344; *Attorney-General for New South Wales v Nationwide News Pty Limited & Anor* [2007] HCATrans 719; *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643; *Aldi Stores (a limited partnership) v Coles Supermarkets Australia Pty Ltd* [2010] FCA 563; *Qantas Airways Ltd v Rolls-Royce PLC* [2010] FCA 1481 - BC201010243; *Hogan v Hinch* [2011] HCA 4; *Momcilovic v R* [2011] HCA 34 (8 September 2011); *Minter Ellison (a Firm) v Raneberg* [2011] SASC 159; *Rinehart v Welker* [2011] NSWCA 425 (21 December 2011); *SPM v LWA* [2013] QSC 138 - BC201309888; *Rich v Attorney-General (NSW)* [2013] NSWSC 891 (BC201310712).

power of lower courts in some circumstances to restrict the publication of proceedings conducted in open court.⁴²⁰

PRACTICAL LIMITATIONS TO THE OPEN COURT RULE

There are occasions where it is not practical for the open court rule to operate normally, as defined in Chapter 2. This is referred to as 'practical limitations' of the open court rule. Practical limitations dictate the circumstances where it would not be practical for a court to be sitting and operating in public view. Traditionally these included circumstances where minors were involved; those complaining of sexual offences⁴²¹ and the mentally incapacitated; where the disclosure of the identity of an individual involved a national security issue;⁴²² where a commercially sensitive issue was concerned, or required that the confidentiality of certain materials be preserved;⁴²³ and where it was required for the administration of justice.⁴²⁴ Other exceptions to the rule include secret technical processes, or a public hearing where evidence of the secret process could "cause an entire destruction of the whole matter in dispute".⁴²⁵

Limitations to the open court system may also involve proceedings where restrictions are made on the disclosure in open court of evidence in an action for injunctive relief

⁴²⁰ Inferior courts lack the inherent jurisdiction of superior courts, but have analogous implied powers: *Grassby v The Queen* [1989] HCA 45 per Dawson J; (1989) 168 CLR 1 at 15-17; *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, at [28] (John Fairfax) per Spigelman CJ, Handley JA and M W Campbell A-JA agreeing at [113]-[114]. In federal courts created by statute implied incidental powers also take the place of 'inherent jurisdiction': *DJL v Central Authority* (2000) 201 CLR 226; 170 ALR 659; 26 Fam LR 1; [2000] HCA 17 at [25] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 618-19; 71 ALR 457 at 460-1; [1987] HCA 23, per Wilson and Dawson JJ at CLR 623-4; ALR 463-4, per Deane J, Mason CJ agreeing at CLR 616; ALR 458 and CLR 630-1; ALR 469, per Toohey J.

⁴²¹ New South Wales Law Reform Commission, *Contempt by publication*, Discussion paper No 43 (2000), Chapter 10.

⁴²² *A v Hayden (ASIS case)* [1984] HCA 67; 156 CLR 532, per Deane J at 599; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, per Kirby P at 141; *R v Lodhi* [2006] NSWCCA 101; (2006) 65 NSWLR 573, per McClellan CJ at 584-585 [26]; *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254; *Minter Ellison (a Firm) v Raneberg* [2011] SASC 159, at 27; *Thomas v Mowbray* [2007] HCA 33 [2007] HCA 33 (2 August 2007) at 173.

⁴²³ *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131.

⁴²⁴ *Hogan v Hinch* [2011] HCA 4. See the scope and role of the administration of justice and its relevance to the open court rule discussed in Chapter 2.

⁴²⁵ *Ibid*, at 21; *Andrew v Raeburn* (1874) LR 9 Ch 522, at 523. See also, *Nagle-Gillman v Christopher* (1876) 4 Ch D 173, per Jessel MR at 174; *Mellor v Thompson* (1885) 31 Ch D 55; *Scott v Scott* [1913] AC 417, per Viscount Haldane LC at 436-437, per Earl of Halsbury at 443, per Earl Loreburn at 445, per Lord Atkinson at 450-451, per Lord Shaw of Dunfermline at 482-483.

against an anticipated breach of confidence.⁴²⁶ In cases involving the prosecution of a blackmailer, the name of the blackmailer's victim, referred to as a prosecution witness, may be suppressed because of the "keen public interest in getting blackmailers convicted and sentenced" and the difficulties that may be encountered in getting complainants to come forward "unless they are given this kind of protection".⁴²⁷ Other instances involving names of a police informant or need to protect the identity of undercover police officers are also considered as practical limitations by this thesis.

Generally, a court which operates pursuant to a constitutional prerogative, must at all times maintain an appearance of absolute independence and impartiality. The main purpose of the open court rule is to achieve that objective.⁴²⁸ However, this rule is not absolute.⁴²⁹ In *Russell v Russell*,⁴³⁰ Gibbs J stated:

Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court. If the [*Family Law Act*] had empowered the Supreme Courts, when exercising matrimonial jurisdiction, to sit in closed court in appropriate cases, I should not have thought that the provision went beyond the power of the Parliament. In requiring them to sit in closed court in all cases – even proceedings for contempt—the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.⁴³¹

Although the comment pertains to the inapplicability of s 97(1) of the *Family Law Act*⁴³² to restrain a court from being heard in public, and the unconstitutional nature of the section in interfering in the open court rule, his Honour's comments regarding the public interest to privacy is particularly valid for this thesis. To that end, the comment is

⁴²⁶ *Hogan v Hinch* [2011] HCA 4, at 20.

⁴²⁷ *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, per Kirby P at 141.

⁴²⁸ *Hogan v Hinch* [2011] HCA 4, at 29.

⁴²⁹ *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334; *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84 (17 April 1991).

⁴³⁰ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

⁴³¹ *Ibid.*

⁴³² *Family Law Act 1975* (Cth) s 97(1) - Proceedings. The section states: subject to this Act, to the regulations and to the applicable Rules of Court, all proceedings in the Family Court, in the Federal Circuit Court of Australia, or in a court of a Territory (other than the Northern Territory) when exercising jurisdiction under this Act, shall be heard in open court.

demonstrative of the non-absolute nature of that rule in modern times. The public interest in having personal information protected is an exception, which ought to be recognised as one of the main exceptions to the open court rule. This is particularly so in light of law reporting on the internet and large amounts of personal information they contain.

The operation of a court sitting in public, with the propensity to report an accurate account of the contents of the court proceedings, is a qualified right as it is subject to established exceptions to the open court rule.⁴³³ It has become apparent that there are serious practical limitations to an open court rule without any privacy protection. Having personal information protected prior to publication of law reports on the internet is not only possible, but also quite certainly practicable.⁴³⁴ Consideration should also be given to the fact that privacy has always had a reasonably healthy relationship with the open court rule. Modern technology has made it very difficult for privacy to continue that relationship.⁴³⁵

In Australia, courts have been reluctant to accommodate privacy concerns “where they could be seen to restrict public information of what goes on in courts”.⁴³⁶ On rare occasions where courts have decided to restrict publication of personal information, it has been done so for reasons pertaining to the public interest in the administration of justice, rather than any privacy concerns.⁴³⁷ This should be differentiated from the proposition of this thesis, which is the implementation of privacy measures into the open court rule, for the public interest in the administration of justice.⁴³⁸

Whilst commentary in this complex area has been divided, there has been commonality regarding the way in which privacy protection may be recognised as a competing

⁴³³ See above, 'Practical limitations / Competing interests to the open court rule'.

⁴³⁴ See Chapter 8, proposed models (I) and (II).

⁴³⁵ See Chapter 3, 'Practical Obscurity'.

⁴³⁶ Chris Puplick, 'Justice: Now Open To Whom?' (Pt 3rd Australian Institute of Judicial Administration) (2002) *Annual Conference Industrial Relations Commission and Compensation Court*.

⁴³⁷ *Hogan v Hinch* [2011] HCA 4.

⁴³⁸ See, Chapter 7, regarding circumstances where the implementation of IPPs/APPs is discussed against a number of common scenarios, and Chapter 8, regarding privacy proposals implemented by way of PPS into the functions of a court registry, see Appendix A, 'Privacy Procedure Standards'.

interest to the open court rule. In the absence of a common law tort of breach of privacy (and as a result) the recognition of such an exception to the open court rule, for privacy to be recognised as an exception to the open court rule, it may only be done so with the creation of new statutes.⁴³⁹ This is preferable, because then such a statute can still be enforced by judicial discretion, in order to make a determination whether there has been a breach of privacy from the disclosure of sensitive personal information from law reporting. This is demonstrated in practical examples in Chapter 7, where the current *Federal Privacy Act* is applied to the regulation of the various examples involving law reporting on the internet, and the risks posed by Following the Event⁴⁴⁰ procedures of publication.⁴⁴¹ More importantly though, having such a statutory regime in place might act as a deterrent, and provide powerful incentives for the proper implementation of 'Prior to the Event' measures for the protection of privacy.⁴⁴²

Such laws could be enacted at a federal level. The Federal judicature is charged by the Australian Constitution⁴⁴³ to interpret and apply laws on behalf of the state. Furthermore, the judicature generally does not make laws, but rather is charged with their interpretation and application. The Australian Constitution specifically allocates law making as a function of the legislature, as encompassed pursuant to Chapter I⁴⁴⁴ or executing and enforcing the law which is reserved for the executive.⁴⁴⁵ It is not clear, however, if parliament can make laws which in effect aim to restrict the powers of the courts, for the benefit of privacy values, particularly in the face of a hostile judiciary.⁴⁴⁶ Both branches of power seem to view such moves as interference by either side into their affairs. Legislative rules which aim to strengthen privacy rights in relation to law

⁴³⁹ See, *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *McPherson v McPherson* [1936] AC 17; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

⁴⁴⁰ Following the Event: defined as all the steps in place designed to regulate following the publication and dissemination of electronic law reports on the world wide web.

⁴⁴¹ See Chapter 7.

⁴⁴² See Chapter 8.

⁴⁴³ *Commonwealth of Australia Constitution Act 1900* (Cth), Chapter III.

⁴⁴⁴ *Ibid*, Chapter I.

⁴⁴⁵ *Ibid*, Chapter II.

⁴⁴⁶ See media publications in that regard: Owen Bowcott, 'Privacy law should be made by MPs, not judges, says David Cameron' (2011) *The Guardian* <<http://www.guardian.co.uk/media/2011/apr/21/cameron-superinjunctions-parliament-should-decide-law?INTCMP=SRCH>>; 'Cameron 'uneasy' about use of injunctions', (2011) *BBC* <<http://www.bbc.co.uk/news/uk-13158087>>.

reporting may be viewed as undermining the open court rule and broadly judicial powers. In light of any such notion to draft a statutory regime, the legislature therefore has to be very specific in its application to restrict the operation of the rule.⁴⁴⁷

In the absence of clearly defined guidelines as to the extent in which the legislature can limit the open court rule for privacy protection, it is necessary to consider the application of statutory measures currently in place designed to regulate personal information, for the sole purpose of privacy protection. In Chapter 7, the thesis discusses the application of the Privacy Principles applicable to examples of current practices by the courts.

The idea that personal information ought to be protected (when for the benefit of the administration of justice) was also discussed in the context of legal professional privilege and its importance in promoting the principle of open justice.⁴⁴⁸ The point here is that, no one would disclose anything private to their lawyer, if they knew that it might one day be published and disseminated on the internet for the world at large. In *HM & O Investments Pty Ltd v Ingram (No 1)*⁴⁴⁹ it was observed that the legal advice allocated privileged status pursuant to s 118 of the *Evidence Act*,⁴⁵⁰ is based historically on the common law doctrine of legal professional privilege⁴⁵¹. As was stated in *Baker v Campbell* by Dawson J:

Legal professional privilege at common law is founded upon the proposition that the proper functioning of the legal system depended on freedom of communication between legal advisors and their clients. That freedom would not exist, his Honour said, "if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice". It is implicit, in his Honour's statement of the justification for legal professional privilege at common law, that what is protected is the terms or substance of the communications between lawyer and client.⁴⁵²

⁴⁴⁷ See Chapter 5, for analysis on statutory exceptions to the open court rule.

⁴⁴⁸ *HM & O Investments Pty Ltd v Ingram (No 1)* [2011] NSWSC 550.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Evidence Act 1995* (Cth), see s 118, legal advice.

⁴⁵¹ *Ibid.*, *HM & O Investments*, at 18.

⁴⁵² *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52, per Dawson J at 128.

His Honour went on to observe that the privilege:

Protects a person from disclosure of oral or written confidential communications, between himself and his solicitor or barrister" made for the requisite purpose. It is I think clear that his Honour was talking of disclosure of the terms or substance of those communications. Thus, His Honour noted that [t]he privilege may be lost by waiver and, arguably, by the content of the communication ceasing to be confidential.⁴⁵³

It is argued that today, restrictions on access to court documents and the publication and dissemination of law reports on privacy grounds are rare, and occur only in exceptional circumstances. There must be material evidence before the court for any such restriction to occur⁴⁵⁴ and only if really necessary to secure the proper administration of justice.⁴⁵⁵

In the next section the thesis discusses the discretionary powers of law courts, where there is legislative provision allowing for suppression and non-publication of law reports.

SUPPRESSION AND NON-PUBLICATION

New technological advances in reporting and publication have placed limitations on the scope of the open court rule. This is particularly relevant in the limitations placed when media and individuals report the court proceedings. In Chapter 5, the thesis discusses the suppression and non-publication of court transcripts prior to publication. There are also moves by the Attorney General's department to implement a register of suppression and non-publication orders.⁴⁵⁶ The issue of reporting outside the court by individuals and media organisations remains contentious. It is unclear if courts are able to exercise any sort of power to restrict law reporting outside the court room. Even more contentious are issues arising from Following the Event publication and dissemination.

⁴⁵³ See *H M & O Investments Pty Ltd v Ingram (No 1)* (above) referring to Dawson J's comments at 19.

⁴⁵⁴ *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, per McHugh JA at 476; *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 4)* [2010] NSWLEC 91(10 June 2010); *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744.

⁴⁵⁵ *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* [2011] NSWSC 385 (5 April 2011), per Pembroke J.

⁴⁵⁶ See Chapter 7 under this specific heading for detailed discussion and analysis.

This describes negative scenarios where reporting and publication has already taken place. This thesis proposes Prior to the Event policies⁴⁵⁷ in Chapter 8.

At common law, unless otherwise instructed from the court, people may publish an accurate report of the proceedings.⁴⁵⁸ This includes the names of the parties and the evidence from all parties, including testimonial, documentary or physical evidence provided during the course of the proceedings. Generally, any imposed restrictions on the normal functioning of the court are a topic of great vagueness. It is altogether not clear as to where the common law stands on the issue. This research shows that generally courts do not have the power to make orders placing binding restrictions or obligations on the conduct of non-parties outside the courtroom. It is also argued, that due to the proliferation of law reporting on the internet, such activity *ipso facto* places serious limitations on the open court rule.

Any conduct outside the court (even by non-parties to the proceedings) designed deliberately to frustrate the effect of an order made to enable a court to act effectively within its jurisdiction, can constitute contempt of court. Whilst Inferior courts lack the power to restrict publication involving a deliberate interference with the administration of justice, the Supreme Court, in the exercise of its inherent jurisdiction, has power to protect inferior courts from contempt by publication.⁴⁵⁹ Here an inference may be drawn in relation to the kind of conduct referred to by courts as constituting and occasioning contempt.⁴⁶⁰ Such conduct, significantly, includes the publication of sensitive and

⁴⁵⁷ Proposed policies designed for the regulation of electronic law reports prior to publication and dissemination on the world wide web, see Chapter 8.

⁴⁵⁸ *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450, per Lord Diplock at 450, per Lord Edmund-Davies at 459, per Lord Scarman at 469; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, per Kirby P at 55, per Samuels JA at 61; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, per McHugh JA at 476-477; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, per Toohey J at 43; [1995] HCA 19; *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, per Fitzgerald P and Lee J at 44; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, per Gleeson CJ and Gummow J at 335 [15]; [2003] HCA 52; *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344, per Spigelman CJ at 353.

⁴⁵⁹ *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, at 332-334.

⁴⁶⁰ *Hogan v Hinch* [2011] HCA 4, at 31. New South Wales Law Reform Commission, *Contempt By Publication*, Discussion paper No 100 (2003) 4, 5.

personal information either on the internet or hard copy, pertaining to individuals involved in court proceedings.⁴⁶¹

In New South Wales, contempt has traditionally been divided into criminal and civil. Criminal contempt involves acts or words which interfere with the administration of justice and amount to a public wrong, while civil contempt involves a disobedience of an order, judgment or other process of a court.⁴⁶² Where a civil contempt is deemed wilful, a court could find that such contempt had a criminal character.⁴⁶³

In *Whitham v Holloway*⁴⁶⁴ the burden of proof in all contempt matters was stated to be the criminal standard of proof – "beyond all reasonable doubt". As observed by Brennan, Deane, Toohey and Gaudron JJ's, the differences between civil and criminal contempt are negligible, because the usual outcome of any successful proceedings is punishment.⁴⁶⁵ They went on to state that the differences in distinction between civil and criminal contempt are illusory, and hence the reason why they certainly do not justify the allocation of different standards of proof for civil and criminal contempt. As was observed:

No matter whether primarily for the vindication of judicial authority or primarily for the purpose of coercing obedience in the interest of the individual, make it clear as Deane J said in *Hinch*, that all proceedings for contempt must realistically be seen as criminal in nature. The consequence is that all charges of contempt must be proved beyond reasonable doubt.⁴⁶⁶

⁴⁶¹ *Hogan v Hinch* [2011] HCA 4, This issue was also reported extensively by the print media on possible breaches of suppression orders, whereby the accused names the sex offender and the victim in his website some months after the High Court found against him; Andy Park, 'Hinch names sex offender' (3 April 2012) <<http://www.smh.com.au/national/hinch-names-sex-offender-20120402-1w8sh.html>>; Megan Levy and Louise Hall, 'Hinch didn't have my permission: sex victim at odds with outspoken broadcaster' (3 April 2012) <<http://www.smh.com.au/entertainment/tv-and-radio/hinch-didnt-have-my-permission-sex-victim-at-odds-with-outspoken-broadcaster-20120403-1w9yd.html>>.

⁴⁶² *Registrar of the Supreme Court v Herald & Weekly Times Ltd No. SCCIV-02-1015* [2004] SASC 129. at [19]

⁴⁶³ *Ibid.*

⁴⁶⁴ *Whitham v Holloway* (1995) 183 CLR 525 (HCA).

⁴⁶⁵ *Ibid.*, at 19.

⁴⁶⁶ *Ibid.*

It may seem that such conduct is not as harmful to parties at the conclusion of such proceedings, as they would otherwise be when the proceedings are ongoing. Nevertheless, should the facts of the case need revisiting, or any appeal be made within the statutory period providing for such applications, it has the potential to undermine the administration of justice.

In the United Kingdom case of *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago*,⁴⁶⁷ the Privy Council stated that no common law power exists to make orders relating to the public at large reporting of open court proceedings. The only way such action can be effected would be by way of statute⁴⁶⁸. The issue of restricting publication of open court proceedings has, however, attracted some limited power in common law in recent years.⁴⁶⁹ In *Ex parte The Queensland Law Society Incorporated*, McPherson J, who had considered an earlier decision of McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal (NSW)*,⁴⁷⁰ said:

The power of the court under general law to prohibit publication of proceedings conducted in open court has been recognised, and does exist as an aspect of the inherent power of the courts. That does not mean that it is an unlimited power. The only inherent power that a court possesses is power to regulate its own proceedings for the purpose of administering justice; and, apart from securing that purpose in proceedings before it, there is no power to prohibit publication of an accurate report of those proceedings if they are conducted in open court, as in all but exceptional cases they must be.⁴⁷¹

In a recent High Court judgment, the implied or inherent power of a court to suppress or prevent the publication of a law report was considered.⁴⁷² In such circumstances where the court has exercised its discretionary power to limit the application of the open court rule, it has been justified by reference to the necessity of such action in the interest of the administration of justice.

⁴⁶⁷ *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2004] EWCA Civ 844, [2005] 1 AC 190 at 216 [67].

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166.

⁴⁷⁰ *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, per McHugh JA at 479.

⁴⁷¹ *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166, per McPherson J at 170.

⁴⁷² *Hogan v Hinch* [2011] HCA 4.

In *Hogan v Hinch*, French CJ⁴⁷³ stated that, when a court exercises its inherent or implied power for such suppression and non-publication of court documents, it is binding on all parties to the proceedings, witnesses, counsel, solicitors and, if relevant, jurors and media representatives. Additionally, the powers are binding on the persons present in court when the order is made, or to whom the order is specifically directed.⁴⁷⁴

One major limitation to the open court rule is that it is generally confused with the principle of open justice. In Chapter 2, the thesis attempts to tease out the difference between the two. Simply stated, the open court rule and other elements, such as, privacy and the right to be heard and so forth, make up the larger principle of open justice.⁴⁷⁵ It is important to articulate the differentiating factors between the two. This is evidenced from some applicants wishing to exercise openness, where they have been disappointed to find that judges, in upholding the principle of open justice, have restrained the open court rule, by giving preference to other values contained within the principle. Or when upholding the open court rule in favour of open justice, as was seen in the recent *Rinehart* cases.⁴⁷⁶

Unless the non-publication is based on the courts inherent or implied powers, it seems there is no power to prohibit publication of an accurate report of those proceedings if they are conducted in an open court.⁴⁷⁷ The inherent or implied discretionary powers of a court are for the administration of justice, and unless a suppression order or non-publication order is sought for that purpose, it is doubtful that such powers for the specific purpose of suppressing information (which would otherwise be subject to the

⁴⁷³ Ibid, per French CJ at 417.

⁴⁷⁴ Ibid, at 26.

⁴⁷⁵ See Chapter 2, 'The Open Court Rule'.

⁴⁷⁶ *Rinehart v Welker* [2011] NSWCA 425 (21 December 2011); *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160 (6 March 2012); *Rinehart v Welker & Ors* [2012] HCATrans 7 (1 February 2012).

⁴⁷⁷ *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166, per McPherson J after reviewing the law in the area. The statement also approved by McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465. *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344, as agreed to by Spigelman CJ, Handley JA and M W Campbell A-JA.

open court rule) be exercised by default.⁴⁷⁸ Additionally, even if the orders being sought for suppression or non-publication are directed to circumstances going beyond the administration of justice, then it is doubtful that the court would entertain an application to that effect.

Notwithstanding contempt powers already discussed above, the thesis reiterates the point that courts lack any power to enforce or suppress publication outside the courts. This is one of the attributes of Following the Event limitations, which the internet has made increasingly apparent and is one of the central themes of this research.⁴⁷⁹

In *Raybos Australia v Jones*, Kirby P stated:⁴⁸⁰

Statute apart, it is doubtful on authorities, that courts have the power to make an order, operating outside the court, which suppresses the publication of anything said in open court.⁴⁸¹

Later chapters emphasise the need to create effective Prior to the Event policies⁴⁸² with respect to the limitations of the implied court power and the inherent jurisdiction of the court. Prior to the Event rules dictate that any measures intended to protect privacy values should be implemented prior to publication on the internet.

In the next section, this thesis discusses the motivational change which has also brought about some apparent limitations on the open court rule and its ability to function without limitation.

MOTIVATIONAL TRANSITION: LAW REPORTING

As previously discussed, the very process involved in publishing something on paper as opposed to electronic publication, restricts its availability, circulation, accessibility,

⁴⁷⁸ *Application by Chief Commissioner of Police* [2004] VSCA 3 (12 February 2004), at 29.

⁴⁷⁹ See Chapters 6 and 8.

⁴⁸⁰ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, per Kirby P at 57.

⁴⁸¹ *Ibid*, *Raybos*. See also, Michael Kirby, 'Privacy Protection, a New Beginning: OECD Principles 20 years on' (1999) 6(25) *Privacy Law & Policy Reporter* 25.

⁴⁸² Proposed policies designed for the regulation of electronic law reports prior to their publication and dissemination on the world wide web.

manipulation, alteration and storage. Another important difference between paper and electronic law reporting is the necessity of having knowledge regarding the existence of the report when it is published on paper in traditional law reports and which were traditionally stored in law libraries.⁴⁸³ The knowledge regarding the person of interest and other relevant data depended on the manual searching of the paper database. This was sometimes a time consuming exercise and only the most interested in the matter would make the effort. Electronic law reports are in contrast are readily searchable and available from anywhere in the world on demand. They may be searched with extraordinary specificity, by a single name, key terms, and point in time.

With electronic publication there are very little impediments and with increased access comes increased exposure. An increase in the publication and dissemination of facts, including private facts, contained in law reports in recent years created potential for the abuse of that information.⁴⁸⁴ The complete transformation from the theoretical to the practical openness, as explained earlier, resulted in the mass publication of court decisions on the internet. The past afforded real privacy to individuals by way of the practical obscurity of traditional paper reporting.⁴⁸⁵

Another issue relevant to the motivational transition from what was and is law reporting, is the nature of cases-law being published. The nature of the sorts of cases being published has also changed, where as certain cases (usually property or contract or tort) from limited jurisdictions (usually Supreme Court) were published,⁴⁸⁶ today, there are no impediments on publication based on content or jurisdiction. Things used to get published to set legal precedent and to demonstrate legal principles (as well as adhering to the open court rule and the principle of open justice), whereas now, you

⁴⁸³ Andrew Cannon, 'Policies to control electronic access to court databases', *Computerisation of the Law: Global Challenges the transformation of justice* (UTS Law Review) (Halstead Press, 2005) vol 6, 39, 40.

⁴⁸⁴ See below discussion on the types of risks which personal information poses once made available on the internet.

⁴⁸⁵ Ibid, Cannon, 40.

⁴⁸⁶ See Chapter 3.

have things being published just for the sake of transparency, rather than the case or legal commentary being of any jurisprudential value or establishing a legal precedent.⁴⁸⁷

Judges are increasingly showing concerns that the rapid availability of multi-jurisdictional case law has meant that young practitioners are resorting to shortcuts and quick availability of precedent without really understanding the reasoning as to why certain judicial decisions were made and the overarching precedent underpinning those decisions. This demonstrates two things. Firstly, that technology has had and continues to have a fundamental impact on the practice of law reporting and the way in which it has changed and continues to change the law.⁴⁸⁸ Secondly, the motivation behind the use of reports by practitioners has changed, in that it is likely that reports are being used simply to win cases rather than understanding the principles of law. Particular emphasis is made in recent years on the quantity rather than the quality of case-law being published.⁴⁸⁹

Thirdly, increased access by media has also meant that much of what is reported is able to be broadcast to the public at large through the internet. Fourthly, the number of cases, types of cases and the varying jurisdictions where the cases originate has increased exponentially in the last decade or so. Fifthly, the rapid rise in the number of electronic precedents has meant that, where traditionally legal reasoning was based on set precedents, today it is changing on a daily basis, or at best, evolving rapidly.⁴⁹⁰

The digitisation of law reports has not only changed the way law reports are made available to the public and the legal profession, but also the way in which law reports are disseminated. This thesis argues that an organic change in the public psyche has taken place due to technological advances in this field. That organic change pertains to a

⁴⁸⁷ Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, see His Honour's commentary on 'Developing Technologies and Precedent' regarding the way in which the use of precedent by lawyers is changing with internet-based technology, 16, 17.

⁴⁸⁸ Michael Kirby, 'The Future of Courts - Do They Have One?' (1998) *Journal of Law, Information and Science* <<http://www.austlii.edu.au/au/journals/JILawInfoSci/1998/12.html>>, see His Honour's comments on 'The Ongoing Electronic Revolution' and its impacts on the legal system.

⁴⁸⁹ Ibid, Kirby, 'Precedent Law, Practice and Trends in Australia', 17.

⁴⁹⁰ See Chapter 3, in particular 'Electronic Law Reporting' and 'Correlation between Law Reporting and Privacy'.

new expectation. The public now expects to find all judgments on the internet and to access those judgments without any restraint or impediment. This was not the case in the past. This was particularly true in light of the limitations on the availability of law reports prior to the internet, discussed at length in Chapter 3.

The gradual impact of internet-based publication on the functioning of the courts should be considered. In the past, when court decisions were first published, legal practitioners were able to gain access to unreported cases before anyone else. These were court sanctioned reports as they were formally recognised by judges as authoritative prescription-based legal publishers.⁴⁹¹

When the free access to law movement established legal databases such as the LII (Cornell LII) and AustLII, they lacked the authority and credibility which they enjoy today. Additionally, many people still lacked a reliable and viable internet connection, and when a reasonable connection was available, it was available to the privileged. For example the maximum available internet speed in 1999 was fifty-six kilobytes per.⁴⁹² In addition, the speed at which downloading of documents took place, left a lot to be desired. For example, a fifteen megabytes file (roughly a twenty page document) took approximately thirty eight minutes to download.⁴⁹³ One could imagine a fifty page court decision being published on the Supreme Court Website. The time and effort it would have taken to access and to print a copy would not have been worth the effort and the cost. The few members of the public and lawyers, excited by the opportunities the free access to law represented, were unable to rely on cases and precedents published from such websites, due mainly to technical impediments and the fact that they were not sanctioned by the courts.

⁴⁹¹ See Chapter 5, 'Modern Exceptions'.

⁴⁹² See Marcus Maher, 'Cable Internet Unbundling: Local Leadership In The Deployment High Speed Access' (1999) 52 *Federal Communications Law Journal* 21, 'Current "Dial-Up" access', 214.

⁴⁹³ Ibid, see also, Shuey, Phil J., 'High-Speed Internet Connections: What You Need to Know' (1998) 27(10) *The Colorado Lawyer* 9.

By the early 1990s, the courts were still reliant on precedent being published in court-sanctioned paper-based subscription copies such as, the Australian Law Reports and the Commonwealth Law Reports and so forth. Indeed, it was a standard practice of the courts that litigants issue a list of the authorities they were relying on, prior to the proceedings commencing. This guarded against undue surprises brought on by unauthorised law reports being used in the proceedings. This was particularly apparent with many judges continuing to use paper-based sanctioned reporting, even after digital law reporting became a routine.⁴⁹⁴

In recent times, the legal profession has experienced tremendous transformation. The rapid rise of the internet, improvements in technology, improvements in search engines, and most relevantly, FALM have all helped broaden the scope of the open court rule. In doing so, they have unintentionally limited the scope of the principle of open justice, by dissolving the practical obscurity factor, thereby undermining privacy values.⁴⁹⁵ Moreover, law reporting on the internet has limited the principle, because of the way in which the internet interacts with information, albeit data, in general. For example, the implementation of ELIRS is one of the main contributing factors to that limitation. This involves automatic data processing software which provides for the transmission of vast quantities of information within seconds, across national frontiers and continents. Additionally, the internet does not discriminate between different forms of information. Therefore it treats law reports with complete equality as any other data floating in cyber space. Such information, as will be discussed in Chapter 7, has the potential to be manipulated and misused.

In the next section the thesis discusses and analyses pressures faced by courts to embrace technology.

⁴⁹⁴ 'Index to compilation of speeches delivered by the Hon. Mr Justice P W Young: A Speech on the Retirement of the Hon Peter Wolstenholme Young AO', (23 April 2012) found at: <<http://www.supremecourt.justice.nsw.gov.au/>>, see in particular the comments of the president of the Law Society of NSW attributed to the paper filing system of Justice Young, 14 at [47].

⁴⁹⁵ See Chapter 3.

COURTS EMBRACE TECHNOLOGY

The open court rule was designed to ensure a transparent judiciary and system of justice, whereby the public is able to observe its daily operation. The development of the internet provided opportunities for law reporting without physical limitations and resources. Law reporting on the internet also allowed for greater public access due to its relatively low costs of operation and due to the redundancy of having to publish in paper format. This also did away with the need for the formal processes involved with authorised law reporting mentioned earlier.

Consider the way in which the free flow of information has changed the delivery of information. Law courts have experienced this change like most other facets of society. Courts were forced to be more engaging with technology, addressing long held attitudes and expectations regarding the publication and dissemination of court decisions. The transition from theoretical to practical openness, discussed in this thesis,⁴⁹⁶ culminated in the courts themselves, independently of commercial, government and non-profit publishers, adopting practices which were significantly more relevant to electronic delivery of legal information.⁴⁹⁷

Yet the courts (while embracing technology) have remained largely silent on the impacts and the complexities of modern technology on their day to day operations, and particularly on law reporting. It is argued that above anything else, court information should be differentiated from other forms of data. Whereas non-judicial data usually lacks character and credibility, one law report may contain a plethora of personal information, abstract figures, financial data or formulae, and sensitive information, such as, health records or business techniques, all of which are valuable because of the credibility and character that court documents carry.⁴⁹⁸ Such information is without exception always verified by a court registry.⁴⁹⁹ Publishing and disseminating law

⁴⁹⁶ See above.

⁴⁹⁷ For Example, by 2013, AustLII maintained 551 databases, each database dedicated to reporting the laws of a specific jurisdiction, see '2013 Year in Review: AustLII Foundation Annual Report' (2013) 1 <http://www.austlii.edu.au/austlii/reports/2013/AustLII_YiR_2013.pdf>.

⁴⁹⁸ See Chapter 5, 'Secrets Go on the Internet, Family Details Exposed to All'.

⁴⁹⁹ See Chapters 7 and 8 on the detailed discussion and analysis of the role of court registries.

reports on the internet, without any oversight, without the editing of personal information, without the removal of sensitive data, has serious legal as well as social ramifications.⁵⁰⁰

Some judges have voiced independent concerns about having their opinions reported by law reporters in jurisdictions such as the United States and the impacts of such technology on law reporting.⁵⁰¹ For instance, in the United States, the federal rules of appellate procedure were specifically amended to strengthen the open court rule, by preventing judges from prohibiting or restricting the publication of law reports.⁵⁰² Legislation also making it compulsory for courts to make published and unpublished reports available on their websites,⁵⁰³ further strengthened the open court rule by embracing technology and allowing the legislature to dictate terms with regards to the open court rule, and broadly, the principle of open justice.

Prima facie, courts appear to be embracing technology for the betterment of the open court rule. To allow such legislation to manipulate the principle of open justice would undermine privacy values and may be counter-productive.⁵⁰⁴ Instead, the opposite should be taking place, where the open court rule could be made subject to existing privacy legislation.⁵⁰⁵ Expressing privacy values through the open court rule may be one effective way of bolstering the principle of open justice, without compromising the open court rule. For example in the United States, in the cases involving the operation of the *E-Government Act*,⁵⁰⁶ the courts are seemingly expanding the scope of the open court

⁵⁰⁰ See Chapters 6 and 7.

⁵⁰¹ Michael Kirby, 'The Future of Courts - Do They Have One?' (1998) *Journal of Law, Information and Science* <<http://www.austlii.edu.au/au/journals/JILawInfoSci/1998/12.html>>; Debra C. Weiss, 'A Judge's Unusual Request: Don't Print This in Westlaw or Lexis' (2010) *ABA Journal* <http://www.abajournal.com/weekly/article/a_judges_unusual_this_in_westlaw_or_lexis>.

See also, Lord David Neuberger, 'Law Reporting and the Doctrine of Precedent: The Past the Present and the Future' (2007) *Halsbury's Laws of England Centenary Essays*.

⁵⁰² Patrick J. Schiltz, 'The Citation of Unpublished Opinions in the Federal Courts of Appeals' (2005) 4(1) *Fordham Law Review*, 39.

⁵⁰³ *Ibid*, *E-Government Act 2002*, 44 U.S.C.A. (3501 2004).

⁵⁰⁴ See Chapter 7.

⁵⁰⁵ In Chapters 7 and 8, the thesis discusses the application of privacy to the open court rule by way of the IPPs.

⁵⁰⁶ *E-Government Act 2002*, 44 U.S.C.A. (3501, 2004).

rule. Yet this thesis argues that by legislating in favour of the open court rule, the legislature is placing limitations on the principle of open justice, by allowing such legislation to undermine privacy values.⁵⁰⁷ In other words, the apparent expansion in the scope and operation of the open court rule is being afforded at the expense of other values such as privacy.⁵⁰⁸

Statutory regimes designed to influence the principle of open justice by placing limitations on its mode of operation -one way or another - should not be freely embraced, without due consideration and consultation. If such legislation is developed, then equivalent legislation designed to address court privacy policies aimed at both the courts and publishers should also be considered and implemented into the open court rule.⁵⁰⁹

In later chapters, the thesis also considers some of the more serious potential limitations and consequences that such openness might have on the operation of laws. This includes the potential for misuse of personal information from law reports, and the importance of anonymity in a public world where technology has made it impossible to exercise any privacy. Ultimately, the end result may be something which may not be in the public interest - the avoidance of the open court system altogether, and seeking secret justice instead of open justice.⁵¹⁰ One of the trigger points for such an outcome, would be that the public does indeed place tremendous importance on privacy values, and (as a result) may not appreciate what the internet has done, is doing and continues to do, with those values.⁵¹¹ The scenario pertains to members of the public choosing to forgo their legal rights for the sake of privacy.

⁵⁰⁷ See Chapter 2.

⁵⁰⁸ See Chapters 6 and 7.

⁵⁰⁹ See discussion in Chapter 7.

⁵¹⁰ Heather Brooke, 'Secret Justice' (Paper presented at the Justice Wide Open Conference, City University London, <<http://www.city.ac.uk/centre-for-law-justice-and-journalism/projects/open-justice-in-the-digital-era>>).

⁵¹¹ Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89(3) *The Yale Law Journal* 421, 423.

CONCLUSION

In this chapter the thesis provides some detailed insight and analysis into common law exceptions to the open court rule. To some extent the exceptions have become relatively easier to distinguish, thanks mainly to the advent of technology and internet-based law reporting.

Whilst existing common law exceptions provide some, albeit qualified, protection for applicants, they do not address the disappearance of the practical obscurity afforded to the public from paper reporting. That method was replaced in a very short space of time, with a digital format, affording instead only theoretical obscurity. Additionally, the digitisation of law reporting, particularly in relation to publication and proliferation of law reports on the internet, can have a permanent effect, such as permanent profiles and archives on individuals being created online, due to the absence of common law exceptions to privacy.

The suppression of information has been one way in which the public has reacted to increased concerns from online law reporting. It must be noted that the common law does not recognise privacy as an important enough exception to contend with the open court rule at present. As a result, the suppression and non-publication of information has been granted or not granted because of other exceptions to the open court rule, such as the administration of justice. Courts failed to implement any practical measures to address the limitations experienced by practical openness. The impacts of the Family Court experience, discussed in the next chapter and the steps that jurisdiction took to implement measures to suppress personal information of litigants, is an example of courts regulating law reporting Prior to the Event. Additionally, there are very few exceptions restricting law reporting designed to provide some reprieve to applicants seeking privacy protection.

In the next chapter the thesis discusses statutory exceptions to the open court rule, which are currently recognised and in operation in various jurisdictions.

CHAPTER 5

STATUTORY EXCEPTIONS TO THE OPEN COURT RULE

The internet has a permanent memory and retains all information permanently.
Daniel Solove⁵¹²

INTRODUCTION

In the previous chapter, the thesis discussed and analysed common law exceptions to the open court rule and privacy. It was concluded that privacy had always operated within the principle of open justice until the advent of the internet and free access to law. The principle of open justice was maintained by the symbiotic balance between the open court rule and privacy brought on by practical obscurity. Other elements were also able to function within the principle of open justice, because of that delicate balance.⁵¹³ It is argued that this relationship has been undermined by the lack of privacy protection brought on by the ever expanding presence of law reporting on the internet.

The idea that we are able to implement privacy measures into the existing open court rule framework is an important point which is discussed and analysed at length in Chapter 8. These are Prior to the Event measures to facilitate practical privacy protection, particularly in cyberspace, where regulation is meaningless and jurisdictions are unclear. This is in line with the understanding that it may yet be several decades before the common law organically evolves into recognising a tort of breach of privacy in this jurisdiction.

There are several issues at play here. First, from our discussions in the last Chapter, there is no common law exception to the open court rule regarding privacy protection.

⁵¹² Daniel J. Solove, 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' (2000-2001) 53(6) *Stanford Law Review* 1393, 1412.

⁵¹³ These include, but are not limited to, accountability by the judiciary, legitimacy of the legal process; the right to be present in the court, the right to be heard, public trust and confidence in the legal system as a whole... for a detailed analysis, see Chapters 2 and 6.

Even the suppression and non-publication orders were sought on the grounds of the administration of justice, rather than privacy.

In light of modern advances in technology, it is important to appreciate the difficulty in maintaining the presumption of openness at all times, whereby the open court rule continues to operate unregulated. Meaningful and effective regulation ought to be implemented in law reporting on the internet-to address the flaws of that presumption-in certain circumstances.

Whilst this thesis demonstrates the need for immediate practical measures to apply a privacy perspective to the open court rule, there are statutory measures currently in place which impact upon the open court rule. These measures are problematic. As discussed in this chapter, problems arise as they are not specific to privacy protection and they are Following the Event regulatory measures.⁵¹⁴ As a result, they lack specificity and effectiveness. Whilst this thesis recognises that the current statutory exceptions are a step in the right direction, their impact and effectiveness is doubtful, due to the nature of the internet. Prior to the Event models to address privacy concerns are suggested in Chapter 8. The suggested models are designed to provide privacy protection by working with the open court rule to ensure the maintenance of the principle of open justice.

This chapter discusses and provides analysis on statutory exceptions currently in place and their shortcomings in regulating the open court rule regarding privacy. The ideals of the open court rule are still very important. Publicity of court proceedings is of utmost importance, because a court does not have an inherent or implied jurisdiction to exclude the public from court proceedings.⁵¹⁵ This thesis argues that the open court rule as

⁵¹⁴ Defined as measures designed for the regulation of electronic law reports following publication and dissemination on the world wide web.

⁵¹⁵ *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344; *Scott v Scott* [1913] AC 417, at 473; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77, at 51; *Daubney v Cooper* [1829] EngR 48; (1829) 10 B & C 237, at 440; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520, at 507 and 520-521, 532: See Spigelman, James J., 'The Internet and the Right to a Fair Trial' (2006) 7 *The Judicial Review* 403.

expressed through the common law must give way or accept modification, to ensure that court proceedings are conducted in a manner which serves the overall interests of society.⁵¹⁶ At least, such open proceedings should not be overtly detrimental to participants as a result of unnecessary disclosure of personal information, where there would otherwise be no need for the publication of such information.⁵¹⁷

MODERN EXCEPTIONS

With the advent of free access to law in Australia, and the establishment of other Legal Information Institutes,⁵¹⁸ pressure on courts to adapt to and embrace electronic law reporting and other related internet-based associated technologies has increased.

Since the mid 1990's, the internet and electronic law reporting, particularly the digitisation of the law,⁵¹⁹ has led to an exponential rise in law reporting.⁵²⁰ Both members of the public and the legal profession in general, have increased their usage of online reports as a result of ease of access and more efficient downloading and uploading speeds.⁵²¹ This has placed courts under tremendous pressure to embrace technology within a very short period of time. Initially, when internet court publications first rapidly increased,⁵²² judges constantly had to deal with the introduction and use of unauthorised law reports, which stressed precedents on different points of law.⁵²³ These were certainly different to the authorised reports they were used to dealing with and which they had in the past made judgments on.⁵²⁴ Over time that trend has changed.⁵²⁵

⁵¹⁶ *R v Lodhi* [2006] NSWCCA 101; (2006) 65 NSWLR 573, at 25.

⁵¹⁷ Such as, any personal information likely to bring harm to the individuals when published and disseminated on the Internet. See Chapter 8 and Appendix F.

⁵¹⁸ See Chapter 3, 'Free Access to Law & the Legal Information Institute'.

⁵¹⁹ Claire Germain, 'Digitizing the World's Laws' (2010) *Cornell Law Faculty Working Papers* Paper 72.

⁵²⁰ See Chapter 3, 'Correlation Between Law Reporting and Privacy'.

⁵²¹ See *ibid*, section on, 'Need for Access to the Law', 2, 3.

⁵²² There are currently 4,395,203 indexed cases, law reform documents and journal articles included in the system. Last updated: 6 June 2013 compared to only a few hundred in the early 1990's, see *Australasian Legal Information Institute (AustLII), University of Technology, Sydney, Faculty of Law* <<http://www.austlii.edu.au/>>; *LawCite*, <<http://www.austlii.edu.au/lawcite/>>.

⁵²³ The Honourable Justice James S Douglas, 'Authorized Law Reporting in the Digital Age (Paper delivered at the Bar Common Room, 22 October 2008) (QSC)' (2008) *QldSchol* 102.

⁵²⁴ Michael Kirby, 'The Future of Courts - Do They Have One?' (1998) *Journal of Law, Information and Science* <<http://www.austlii.edu.au/au/journals/JILawInfoSci/1998/12.html>>. Also see, Sheryl Jackson, 'New Challenges for litigation in the electronic age' (2007) 12(1) *Deakin Law Review* 81.

These days any precedent may be cited from any source which the court considers reliable. In modern times, this kind of practice is common for the proper administration of justice.

There is also an increasing demand for access to such precedent relating to case law on Commonwealth legislation, and important common law legal regimes. Non-common law jurisdictions, such as United Nations Treaties⁵²⁶ and European Commission decisions, are also very important. As such, there is a requirement that such laws are searchable, reliable and readily accessible, upon demand. This will promote the accurate interpretation of such laws, not just by judges, but also the public. As such the important and significant position which law reporting has attracted in the last decade cannot be overstated.

Such rapid transformation gave rise to Following the Event unintended and negative consequences,⁵²⁷ and exposed serious shortcomings in the delivery of law reports and its broader impacts on society. For instance, law reports containing a plethora of personal information and other sensitive personal data published and disseminated on the internet at the time of the trial, may be accessed months or years later on the internet.⁵²⁸ This poses, amongst other things, serious privacy concerns, without the availability of any statutory exceptions to the open court rule. This led to the deployment of one of the first statutory exceptions to the open court rule, at a federal jurisdiction.

In 1996, an article titled: 'Secrets Go on the Internet-Family Details exposed to all' reverberated in the popular press.⁵²⁹ The publication of the article had an immediate impact on the community and caught the attention of both the legislature and the

⁵²⁵ Carleton Kemp Allen, *Law in the making* (Oxford University Press, 7th ed, 1964) 363, in particular reports of the Incorporated Council of Law Reporting for England and Wales enjoyed particular authority.

⁵²⁶ See for example, *Civil and Political Rights 2 (Ratified 13 Aug 1980)*, 14668, UN Doc 1197 UNTS 411 United Nations Treaty Series International.

⁵²⁷ Defined as unintended negative consequences which arise following publication and dissemination of electronic law reports on the world wide web.

⁵²⁸ *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344, per Spigelman at 64, cited from 312; Justice Virginia Bell, 'How to preserve the integrity of jury trials in a mass media age.' (2006) 7(3) *Judicial Review* 311.

⁵²⁹ 'Secrets Go on the Internet, Family Details Exposed to All', *The Sunday Telegraph* (Sydney), 12 May 1996.

judiciary alike. The significance of this article was not so much that it contained some new revelation, but that it revealed what many in the industry had long suspected: the serious limitations posed by electronic law reporting on the internet. There was little appreciation of the real impact on the public of the publication and dissemination of private facts contained in some of the law reports.

The excerpt from the news article read as follows:

Secrets Go on the Internet-Family Details Exposed to All

(The Sunday Telegraph, published on 12 May 1996)

Intimate Family Court secrets of hundreds of Australians have been splashed across the internet. Actors, doctors, society figures and company chiefs are among those whose lives have been thrown open to a worldwide audience. An astonishing bureaucratic blunder has provided an easy window into the private bank accounts, assets and home lives of scores of people. Reports from the family Court analysing individual assets, from superannuation packages and share portfolios to clothing and jewellery, are available at the touch of a button. Unproven allegations of child abuse, details of child abduction cases, psychological assessments and the names and addresses of some parties involved in Family Law proceedings are published on an Australian legal database accessible internationally. The publication of the highly sensitive materials provided by the family court and Federal Attorney-General's Department not only raises serious privacy issues, but may also contravene the *Family Law Act*. Legal advice sought by the Sunday Telegraph suggests the publication of Family Law proceedings - on the website officially recognised as among the top 5 percent in the world - goes against the court's stringent reporting restrictions. Blake Dawson Waldron senior partner Robert Todd said: "While it is not necessarily illegal, it certainly breaches the spirit of provisions which allow the publication of such material primarily for lawyers and involved parties. "Most people involved in Family Court Proceedings - while surprised such material would be in dusty volumes of law reports - would be astounded to learn that such intimate personal and financial details would be available on the internet". "This raises issues as to the adequacy of privacy provisions applied to the internet." Australian Family Court proceedings are governed by some of the most stringent publication laws in the world. Under the strictest interpretation of the *Family Law Act 1975* it may be an offence to describe so much as the clothing or even the political persuasion of any party in a manner which may publicly identify them. To identify any party, witness or associate in proceedings is an offence punishable by up to one year's jail. Exceptions are spelled out under section 121 of the *Family Law Act*. While there is nothing to stop people looking up case books, it is a tedious and little known avenue. The internet, however, is a highly public forum, accessible to tens of millions of people throughout the world. In Australia there are 2.5 million users of the internet. The Family Court went online late last year as part of the Australia-wide legal data base, the Australasian legal Information Institute (AustLII).⁵³⁰

⁵³⁰ 'Secrets Go on the Internet, Family Details Exposed to All', *The Sunday Telegraph* (Sydney), 12 May 1996.

Two things had clearly come about. First, that technology and internet-based publication was having a real practical impact on society. In the past, as previously analysed, the theoretical open court rule conformed to the principle of open justice,⁵³¹ where access to law was limited and practical obscurity provided actual privacy to the public. Second, there was a real challenge in the scope of the operation of the open court rule. The fact that the open court rule was operating without any form of regulation with respect to the protection of personal information, had become apparent in a real way. Indeed, this thesis identifies the first instance where, in theory, a Prior to the Event statutory measure was implemented to restrict the publication of personal information, to address the necessary balance between the public interest in seeing justice done, versus the very important public interest in privacy protection. Although s 121 of the *Family Law Act*⁵³² was not designed with privacy in mind, similarly no other section of the legislation mentions the word "privacy".

Additionally, the article raised concerns about the nature of free access to law and the way in which personal information was being handled. Specifically, the way in which personal information was being published in a public space for the world at large to access.⁵³³ The Family Court of Australia⁵³⁴ (Family Court) took immediate steps to implement a court policy which worked to suppress and anonymise personal information uniformly thereafter. This important step by the Family Court meant that its judgments would thereafter be restricted to the public, pursuant to s 121.⁵³⁵ The restrictions meant that the Family Court registry would anonymise the law report, prior to its publication. This is the first example of statutory exception to the open court rule

⁵³¹ *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344. See also relevant commentary from Justice Virginia Bell on the subject matter, Justice Virginia Bell, 'How to preserve the integrity of jury trials in a mass media age' (2006) 7(3) *Judicial Review* 311.

⁵³² *Family Law Act 1975* (Cth) s 121, 'Restriction on publication of court proceedings'.

⁵³³ The privacy implications of publishing private facts on the Internet are discussed at length in Chapters 6 and 7.

⁵³⁴ *Family Court of Australia*, <<http://www.familycourt.gov.au/>>.

⁵³⁵ *Ibid*, s 121 - the requirements of s 121 is that publication of information about proceedings in the Family Court, must not identify a party or witness, and any breach may incur a criminal sanction of up to 1 year's imprisonment.

born out of necessity (as was evident from concerns in the article) and the will to maintain and uphold the principle of open justice, and by virtue of that, the rule of law. More importantly, it is the first example of what this thesis terms as Prior to the Event policy being implemented by the legislature, with judicial approval.

In addition to its now apparent shortcomings, the statutory exception is limited by the fact that it was not designed for privacy protection.⁵³⁶ It is now obvious that simply anonymising names of parties and other ancillary data (names of third parties), may not be enough to thwart serious privacy breaches arising from law reporting on the internet. This is particularly relevant in light of the rapidly evolving technology in ELIRS, the technology deployed by data mining companies on the internet. Whichever way it is dealt with, it is apparent that the courts have to expend substantial resources to implement privacy protection measures.⁵³⁷ This issue is further explored in Chapter 8.

Nevertheless, the undeniable downstream privacy benefits of this statutory exception provided by s 121 to the open court rule are undeniable. The result is the absence of a single complaint regarding the way in which that jurisdiction conducts its law reporting, including those concerned about the privacy of the applicants. At the same time, the downstream effects of the Family Court policy also impacted non-judicial law reporters. For example, AustLII began to develop and implement privacy policies which openly stated that the contents of its publications were court sanctioned primary and secondary materials.⁵³⁸ Furthermore, AustLII declared that very little (if any) of its staff interfered with the actual contents of the material earmarked for law reporting, not only because this conflicted with its role as an online publisher, but that it lacked the resources to do so.⁵³⁹ This was another early indicator that not all law reporters were able to deploy

⁵³⁶ See above.

⁵³⁷ Some argue that in the future, privacy will become a precious commodity which only the elite will be able to afford. This is already seen in the way Google Operates for instance in its data mining and meticulous cataloguing of an individual's Internet life. See Karl T. Muth, 'Goolestroika: Privatizing Privacy' (2009) 47 *Duquesne Law Review* 337.

⁵³⁸ See AustLII Privacy Policy <<http://www.austlii.edu.au/austlii/privacy.html>>.

⁵³⁹ AustLII has been run with very few dedicated staff and limited government funding since its inception. See also, Graham Greenleaf, Andrew Mowbray and Philip Chung, 'AustLII: Thinking Locally, Acting

sufficient resources to implement such policies.⁵⁴⁰ Such concerns were quickly overshadowed by the importance of digital law reporting, and the necessity of ELIRS in the Australian legal system and indeed in other jurisdictions around the globe.⁵⁴¹ To put it in the modern context, Einstein J spoke of the advantages of embracing technology in the court room:

...to access online legal databases such as AustLII and thereby retrieve and print authorities as they become relevant to the proceedings. These facilities make for a highly efficient working environment, especially when one considers the extensive hours spent in the courtroom....⁵⁴²

In the next section the thesis discusses the role of the Suppression Register for suppression and non-publication orders, and its effectiveness in providing real privacy protection to the public, in the context of law reporting and the proliferation of personal information on the internet.

NATIONAL REGISTER FOR SUPPRESSION AND NON-PUBLICATION ORDERS⁵⁴³

At the time of drafting this thesis, the Australian judicial system, through the Standing Committee on Law and Justice (SCLJ),⁵⁴⁴ is in the process of developing and establishing a national suppression register of suppression and non-publication orders

Globally' (21 October 2011) Australian Law Librarian, 101-116, 2011; *UNSW Law Research Paper* No. 2011-41.

⁵⁴⁰ Graham Greenleaf, Andrew Mowbray, Geoffrey King and Peter Van Dijk, 'Public Access to Law Via Internet: The Australasian Legal Information Institute' (1995) 6(1) *Journal of Law, Information and Science* 49.

⁵⁴¹ See other legal Information Institutes associated with AustLII at: *Australasian Legal Information Institute (AustLII)*, *University of Technology, Sydney, Faculty of Law* <<http://www.austlii.edu.au/>>.

⁵⁴² Clifford Einstein, 'Technology in the Court Room 2001 [Friend or Foe?]' <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_einstein_201101>. Another view, beyond the scope of this thesis pertains to the globalisation of the law and the role which the digital media plays in its proliferation, see, Abdul Paliwala, 'Digital Divide: Globalisation and Legal Regulation (UTS Law Review)', *Computerisation of the Law: Global Challenges* (Halstead Press, 2004) vol 6, 26.

⁵⁴³ 'Suppression and Non-Publication Orders - Proposal for National Register' (Pt Standing Committee of Attorney-General (National Committee on Law and Justice)) (2009) 12.

⁵⁴⁴ 'Standing Committee on Law and Justice (SCLJ)', <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_index>.

(suppression register), issued by all Commonwealth, State and Territory Courts, and some tribunals to be hosted by the Federal Court of Australia website.⁵⁴⁵

In practical terms, the Commonwealth, States and Territories could potentially enter into a memorandum of understanding with each other to undertake the responsibility of the various national jurisdictions to maintain the Suppression Register with current and accurate suppression orders issued by the court. This register is intended for use when responding to inquiries from the media, the general public about orders, and for ensuring that the maintenance of statistics and suppression orders are met.⁵⁴⁶ These functions would be performed by the courts in which an order was made.

The suppression register is an example of a Following the Event regulation, arising from a statutory exception to the open court rule.⁵⁴⁷ The register acts as a notice to the public and the media regarding law reports which should not be published and disseminated in any form and in any medium.⁵⁴⁸

It should be noted that the suppression register was not designed to act for privacy protection, and being a Following the Event instrument,⁵⁴⁹ has limited effect in its application. Yet the register might potentially have practical privacy benefits flowing from any non-publication and suppression compliance by the media, law reporters and even other jurisdictions. Interestingly, any breach of compliance to notices on the

⁵⁴⁵ This is an important project undertaken by the Standing Committee on Law and Justice [SCLJ] (formerly, Standing Committee of Attorneys-General [SCAG] working group). The Victorian Civil and Administrative Tribunal is also a participant in the project. See also, *ibid*.

⁵⁴⁶ Suppression and Non-Publication Orders - Proposal for National Register, *Suppression and Non-Publication Orders - Proposal for National Register* (2009) at 6.

⁵⁴⁷ Court Suppression and Non-Publication Orders Bill 2010 (NSW); *Court Suppression and Non-Publication Orders Act 2010* (NSW).

⁵⁴⁸ It is not intended that non-disclosure of information as a consequence of the operation of general statutory prohibitions against disclosure (such as that provided for by s 121 of the *Family Law Act 1975* (Cth)) will be recorded on the register. 'Suppression and Non-Publication Orders - Proposal for National Register', (Pt Standing Committee of Attorney-General (National Committee on Law and Justice) (2009) 12 [2].

⁵⁴⁹ Defined as an instrument designed for the regulation of electronic law reports following publication and dissemination on the world wide web.

register is unable to be prosecuted.⁵⁵⁰ This means that at best, the suppression register will only act as an information service for the present, and will not have a binding evidentiary effect. Any reliance on the register will not be enacted as a statutory defence to a prosecution for breach of a suppression order.⁵⁵¹

This is designed to address two major points. First, the development of a framework of a detailed proposal for the suppression register, and second, the development of a model of laws dealing with the making of suppression orders,⁵⁵² to improve harmonisation across jurisdictions.⁵⁵³ Each is intended to strengthen and improve the balance between the open court rule⁵⁵⁴ and the necessary and proper protection of vulnerable witnesses and other parties to litigation, such as victims.⁵⁵⁵

Such Following the Event regulatory measures are being directed based on a *proof of concept* model⁵⁵⁶ which is earmarked to be implemented as a publicly accessible website.⁵⁵⁷ The interface⁵⁵⁸ can be accessed and updated by the various courts and tribunals in the various jurisdictions, to indicate that a suppression or non-publication order has been made in relation to a particular case. In relation to the difficulties faced by the availability of suppression orders, when they are made by the various jurisdictions, the National Justice CEOs Group were requested by the ministers to

⁵⁵⁰ 'Suppression and Non-Publication Orders - Proposal for National Register', (Pt Standing Committee of Attorney-General (National Committee on Law and Justice)) (2009) 12[6].

⁵⁵¹ Ibid.

⁵⁵² See for example, Court Suppression and Non-Publication Orders Act 2010 (NSW) discussed below.

⁵⁵³ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520. The underlying rule is that court proceedings are fully exposed and transparent, in that, the hand of justice must be seen in its operation and decision making process. A system void of this invites abuses of the system mushrooming undetected, a system void of this would undermine the public administration of justice, a system void of this would undermine the independence and integrity of the judiciary, per Gibbs J at 520.

⁵⁵⁴ Referred in the paper as 'the balance between the important public interest in open justice and the necessary and proper protection of vulnerable witnesses and other parties to litigation (such as victims)'. See, *ibid*.

⁵⁵⁵ The register is specifically void of privacy protection, but otherwise draws an inference of such protection. See *ibid*, discussion paper, 2.

⁵⁵⁶ In the context of this thesis, the model is indicative of the considered attitude of many in the profession, as a 'wait and see' approach, to ascertain the impact of the central registry, if and when it is finally implemented.

⁵⁵⁷ Court Suppression and Non-Publication Orders Bill 2010 (NSW); *Court Suppression and Non-Publication Orders Act 2010* (NSW).

⁵⁵⁸ It is envisaged that this website would be a nationally accessible database to be hosted by the Federal Court of Australia. See, *Federal Court of Australia*, <<http://www.fedcourt.gov.au/>>.

investigate improvements to the distribution of suppression orders, so that they may be made readily available on the national database website⁵⁵⁹. In particular, the National Justice CEO's examine the risks, costs and resources of establishing a secure, closed access *suppression register* of suppression orders, as well as any alternative approaches.⁵⁶⁰

In the next section the thesis discusses and analyses the development of the NSW suppression legislation developed by the SCLJ, and its impact in NSW and other jurisdictions in Australia. This is undertaken against the backdrop of recent high profile court cases involving the new legislation in order to highlight the limitations of the legislation regarding the open court rule.

COURT SUPPRESSION AND NON-PUBLICATION ORDERS ACT 2010 (NSW)

In May 2010, in its published communiqué,⁵⁶¹ SCJL endorsed model provisions in the form of the Court Suppression and Non-Publication Orders Bill 2010,⁵⁶² now passed as the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (*Suppression Act*)⁵⁶³ and its implementation in the various jurisdictions in New South Wales. In addition, a 2011 Federal Bill proposes that the model provisions also be adopted by all Federal Courts of Australia.⁵⁶⁴

What is important about the *Suppression Act* (in the context of this thesis), is that it removes ambiguity regarding the grounds on which suppression and non-publication orders may be obtained. To that end, it also places downward pressure on the discretionary powers of a court to make such orders and strengthens the legislative protection of such orders. The legislation is applicable, based on a court's inherent

⁵⁵⁹ Commonwealth of Australia, Communiqué Standing Committee of Attorneys-General (2010) found at < <http://www.parliament.qld.gov.au/>>.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid.

⁵⁶² Court Suppression and Non-Publication Orders Bill 2010 (NSW).

⁵⁶³ *Court Suppression and Non-Publication Orders Act 2010* (NSW) passed by New South Wales Parliament on 29 November 2010.

⁵⁶⁴ Federal Court of Australia, Family Court of Australia, Federal Magistrates Court of Australia and the High Court of Australia, see, Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth).

jurisdiction, to regulate its own court proceedings and to deal with issues of contempt of court.⁵⁶⁵ The *Act* provides certainty for the application on the grounds for making such Suppression Orders. The *Suppression Act* is a good example of a statutory exemption to the open court rule and one of the very few Prior to the Event laws designed to restrict the proliferation of personal information in law reports.⁵⁶⁶

In *R v Md Kowser Ali*⁵⁶⁷ an application was brought before the District Court of NSW by the The Daily Telegraph newspaper, which sought to revoke orders which had been made pursuant to the now repealed s 292 of the *Criminal Procedure Act*,⁵⁶⁸ which prohibited publication of any evidence which may identify or tend to identify the alleged victim in the case. In that case, the alleged victim had actually given consent for the newspaper to publish her name and photographs. In granting the application in favour of the applicant, District Court of New South Wales Justice Berman stated that since the exemption under s 578A of the *Crimes Act 1900* (NSW)⁵⁶⁹ applied to the case in that the victim had given her consent for the paper to publish her name and photographs, then the paper would be entitled to publish, if the orders pursuant to s292 of the *Act* were revoked.⁵⁷⁰ In emphasising the significance of identifying or being identified as a victim of sexual assault, His Honour stated:

Once publication is made in these days of ready internet access Pandora's box has been opened. Ms Loiterton will, if I grant the application, be forever more easily identifiable as the victim of a sexual assault. She is nineteen now and it would be entirely within my understanding of human nature that she may, in years to come, regret that she gave permission for her identity being published.⁵⁷¹

⁵⁶⁵ *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 4, inherent jurisdiction and powers of courts not affected.

⁵⁶⁶ *Ibid*, s 8, Grounds for making an order.

⁵⁶⁷ *R v Md Kowser Ali* [2008] NSWDC 318.

⁵⁶⁸ *Criminal Procedure Act 1986* (NSW) s 292 - (Repealed).

⁵⁶⁹ *Crimes Act 1900* (NSW) s 578A, Prohibition of publication identifying victims of certain sexual offences.

⁵⁷⁰ *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), at 2.

⁵⁷¹ *Ibid*, at 3.

His Honour considered the weight which should be given to public interest when revoking such an order. He noted that when considering whether to revoke such an order, one has to consider whether it is in the public's interest to do so.

Indeed, I am not to make an order unless I am satisfied that publication is not in the public interest. The way that that is phrased in the negative is important. The default position is publication. Only when I have considered the views of the complainant and also when publication is not in the public interest do I make an order under s 292. To continue an order under s 292 by failing to revoke it I must also be satisfied that publication is not in the public interest.⁵⁷²

Section 8, of the *NSW Suppression Act*⁵⁷³ was recently tested in *Rinehart v Welker*,⁵⁷⁴ where an application was made by *Gina Rinehart's* three children, as the beneficiaries under a trust,⁵⁷⁵ for the removal of Ms Rinehart as the trustee. In that case, several attempts made by Ms Rinehart to have certain information suppressed from publication by law reporters is of significant relevance here because it crystallised the applicability of the *Act* in circumstances where previously the common law tests on restriction would have had to be examined by a court. Although initially successful in her application, the final verdict went against Ms Rinehart, on the grounds that it was in the public interest for the information to be made available to the public. This was based on the public interest in open justice and that the suppression of the information did not outweigh that interest.⁵⁷⁶

In the NSW Court of Appeal, the Court, in reviewing an earlier decision pursuant to s 46 of the *Supreme Court Act 1970* (NSW),⁵⁷⁷ dismissed the decision of Tobias AJA, who had upheld the decision of Brereton J in the Supreme Court of NSW Equity

⁵⁷² *Ibid*, at 4.

⁵⁷³ *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 8, Grounds for making an order.

⁵⁷⁴ *Rinehart v Welker and Ors* [2011] NSWCA 345 (31 October 2011).

⁵⁷⁵ Lang Hancock, Gina Rinehart's father, established the Hope Margaret Hancock Trust, nominating Rinehart as the sole trustee and his four grandchildren named as beneficiaries to that trust. See, *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160 (6 March 2012).

⁵⁷⁶ Publicity of court proceedings, and maintaining the open court rule, outweighed any other public interest arguments, because ultimately it was necessary for the administration of justice.

⁵⁷⁷ *Supreme Court Act 1970* (NSW) s 46, Powers of Judge of Appeal to dismiss an appeal, per Bathurst CJ, McColl and Young JJA, made an order discharging orders 1, 2 and 3 made by Tobias AJA on 31 October 2011.

division for suppression of certain facts in the proceedings.⁵⁷⁸ In that case, the suppression order made by Brereton J, prohibited disclosure by publication or otherwise of information about any relief claimed in the proceedings or any pleading, evidence or argument filed, read or given in the proceedings. Pursuant to s 9(4) of the *Suppression Act*,⁵⁷⁹ His Honour made an order under s 7 of the *Suppression Act* on the grounds referred to in s 8(1)(a) and s 8(1)(e)⁵⁸⁰ of the *Act*. When the matter went to appeal by the beneficiaries in the trust (the children of Ms Rinehart) Tobias AJA upheld the decision of Brereton J. One of the main reasons why Tobias AJA upheld that decision was because Brereton J in his judgment had considered that Ms Rinehart's application for suppression fell within one of the few and strictly defined exceptions to the principle of open justice,⁵⁸¹ and which was accepted in *John Fairfax Pty Ltd v District Court of NSW & Ors.*, that there are exceptions to the principle of open justice⁵⁸² although they are few and strictly defined:

It is now accepted that the Court will not add to the list of exceptions but, of course, Parliament can do so, subject to any constitutional constraints.⁵⁸³

As a result, the beneficiaries made an application to review the decision of Tobias AJA, which was dismissed by Bathurst CJ, McColl and Young JJA.⁵⁸⁴ In overturning the decision of Tobias AJA, the court considered s 6 of the *Suppression Act*⁵⁸⁵ and cited the

⁵⁷⁸ *Welker & Ors v Rinehart* [2011] NSWSC 1094 (13 September 2011).

⁵⁷⁹ *Court Suppression and Non-Publication Orders Act 2010* (NSW).

⁵⁸⁰ *Ibid*, see s 7, a court may, by making a suppression order or non-publication order on grounds permitted by this Act, prohibit or restrict the publication or other disclosure of: (a) information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court. Conferring with s 8(1), that the order being sought is necessary to prevent prejudice to the proper administration of justice, and s 8(1)(e) that the public interest outweighs the public interest in open justice.

⁵⁸¹ *Rinehart v Welker and Ors* [2011] NSWCA 345 (31 October 2011), at 19.

⁵⁸² The principle of open justice is broken down into multiple elements, one of which is the open court rule, which is erroneously referred to as the principle of open justice. See Chapter 2, 'the open court rule'.

⁵⁸³ *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344, at 19, per Spigelman CJ, whom Handley JA and MW Campbell AJA agreed, with respect to the established principles of open justice as a fundamental aspect of the system of justice in this country.

⁵⁸⁴ *Rinehart v Welker* [2012] NSWCA 1 (13 January 2012).

⁵⁸⁵ *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 6, making the non-publication order must be in the public's interest.

decision in *Hogan v Hinch*⁵⁸⁶ by weighing on the balance the safeguarding of the interest of the public in open justice.⁵⁸⁷ The matter then went before Beazley J⁵⁸⁸ for an application to appeal to the High Court, which was granted.

In deciding whether to make a Suppression Order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.⁵⁸⁹ This idea is in-line with the changed circumstances surrounding law reporting in general, with the advent of the internet and the negative impact of personal information being available in cyberspace.

In *Liu v The Age Company Limited*,⁵⁹⁰ McCallum J, in the Supreme Court of New South Wales, restricted publication of her own judgment, pending further hearing of submissions on a non-publication order relating to one of the exhibits in the court documents submitted as part of the proceedings.⁵⁹¹ The matter related to undeclared donations and other moneys paid by a Chinese business woman to a number of people, including a senior Minister in government. It was argued that the allegations were not only damaging, but attracted safety fears for the people mentioned on the list.⁵⁹² The court indicated that it would likely want the disclosure of identity of the people the journalists had consulted prior to reporting the story. Her Honour stated that the disclosure of the sources the journalists used would have adverse effects on the legal system. She stated:

In my view, the constitutionally prescribed system of government is likely to be adversely affected by the automatic exclusion of all confidential sources of political information, including sources of lies and misinformation, from the operation of the rule.⁵⁹³

⁵⁸⁶ *Hogan v Hinch* [2011] HCA 4.

⁵⁸⁷ See Chapter 3, 'The Open Court Rule'.

⁵⁸⁸ *Rinehart v Welker* [2011] NSWCA 425 (21 December 2011).

⁵⁸⁹ *Rinehart v Welker and Ors* [2011] NSWCA 345 (31 October 2011).

⁵⁹⁰ *Liu v The Age Company Limited* [2012] NSWSC 12 (1 February 2012).

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*, at 55. The document which contained a list of names and the exact amounts paid, is alleged by the business woman to have been fabricated.

⁵⁹³ *Ibid.*, at 58.

To that end, it is unclear whether the public interest in having personal information protected, or outweighed, the public interest in the open court rule on every occasion, or on a case-by-case basis. This thesis argues in favour of the former position, since such protection should be considered in light of new advances in modern technology and in the context of the publication and dissemination of court decisions on the internet. Implementing privacy measures into the open court rule will benefit the administration of justice, and ultimately bring about recognition from the public that their personal information is only being utilised for the administration of justice. This is based on the premise that when privacy is being protected, the public will be more likely to embrace the open court rule⁵⁹⁴ and in-turn, the principle of open justice.

The *Suppression Act* will not impact statutory provisions that provide a direct prohibition or presumption against publication or disclosure of information in connection with proceedings, such as those pursuant to s 121 of the *Family Law Act*.⁵⁹⁵ It creates more certainty when operating as an exception to the open court rule, particularly regarding the grounds and the application process in order to obtain suppression orders.

Greater public scrutiny of the judicial system will ensure that the *Suppression Act* is applied to grey areas, where previously applicants might have had difficulty appealing to the courts' discretionary powers for particular orders. Section 6 of the *Suppression Act*⁵⁹⁶ requires that in making a suppression or non-publication order, a court must take into account that 'a' and not 'the' primary objective of the administration of justice is to safeguard the public interest in open justice.⁵⁹⁷

⁵⁹⁴ Max Wind-Cowie and Beatrice Karol Burks, 'The open society cannot be relied upon to defend itself...' (2011) *Demos* 43. See also, the general discussion on restricting the publicity rule to publication: Colleen Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92.

⁵⁹⁵ *Family Law Act 1975* (Cth).

⁵⁹⁶ *Ibid*, s 6, 'Safeguarding public interest in open justice'.

⁵⁹⁷ See Chapter 3, 'The Open Court Rule'.

The *Suppression Act* specifically allocates discretionary powers to a court in s 12 of the *Act*.⁵⁹⁸ The section grants a court powers to allocate the duration of an order, whilst s13 grants the court powers to review an order made by that court,⁵⁹⁹ both on its own initiative and/or by application from a person who is entitled to apply for the review.

Section 16 sets harsh penalties for anyone who engages in conduct which constitutes a contravention of a suppression or non-publication order.⁶⁰⁰ These include a maximum penalty of \$100,000 or imprisonment for 12 months or both for an individual, and \$500,000 for a body corporate, while s 16(2) takes it even further by allocating the 'contempt of court' label to an offence under this section.⁶⁰¹

Currently in Australia, each state has different laws dealing with suppression and non-publication orders, with some common elements between them.⁶⁰² That common element being that the laws were not designed specifically for privacy protection, yet the common [practical] approach amongst many of the applicants seeking privacy protection under these provisions, would be through the relevant statutory exceptions to the open court rule provisions.⁶⁰³ With the number of court cases utilising the provisions of the legislation on the rise,⁶⁰⁴ it is still premature to provide a comprehensive assessment of the full application and impact of the *Suppression Act*. Although, it seems

⁵⁹⁸ Ibid, s 12, 'Duration of orders'.

⁵⁹⁹ Ibid, s13, 'Review of orders'.

⁶⁰⁰ Ibid, s16, 'Contravention of order'.

⁶⁰¹ See Chapter 4, elements of contempt of court.

⁶⁰² See *Youth Justice Act 1997* (TAS) s 45; *Victims of Crime (Financial Assistance) (Amendment) Act 1999* (ACT) s 45 replaced the same section in *Victims of Crime (Financial Assistance) Act 1983* (ACT). *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18. *Young Offenders Act 1993* (SA) s 13. *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 182. *Community Protection (Offender Reporting) Act 2004* (WA) s 106. *Criminal Code Act 1995* (Cth) ss 134, 135, 144, 145. See also, s 5 of the *Criminal Code Act 1995*, sch to the Code.

⁶⁰³ The laws were not specifically designed to provide privacy protection, but they do have the practical impact of providing some privacy protection.

⁶⁰⁴ *Ashton v Pratt* [2011] NSWSC 1092 (12 September 2011); *"X" v Sydney Children's Hospitals Specialty Network & Anor* [2011] NSWSC 1272 (27 October 2011); *Showtime Touring Group Pty Ltd v Mosley Touring Inc* [2011] NSWSC 1401 (22 November 2011); *Rinehart v Welker* [2011] NSWCA 403 (7 December 2011); *ibid*; *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160 (6 March 2012); *New South Wales Crime Commission v Jason Lee* [2012] NSWCA 276 (6 September 2012); *CY v AEF and Northern Sydney Local Health District (GD)* [2012] NSWADTAP 46 (14 November 2012); *Attorney General v Budd* [2013] NSWSC 155 (19 April 2013); *Robinson v NSW and Ors*. [2013] BC201313210 1398 (Unreported, NSWSC); *AGU v Commonwealth of Australia (No 2)* [2013] NSWCA 473.

the full gambit of this area of the law has already required substantial coverage in trying to see whether the *Suppression Act* could be applied without undermining the open court rule.⁶⁰⁵

In the next section, the various methods of suppression and non-publication in the form of super-injunctions are discussed and analysed.

SUPER-INJUNCTIONS

The way in which United Kingdom courts are attempting to deal with public concerns regarding suppression and non-publication in law reporting is relevant and requires some in-depth analysis. Similarly to Australia, UK courts have seen a rise in the number of applications for suppression and non-publication of court reports and other court documents.⁶⁰⁶ UK courts deal with suppression and non-publication orders in the form of super-injunctions. A super-injunction is a special kind of a restraining order which has in the past been granted by the UK High Court, in extraordinary circumstances, for cases which warrant such restraining orders.⁶⁰⁷ A super-injunction provides for an order which specifically prevents the publication of the names or attributes of the parties involved in court proceedings. Such orders are common place in serious criminal trials involving children and recent high-profile commercial disputes.⁶⁰⁸

As an exception to the open court rule, the comments of Igor Judge LCJ are relevant. His Honour considered the application of super-injunctions in a number of

⁶⁰⁵ See for example, *Hogan v Hinch* [2011] HCA 4; *Rinehart v Welker & Ors* [2012] HCATrans 7 (1 February 2012).

⁶⁰⁶ There has been a rise in the number of privacy injunctions being sought in the courts, according to figures released by the United Kingdom, Ministry of Justice, see Ministry of Justice Statistics Bulletin: 'statistics on privacy injunctions', (January to June 2013) Fig. 1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243813/privacy-injunctions-bulletin-jan-jun-2013.pdf>.

⁶⁰⁷ *Yao Essaie Motto & Ors v Trafigura Ltd and Trafigura Beheer BV* [2011] EWHC 90201 (Costs); Gerard Carney, 'Another Judicial Skirmish with Parliamentary Privilege: Trafigura's Super Injunction Against the Guardian Newspaper' (2010) 21(1) *Public Law Review* 5; Dan Meagher, 'Commentary, Another Judicial Skirmish with Parliamentary Privilege: Trafigura's Super Injunction Against the Guardian Newspaper', *ibid*.

⁶⁰⁸ *Ibid*, Carney, 'Another Judicial Skirmish with Parliamentary Privilege: Trafigura's Super Injunction Against the Guardian Newspaper'.

circumstances, such as against corporations and sometimes against an individual. He stated:

The order should only be made if failing to make it would destroy the purpose of the injunction, or cause the very damage that the injunction was designed to avoid. And the process requires that the person against whom any such order is made should be provided with an early opportunity to persuade the court that it is unnecessary.

I am speaking entirely personally but I should need some very powerful persuasion indeed - and that, I suppose, is close to saying I simply cannot envisage - that it would be constitutionally possible, or proper, for a court to make an order which might prevent or hinder or limit discussion of any topic in Parliament. Or that any judge would intentionally formulate an injunction which would purport to have that effect.⁶⁰⁹

In discussing the issue of such an injunction being ordered by a court, His Honour discussed parliamentary privilege and the sensitivity which the legislature has shown to the judiciary, regarding the perceived interference in its affairs.⁶¹⁰ Such is the case then that, in the super-injunction made in *CTB v News Group Newspapers*,⁶¹¹ the judgment contains the following clause, in bold red letters:

Publication of any report as to the subject-matter of these proceedings or the identity of the Claimant is limited to what is contained in this judgment and in the order of the court dated 21 April 2011.⁶¹²

An important aspect of these injunctions is its ability to suppress the identification of individuals on behalf of individuals who apply to the court for entitlement of anonymity, pursuant to Article 8 of the European Convention on Human Rights.⁶¹³ Nevertheless, this thesis argues that simply suppressing the names of individuals is no longer a viable exercise of privacy protection, in light of the proliferation of other

⁶⁰⁹ Lord Judge, 'Lord Chief Justice's View on "Super-injunctions"', Media Release.' (Judicial Communications Office statement) (20 October 2009) <<http://www.judiciary.gov.uk/media-releases/2009/statement-jco-super-injunctions-09>>.

⁶¹⁰ *New South Wales v Commonwealth* [1915] HCA 17; (1915) 20 CLR 54; 21 ALR 128; *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254; [1956] ALR 163; *Attorney-General (Cth) v R* [1957] HCA 12; (1957) 95 CLR 529. The separation of powers doctrine discussed previously, in Australia and America's case, is indeed a subject of great sensitivity in the United Kingdom and would be in all common law states espousing under a democratic system of government.

⁶¹¹ *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB).

⁶¹² *Ibid*, see special binding instructions at the top of the judgment.

⁶¹³ 'European Convention on Human Rights as amended by Protocol No.14', (2010) Art. 8, see <<http://www.echr.coe.int/echr/en/header/the+court/events+at+the+court/60+years+of+the+convention>>.

relevant facts of a private nature on the internet.⁶¹⁴ The thesis demonstrates in Chapter 8, that anything short of its proposed privacy measures is a compromise and risks hurting the foundations of the principle of open justice. Without meaningful privacy protection, the public may be dissuaded from embracing the open court rule.

The next section discusses the other end of the spectrum, regarding the current proposal to drastically expand the scope and operation of the open court rule. This involves, amongst other things, further easing of regulations pertaining to law report access and other court documents.

OPEN ACCESS TO COURT DOCUMENTS

At the other end of the spectrum, statutes designed to promote the open court rule which practically act as an exception to privacy, should also be considered. For example, in NSW, legislation allowing open access to court documents by parties and non-parties in court proceedings was implemented in early 2010, through the *Court Information Act*⁶¹⁵ (*CIA*).

This legislation came about from discussions and submissions contained in the Report on Access to Court Information (June 2008)⁶¹⁶ to the NSW Attorney-General's Department. The reports opening paragraph stated that "Access to court information and documents is accepted as an essential feature of an open justice system". The *CIA* would "allow the public to be informed about what takes place in the courtroom and to understand the basis on which judicial officers make their decisions".⁶¹⁷ The *CIA* emphasises the importance of the role the media plays in the public interest in the open court rule, when it states: "The ability of the media and the public in general to understand what takes place in the courtroom increasingly depends on access to court records".

⁶¹⁴ See Chapters 7 and 8, Appendix A, particularly regarding Quaternary and Quinary data. Also see Appendix G, GP 11, where law reports destined for publication and dissemination should comply with local privacy laws.

⁶¹⁵ *Court Information Act 2010* (NSW).

⁶¹⁶ Report on Access to Court Information, Attorney General's Department (June 2008), found at <<http://www.imf.com.au/>>

The relevance of the *CIA* to this research comes down to the impact it is intended to have on the operation of the open court rule. The legislation is designed to promote procedural reforms, designed to improve the efficiency of court hearings. Practically, this translates to the procedural method by which court documents are adduced during court proceedings. In the past, information used to be provided to the court orally, however, it is now tendered to the court in the form of documentary evidence, statements and affidavits. There are clear occasions where the courts step in to prevent the normal operation of the open court rule by exercising their inherent jurisdiction or implied powers⁶¹⁸ for the administration of justice.⁶¹⁹

In the UK, the issue of open access to court documents and the scope of the open court rule was recently considered in *Newspapers Ltd, R (On the application of), Rt Hon Lord Justice Leveson*,⁶²⁰ where the court exercised its inherent jurisdiction, to decide whether admitting certain evidence was ultimately in the public's interest to advance the interests of justice. In that case, the court dismissed an application by Associated Newspapers (supported by the Daily Telegraph) to quash the decision to admit evidence from journalists who wished to remain anonymous, on the grounds that it might attract harm to their future career prospects. Associated Newspapers argued that allowing employees or former employees of press organisations to give evidence against those organisations anonymously would be unfair and contravene the open court rule.⁶²¹

Toulson LJ, drew a balance between the public's right to know the ultimate facts⁶²² and the open court rule, by allowing the evidence from the anonymous journalists in

⁶¹⁸ *Parsons v Martin* (1984–5) FCA 408 (19 December 1984). See comment of Bowen CJ, Northrop and Toohey JJ said: In our opinion a court exercising jurisdiction conferred by statute has powers expressly or by implication conferred by the legislation which governs it. This is a matter of statutory construction. We are of opinion also that it has in addition such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred. In view of the way in which the phrase 'inherent jurisdiction' is used in many of the cases, it seems advisable generally to avoid the use of it to refer to this incidental and necessary power of a statutory court.

⁶¹⁹ *BUSB v R* [2011] NSWCCA 39, per Spigelman CJ at 28, 'the implied powers of a court are directed to preserving its ability to perform its functions in the administration of justice'.

⁶²⁰ *Associated Newspapers Ltd, R (On the application of), Rt Hon Lord Justice Leveson* [2012] EWHC 57.

⁶²¹ *Ibid*, at 33.

⁶²² Despite the source of the evidence drawn from anonymous journalists.

because they affected the results of the inquiry in a way considered to be of great public interest.⁶²³

Toulson LJ stated:

..that the issues being investigated by the Inquiry affect the population as a whole. I would be very reluctant to place any fetter on the Chairman pursuing his terms of reference as widely and deeply as he considers necessary.⁶²⁴

His Honour wanted to make it clear that the fact finding mission of the inquiry was bigger⁶²⁵ than matters relating to the strict rules of evidence pursuant to the open court rule. The court found that the inquiry should not be deprived of crucial evidence because the applicant is claiming contravention of the open court rule. It is difficult to ignore the possibility that the applicant is perhaps resorting to the underlying principle which governs the public's right to access court documents pursuant to the open court rule, in order to keep certain anonymous evidence of a sensitive nature out of the proceedings.

His Honour commented:⁶²⁶

It is also important to recognise that the evidence in question will be part of a much wider tapestry, and that it is open to the claimant and others to present balancing non-anonymous evidence.

In *Seven Network (Operations) Limited & Ors v James Warburton (No 1)*,⁶²⁷ the court decided in favour of preventing access to certain documents regarding executive salary based on commercial reasons, where orders were made to prevent access to documents relating to the remuneration of senior executives. The court considered the facts, considered the principle of open justice and evoked a long-standing exception to the open court rule, by stating that if the open court rule was strictly adhered to, it might

⁶²³ Ibid, *Associated Newspapers Ltd*, at 58.

⁶²⁴ Ibid.

⁶²⁵ The administration of justice.

⁶²⁶ Ibid, *Associated Newspapers Ltd*.

⁶²⁷ *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* [2011] NSWSC 385 (5 April 2011).

result in injustice to a person or entity whose legitimate confidentiality is exposed and infringed. Additionally the protection of trade secrets and genuine confidential information that might assist competitors was also evoked.⁶²⁸

In the next section, the flaws and shortcomings of CIA are closely analysed and a discussion about the legislation's extended delay is provided.

COURT INFORMATION ACT: FLAWED LEGISLATION

Legislation such as the *CIA* is designed to act as enablers of the open court rule. In recent years, technology highlighted the scope and limitations of the open court rule and the extent to which it may be able to operate. This is particularly relevant in light of the rapid transition from the theoretical openness and practical obscurity model to the Practical openness and theoretical obscurity model, brought on by the evolution in publication technology and free access to law.⁶²⁹ One of the more significant outcomes of that transition has been the apparent lack of privacy from the onset of practical openness and theoretical obscurity. This thesis argues that there is a direct correlation between practical openness and theoretical obscurity, and the lack of privacy in modern court reporting practices. The second issue is whether the extreme openness being advocated by the media⁶³⁰ may actually be counterproductive in delivering the intended aims and objectives of the principle of open justice.⁶³¹

Whilst it is argued that laws such as *CIA* were designed to promote the open court rule, they do little to instil confidence for litigants concerned about privacy. The *CIA* provides practical openness by allowing for uninhibited access to court documents. As a result, there are some fundamental conflicts with other laws which would have to be resolved prior to the commencement of *CIA*.⁶³² The legislation was introduced based on

⁶²⁸ *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, per Kirby P at 334, cited from *ibid*, at 7.

⁶²⁹ See Chapter 4, 'Theoretical Openness v Practical Openness'.

⁶³⁰ *Australian Press Council*, <<http://www.presscouncil.org.au/about/>>. See, eg, Ryan Inez, 'Access to Court Documents' (2006) 18(3) *Australian Press Council*.

⁶³¹ Recalling that supporting the open court rule at the expense of other fundamental rights, such as privacy, undermines the principle of open justice, see Chapter 2.

⁶³² See detailed discussion below.

a comprehensive consultation with the media; victims of crime, the courts and the legal profession, and they were intended primarily for open access to court information.⁶³³

The Attorney General at the time stated:

Being able to easily obtain information discussed in a court proceeding is an essential feature of an open and transparent justice system. The new laws balance the principle of open justice with the need to protect the privacy and safety of witnesses and victims.⁶³⁴

Interestingly, Part 4 of the *CIA*⁶³⁵ provides for privacy protection, with the exception of the *Privacy and Personal Information Protection Act 1998*⁶³⁶ and the *Health Records and Information Privacy Act 2002*,⁶³⁷ which are exempted from the *CIA*.

The *CIA* also makes provision for each court to publish on its website, or by other appropriate means, general information that promotes awareness of the potential for information provided by a party to proceedings to be accessed by other persons, pursuant to an entitlement under this legislation and the court's practices and procedures for preventing or limiting access to personal information. Furthermore, any risk of disclosing personal information seems to have been covered under s 18 of the *CIA*,⁶³⁸ which provides for the anonymisation of personal information in court records that contain open access information - to the maximum extent practicable.⁶³⁹

Theoretically, the legislation grants non-parties to proceedings unfettered access to court documents, even while the proceedings are under way. This is despite the fact that reports leading up to its enactment acknowledged that access needs to be balanced

⁶³³ John Hatzistergos, 'Community Given Greater Access to Court Information' (Pt NSW Attorney General's Department) (2010) *NSW Attorney General - Media Release*.

⁶³⁴ *Ibid.*

⁶³⁵ *Court Information Act 2010* (NSW), Part 4.

⁶³⁶ *Privacy and Personal Information Protection Act 1998* (NSW).

⁶³⁷ *Health Records and Information Privacy Act 2002* (NSW).

⁶³⁸ *Court Information Act 2010* (NSW), s 18.

⁶³⁹ *Ibid.*

against legitimate reasons for restriction, which might include privacy,⁶⁴⁰ personal or sensitive information,⁶⁴¹ improper use of the information,⁶⁴² unwarranted video footage,⁶⁴³ police fact sheets not tested by the courts yet,⁶⁴⁴ and pleadings which are wrong, factually incorrect, unsupported by evidence, or may be proven false in law at a later stage.⁶⁴⁵ It is legislation which arguably is politically motivated,⁶⁴⁶ and seemingly ignores the qualified nature of the open court rule.

Written submissions; statements and affidavits admitted into evidence, including expert reports; judgments, directions and orders given or made in the proceedings, including a record of conviction in criminal proceedings; the name of the judge, magistrate or registrar, who is listed to hear the proceedings; are all able to be accessed by parties and non-parties. Open access information will also include the indictment, court attendance notice or any other document commencing proceedings.⁶⁴⁷ Perhaps the most significant issue is what this thesis refers to as the negative flow-on effects of information

⁶⁴⁰ Attorney General's Department of NSW, Review of the Policy on Access to Court Information (April 2006); Report on Access to Court Information, Attorney General's Department (June 2008) found at <<http://www.imf.com.au/>>.

⁶⁴¹ Ibid, at 31.

⁶⁴² Ibid, at 37. In the United Kingdom for example, there is the implied notion of the 'Harman Rule', which the House of Lords confirmed that documents obtained by discovery are subject to an implied undertaking, which prevents their use for any purpose other than the proper conduct of the action in which the documents were obtained, except with the leave of the court, see *Home Office v Harman* [1981] QB 534; [1981] 2 All ER 349; [1981] 2 WLR 310.

⁶⁴³ Ibid, at 41, see also, New South Wales Law Reform Commission, *Contempt By Publication*, Discussion paper No 100 (2003) at [11.2]. To enable the public to exercise their right to scrutinise and criticise courts and court proceedings, and to make fair and accurate reports of what occurs in the courtroom, it is arguably a logical extension to allow public access to, and reporting on, court documents. This chapter examines whether there should be a public right of access to court documents and, if so, to what documents such a right should apply, what should be the parameters of the right and whether the right should extend to publishing the contents of such documents.

⁶⁴⁴ Report on Access to Court Information, Attorney General's Department (June 2008) at 18 <<http://www.imf.com.au/>>.

⁶⁴⁵ New South Wales Law Reform Commission, *Contempt By Publication*, Discussion paper No 100 (2003) see [11.59] - [11.61].

⁶⁴⁶ Ryan Inez, 'Access to Court Documents' (2006) 18(3) *Australian Press Council*. The Australian Press Council strongly argued for greater openness in the courts, years prior to drafting of any such legislation. In that regard they contend that courts have failed to grasp the technology and the way in which information is now handled by the media. The APC recommended that: 'statements, affidavits and exhibits should be available to the media as soon as possible, following their introduction into evidence in open court - unless the judge has ordered that they be suppressed'. See also similar publications found on *Australian Press Council* <<http://www.presscouncil.org.au/about/>>.

⁶⁴⁷ John Hatzistergos, 'Community Given Greater Access to Court Information' (Pt NSW Attorney General's Department) (2010) *NSW Attorney General - Media Release*.

remaining on the internet, long after the proceedings are over, with no technical way of removing them from cyberspace.⁶⁴⁸

In *R v Perish; R v Lawton; R v Perish*⁶⁴⁹ a publisher of multiple websites, which had published several articles containing personal information pertaining to the accused in those proceedings, was ordered to remove the articles from its websites on the grounds that they might interfere with a fair trial.⁶⁵⁰ Although incidental to the substantive case, His Honour observed that the article subject to the notice of motion was highly prejudicial to the defendant, because it associated him with crimes for which he had not been charged. Section 8 of the *NSW Suppression Act* was utilised, where His Honour commented that the use of the *Act* was necessary to prevent prejudice to the proper administration of justice.⁶⁵¹

His Honour agreed with counsel for the accused, that the court had an obligation to protect the integrity of the judicial system. The main issue being that a juror might inadvertently speak to someone who had read one of the articles from any of the mentioned websites, and as a result develop prejudice. Counsel for the defendant publisher argued that the problem lay elsewhere, and despite the dangers presented, the open court rule should be maintained. The publisher further argued that the personal information would simply be accessible from other websites because as soon as the personal information is made available on the internet, it remains accessible permanently.

The expert witness in the proceedings agreed with the publisher, providing evidence to the court that the material could simply be transferred and be republished on another website. The only way to bring about an absolute remedy would be to bring about a

⁶⁴⁸ *R v Perish; R v Lawton; R v Perish* [2011] NSWSC 1101; *R v Perish; Perish & Lawton* [2012] NSWSC 355.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ See Geesche Jacobsen, 'Accused win battle to delete web history' (2011) *The Sydney Morning Herald* <<http://www.smh.com.au/technology/technology-news/accused-win-battle-to-delete-web-history-2020110216-1awmp.html>> referring to *R v Perish; R v Lawton; R v Perish* [2011] NSWSC 1101, per Price J.

⁶⁵¹ *Ibid.*, at 23, see Court Suppression and Non-Publication Orders Act 2010 (NSW), s 8.

system that would “remove every single item pertaining to the individual from the internet”. Price J, admitting that his decision “lacked practical utility”,⁶⁵² said that the inability to remove all offending material did not mean the removal of the outlined articles would be futile.

Another important issue to draw from the case is that, an important point raised in the case was that Price J did not invent or utilise any new grounds for suppressing the relevant information, but rather emphasised the rule pursuant to the principle of open justice necessary⁶⁵³ for the administration of justice.⁶⁵⁴ The 'necessity test' was accordingly applied, because it was deemed necessary to determine that the objective of ensuring the fairness of a subsequent trial could not be achieved in any other way.⁶⁵⁵

Price J, stated that the term 'necessary' did not have the meaning of 'essential', rather it is to be "subjected to the touchstone of reasonableness".⁶⁵⁶ The concept as to what 'reasonably is necessary', is to be approached in a 'common sense way'⁶⁵⁷. The court must have evidence of material before it, in order to reasonably reach the conclusion, that it is necessary to make an order removing material from the internet and prohibiting publication of that material during the trial. Mere belief that the order is necessary is insufficient.⁶⁵⁸

⁶⁵² Ibid, Jacobson, 'Accused win battle to delete web history'.

⁶⁵³ *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465. The necessity test: necessary does not mean 'convenient, reasonable or sensible or to serve some notion of the public interest', *Hogan v Australian Crime Commission* (2010) HCA 21; (2010) 240 CLR 651, at 664.

⁶⁵⁴ The principle of open justice requires that once material is given in evidence or otherwise made available in judicial proceedings, an order prohibiting its publication will not be made unless it is found necessary for the administration of justice: *Attorney-General for New South Wales v Nationwide News Pty Limited & Anor* [2007] HCA Trans 719, per Hodgson J at 25.

⁶⁵⁵ *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344, per Spigelman CJ at 51 and 101 A fundamental principle of the administration of criminal justice is the principle of open justice. Where the application of the power to make a non-publication order conflicts with the principle of open justice the test of necessity must be applied with strictness. A high level of certainty that prejudice of the trial will ensue is required.

⁶⁵⁶ *Pelechowski v The Registrar, Court of Appeal* (NSW) (1999) 198 CLR 435, at 452.

⁶⁵⁷ *State Drug Crime Commission (NSW) v Chapman* (1987) 12 NSWLR 447, per Allen J at 452.

⁶⁵⁸ Ibid, Jacobson, 'Accused win battle to delete web history'.

Whilst the *CIA* is potentially capable of providing greater unrestricted access to court documents, it would mean that larger numbers of previously restricted information only accessible by court leave would now proliferate on the internet, being potentially searchable⁶⁵⁹ and linkable with the relevant law report of the proceedings. The logic behind this of course is that all information, whether true or false, is always floating around in cyberspace and as a result is searchable and collectable. To that end the internet has a permanent memory and retains all information permanently.⁶⁶⁰

This information may include information contained in transcripts of closed proceedings, personal information in court records, and information contained in a brief of evidence in criminal proceedings. The high threshold of access is premised on the idea that "the media plays a crucial role in informing the public about civil and criminal proceedings, and as a result requires access to information that will enable fair and accurate reporting".⁶⁶¹

Two important issues must be considered. The *CIA* is yet to commence, despite being three years since it was assented to,⁶⁶² and at this stage, without substantial revision, may take even longer to be proclaimed.⁶⁶³ The main issue of contention from the legislation is that, if court documents are to be released for access, then they have to be anonymised of all personal information they contain. Section 18 of the *CIA* requires that all NSW courts must ensure that all personal information is removed from court

⁶⁵⁹ See heuristic linking discussed in Chapter 6, 'Information Privacy Elements'.

⁶⁶⁰ Daniel J. Solove, 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' (2001) 53(6) *Stanford Law Review* 1393, 1442.

⁶⁶¹ John Hatzistergos, 'Community Given Greater Access to Court Information' (Pt NSW Attorney General's Department) (2010) *NSW Attorney General - Media Release*. Access to other information classified as 'restricted access', such as information contained in medical or psychiatric reports, may be obtained by making an application to the court.

⁶⁶² As of June 2013.

⁶⁶³ 'Judicial Commission of New South Wales: Closed court, suppression and non-publication orders', <http://www.judcom.nsw.gov.au/publications/benchbks/criminal/closed_court_and_non-publication_orders.html>.

documents prior to being released to the public. Failure to do so will be a breach of the *Act*.⁶⁶⁴

As a result, the *CIA* is self contradictory pursuant to the intended spirit of the *Act*. On one hand it is apparently designed to promote the open court rule and the uninhibited access to court documents, while on the other hand, without significant resources and investment by the courts, to constantly anonymise personal information from court documents, the *Act* is, for all practical purposes, obsolete. To that end, the legislation is onerous on the courts, which must ensure that personal information of parties to proceedings is not released, when access is granted. On a practical level, it would require every court in all NSW jurisdictions to redact court documents using existing funding in order to comply with the *Act's* own non-disclosure of personal information clause.⁶⁶⁵

The regime of greater access to court documents is not new to Australia, and has in fact already been implemented in other jurisdictions, such as Canada.⁶⁶⁶ However, there are other jurisdictions, such as the European Union, that take such matters, particularly any type of discussion or disclosure of the contents and or direction of the proceedings by both parties and non-parties to proceedings, extremely seriously.⁶⁶⁷ This is predominantly due to the fact that privacy is recognised as a human right in that jurisdiction.⁶⁶⁸

⁶⁶⁴ Court Information Bill 2009 (NSW); Court Information Bill 2010 (NSW); *Court Information Act 2010* (NSW). Section 18 of the *Act* prohibits the publication of personal information prior to access being granted.

⁶⁶⁵ *Ibid*.

⁶⁶⁶ 'Court ruling posted online puts privacy at risk: Commissioner' (Pt CANWEST News Service) (2008) *Canada.com* <<http://www.canada.com/topics/news/national/story.html?id=ebea3d52-4d07-4c25-aeel-7def357ae570>>.

⁶⁶⁷ J.P. Mifsud-Bonnici and J.A. Cannataci, 'Data protection comes of age: The data protection clauses in the European Constitutional Treaty' (2005) 14(1) *Information & Communications Technology Law*; Jari Råman, 'European Court of Human Rights: Failure to take effective information security measures to protect sensitive personal data violates right to privacy – *I v. Finland*, no. 20511/03, 17 July 2008' (2008) 24 *Computer Law & Security Review* 562; A Levin and M. Nicholson, 'Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground' (2005) 2 *University of Ottawa Law & Technology Journal* 357.

⁶⁶⁸ 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1950) (Art 8) Right to respect for private and family life <<http://conventions.coe.int/treaty/en/treaties/html/005.htm>>.

For example, in the European Union jurisdictions, the open court rule operates to the extent where it does not interfere with "public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".⁶⁶⁹ In other words, law reports may be suppressed or redacted, if the privacy of the individual requires it and it ensures the right to a fair trial. It should be mentioned that the open court rule is upheld despite other concerns, even if both parties request suppression and or non-publication from the court, where the court deems reporting necessary for the administration of justice.⁶⁷⁰

In order to highlight the shortcomings of existing statutory exceptions to the open court rule, the thesis next section discusses one of most important negative consequences of online law reporting - identity theft. Identity theft is on the risen as a direct consequence of easy access to sensitive personal information. Exposing personal information on the internet invariably places the public at risk and is therefore not in the public interest to publicise personal information.

IDENTITY THEFT PREVENTION AND ANONYMISATION

One of the main side effects of privacy breaches is identity theft.⁶⁷¹ Specifically, when personal information is handled in a way which (as discussed in Chapters 6 and 7) is in breach of Information Privacy Principles (IPP) contained in the *Federal Privacy Act* and where the owner of the personal information is unable to exercise any control over that information. Identity theft is considered as one of the most rapidly growing types of criminal activity.⁶⁷²

⁶⁶⁹ Ibid, Art. 6(1).

⁶⁷⁰ *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42.

⁶⁷¹ This thesis notes that Identity theft and crime should be differentiated from one another. As identity theft by itself is not a crime, until the perpetrator uses that identity or the personal information pertaining to that identity to advance a crime, see Alex Steel, 'True Identity of Australian Identity Theft Offences: A Measured Response or an Unjustified Status Offence' (2010) 33(2) *UNSW Law Journal* 203.

⁶⁷² Daniel J. Solove, 'Identity Theft, Privacy, and the Architecture of Vulnerability' (2002-2003) 54(4) *Hastings Law Journal* 1227.

Solove describes identity theft as the following:

A criminal impersonates an individual by using personal data to obtain accounts, credit cards, and loans. This upends a person's life, destroys their credit, and often prevents them from engaging in important activities such as making purchases, obtaining loans or mortgages, renting an apartment, or even getting a job or license.⁶⁷³

There is a clear reason why identity theft is relevant to law reporting. Court registries are larger repositories of personal information. At any given time registry files contain a plethora of personal information such as details financial data, medical and other insurance details, employment records, medical and dental records, personal information of family members, details of intimate relationships, personal information of victims and witnesses and other personal information able to identify the individual.⁶⁷⁴ As such, the unregulated nature of any such registry⁶⁷⁵ places the public at risk by undermining the public interest in privacy protection.

When such personal information is then included in law reports and published and disseminated on the internet pursuant to a court's natural functions under the open court rule, it places the public at risk. Electronic law reports will almost instantly be available for access, downloading, searching, compilation, storage and other uses which were never intended by any of the parties or those remotely connected to the proceedings.⁶⁷⁶ At present, there are some Prior to the Event measures in place specifically designed to address the public's growing concerns over identity theft. However, these measures are applied based on the discretionary powers of a court or tribunal pursuant to an application by the individual.⁶⁷⁷ Generally speaking, Following the Event regulatory measures, including the discretionary application of any form of anonymisation (by

⁶⁷³ Ibid, 1229.

⁶⁷⁴ See, Peter A. Winn, 'Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information' (2004) 39 *Washington Law Review* 307, 320, 321.

⁶⁷⁵ See the correlation between the functions of a court registry and the open court rule discussed in Chapter 8.

⁶⁷⁶ Ibid, Winn, 321.

⁶⁷⁷ See for example, Supreme Court of NSW-Identity theft prevention and anonymisation policy 2010 (NSW); and Local Court of New South Wales, Practice Note 1 2008 (NSW).

courts) following publication and dissemination do little to prevent such crimes, as was discussed earlier regarding the nature of the internet.⁶⁷⁸

Today, identity theft is viewed as an epidemic.⁶⁷⁹ Criminals utilise any and all available information on the internet, in conjunction with other forms of extraction methods, to acquire information used to identify individuals and to apply for benefits, such as credit and other valuable data. Moreover, inadequate regulation has led to what is described as an epidemic in identity offences.⁶⁸⁰ The overwhelming explanation is that identity theft is occurring with greater ease, sophistication and rate of occurrence.⁶⁸¹

Identity theft is described as the intentional acquiring of personal information or accreditation of another, in order for it to be used as an alternative identity in a crime.⁶⁸² That stolen identity is then used by the perpetrator as an alternative identity to obtain certain benefits, where a new victim or victims are then induced to accept that the alternative identity is in fact the perpetrator's true identity. In short, any type of crime can then be committed with the stolen identity. Identity theft is a particularly nefarious type of crime, as there are several victims at any one time. Not only would the third party victim feel a sense of violation, but also the financial liability attributed to them and many others as a result of the use of the fraudulent identification.⁶⁸³ In a sense, the crimes born from identity theft use new technologies to commit well-known traditional types of scams and crimes.⁶⁸⁴ Both governments and some of the superior courts have

⁶⁷⁸ See also, the application of information Privacy Principles and Australian Privacy Principles to the operation of a court registry in Chapter 7. See also, Chapter 8 regarding the proposed Prior to the Event policies designed to restrict the disclosure of all personal information on the internet arising from law reporting.

⁶⁷⁹ Alex Steel, 'True Identity of Australian Identity Theft Offences: A Measured Response or an Unjustified Status Offence' (2010) 33(2) *UNSW Law Journal* 203, fn 1.

⁶⁸⁰ *Ibid.*

⁶⁸¹ Daniel J. Solove, 'Identity Theft, Privacy, and the Architecture of Vulnerability' (2002-2003) 54(4) *Hastings Law Journal* 1227.

⁶⁸² See Alex Steel, 'True Identity of Australian Identity Theft Offences: A Measured Response or an Unjustified Status Offence' (2010) 33(2) *UNSW Law Journal* 203, 504.

⁶⁸³ *Ibid.*

⁶⁸⁴ Michael L. Benson, 'Offenders or opportunities: Approaches to controlling identity theft' (2009) 8(2) *Criminology & Public Policy* 231.

started implementing discretionary Prior to the Event policies⁶⁸⁵ in order to combat identity theft.⁶⁸⁶

There are predominantly three types of Following the Event instruments addressing identity theft. Some legislative schemes are designed to address and target specific areas. The first prohibits certain activities such as forgery of bank cheques, fabricating certain documents for the commission of an identity crime, and or impersonating an individual in an official capacity. Second, legislative regimes which are designed to help victims of identity theft to deal with it in as short a time as possible, such as banks and credit societies assisting victims and providing the necessary information required by victims. The third area covers legislation which deals with the obligatory responsibilities of organisations to protect the information entrusted or harvested by them. These are covered both at the State and Federal levels in Australian jurisdictions⁶⁸⁷ and international jurisdictions, such as the United States,⁶⁸⁸ United Kingdom⁶⁸⁹ and the European Commission⁶⁹⁰ which aim to regulate identity theft.

⁶⁸⁵ Defined as statutory and or policy instruments designed to regulate electronic law reports prior to publication and dissemination in the world wide web.

⁶⁸⁶ See for example, Supreme Court of NSW - Identity theft prevention and anonymisation policy 2010 (NSW); Local Court of New South Wales, Practice Note 1 2008 (NSW).

⁶⁸⁷ *Criminal Code Act 1995* (Cth) see s 5 of the *Criminal Code Act 1995*, sch to the Criminal Code. The legislation covers areas such as, obtaining property by deception, ss 135,144, 145; *Financial Transaction Reports Act 1988* (Cth) s 24; *Migration Act 1958* (Cth) s 234; *Criminal Code Amendment (Theft, Fraud, Bribery & Related Offences) Act 2000* (Cth) inserted amendments into the *Criminal Code Act 1995* which deals with criminal conduct related to identity fraud. *Crimes Act 1900* (NSW) Part 4AA replaced ss 164 - 186. The part was designed to simplify and make current the previous provisions in relation to fraudulent conduct and related offences s 158, s 164-186, s 527-527B, s 528, s 545A, s 547A; *Crimes; Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW) sch 2. See NSW, Parliamentary Debates (Hansard) Legislative Council, 12 November 2009, 19507. *Crimes Act 1958* (VIC) ss 81, 82. *Criminal Code and Civil Liability Amendment Act 2007* (QLD) ss 6, 408D; *Criminal Code Act 1899* (QLD). *Criminal Code Act Compilation Act 1913* (WA) which contains the relevant sections, see ss 378, 409, 473, 474, 552, 558; *Criminal Code Act 1913* (WA). *Criminal Law Consolidation Act 1935* (SA) Part 5A, ss 144A, 144B. *Criminal Code Act 1924* (Tas) ss 229(1)(b), 234, 252A(1), 257E, 299. *Crimes Act 1900* (ACT) ss 308, 332; and Pt. 3.4 & 3.6; *Criminal Code 2002* (ACT). *Criminal Code Act 1924* (Tas) Sch 1, ss 210, 227, Div. 10, s 276.

⁶⁸⁸ *Identity Theft and Assumption Deterrence Act (US)*, 47 USC § 18 (1998). *Identity Cards Act 2006* (UK) 2006, c 15, see s 25, possession of false identity documents etc.

⁶⁸⁹ *Data Protection Act 1998* (UK) 1998 c. 29, c Part VI, s 55, Unlawful obtaining etc. of personal data.

⁶⁹⁰ Directive 95/46/EC of the European Parliament and of the Council (Data Protection Directive) 1995 (EC); Directive 2002/58/EC of the European Parliament and of the Council 2002 (European Commission); Directive 2006/24/EC 2006 (European Commission). See also discussions about identity protection approaches, found in para. 4 of 'European Commission plan to deliver justice, freedom and security to citizens (2010 – 2014)' (Press Release, MEMO/10/139)

Other policies implemented by certain court registries (subject to a court order), are designed to protect basic personal information, such as dates of birth, addresses, and unique numbers, including medicare numbers, bank account numbers and tax file numbers.⁶⁹¹ These are specific for preventing identity theft in relation to litigants and witnesses in appropriate cases; and to anonymise or de-privatise the identities of accused persons and witnesses in appropriate cases.⁶⁹² However, the policies are only enforced by the exercise of the court's inherent jurisdiction. Section 23 of the *Supreme Court Act 1970* (NSW) grants the court general jurisdiction for the administration of justice,⁶⁹³ a Court jurisdiction necessary for the administration of justice in New South Wales. In exercising their inherent or implied powers, courts may stay such proceedings in order to prevent the abuse of process.⁶⁹⁴ This would be either when the presiding judge deems it necessary to administer justice, or based on an application made to the court.⁶⁹⁵ Thereafter the court staff and reporting services carry out the policy, when preparing transcripts and judgments in all court matters, unless otherwise directed by a judge.⁶⁹⁶

Specifically, anything which is deemed as personal information capable (in any way) to be used to identify the individual, is subject to the court's anonymisation process. A lack of protection might result in identity theft. It is important to note that the policy itself recognises that breaches of privacy lead to identity theft.⁶⁹⁷ In the context of free access to law and the manifestation of practical openness and theoretical obscurity thereafter, Following the Event measures do very little to address the underlying issue of the lack of privacy arising from law reporting. One of the underlying problem identified by this research is that whilst courts have the ability to gain and use personal

<<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/139>>.

⁶⁹¹ Ibid, Supreme Court of NSW - Identity theft prevention and anonymisation policy 2010 (NSW) and Local Court of New South Wales, Practice Note 1 2008 (NSW).

⁶⁹² Ibid.

⁶⁹³ *Supreme Court Act 1970* (NSW) s 23, the court's general jurisdiction, where the Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

⁶⁹⁴ *Barton v R* [1980] HCA 48; (1980) 147 CLR 75 (5 December 1980) at 96, 107, 116. Also, see *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23 (12 October 1989) per Gaudron J at 76.

⁶⁹⁵ Again requiring the court to grant such leave, see below discussion.

⁶⁹⁶ Supreme Court of NSW - Identity theft prevention and anonymisation policy 2010 (NSW).

⁶⁹⁷ Ibid.

information from applicants for the administration of justice, due to the lack of any meaningful Prior to the Event regulation of law reports, the ability to exercise any form of control over that information once it is made available and disseminated on the world wide web becomes glaringly obvious.⁶⁹⁸ This places individuals at risk of having their personal information being misused.

CONCLUSION

Although existing statutory exceptions to the open court rule are a step in the right direction, they do not go far enough. Almost all are Following the Event regulatory measures, rather than Prior to the Event, which is the model this thesis proposes. The more effective and practical form of privacy protection regarding the regulation of personal information (contained in court decisions prior to their publication and dissemination on the internet) is invariably Prior to the Event measures. These measures are discussed in further detail in Chapters 7 and 8. The limitations of Following the Event measures are demonstrably limited in their scope and effectiveness. Most significantly, none of the statutory exceptions to the open court rule discussed above are specific to privacy protection.

As a result of the open court rule and its pivotal role in maintaining the principle of open justice, it is important to note that any regulatory measures which come about must maintain the principle of open justice with both privacy and the open court rule in mind.

As a result of modern challenges posed by free access to law, the rise of technology and the increased access to law reporting, courts were forced to embrace technology at a rapid pace, creating the need to adopt modern exceptions to the open court rule. However, these modern exceptions did not take the imposition of new limitations, and the reality of the transition from the theoretical openness and practical obscurity model to the practical openness and theoretical obscurity model, into account when developing modern Following the Event statutory exceptions to the open court rule. This is seen in

⁶⁹⁸ See Chapter 6 and 7 for discussion on this point.

the Suppression Register, which is an example of a national move to unify and register suppression orders. Whilst the register may have benefits for both the media and the public, it does not go far enough. Firstly, it is not binding on the offenders, and secondly, it is a Following the Event measure.

Nevertheless, the initiative, was instrumental in the development and establishment of one of the few statutory exceptions to the open court rule, designed to prevent [to a very limited extent] the proliferation of personal information via law reporting on the internet; and also acting as a Prior to the Event measure. While the *Suppression Act* is still applicable through the inherent or implied powers of a court, the clear and unambiguous grounds of any application for suppression and non-publication is limited and has so far had little impact in dealing with the bigger issues relevant to the negative consequences of electronic law reporting highlighted in this thesis.

Other jurisdictions have also been grappling with the modern challenges introduced by free access to law, and specifically with the public's right to publicity of court proceedings, without jeopardising the administration of justice. A manifestation of the Practical openness and theoretical obscurity model through technology was the outcome. Such is the case in the United Kingdom, where super injunctions are administered by courts. At the other end of the scale, modern challenges of free access to law are also evident even when statutory exceptions are designed to promote the open court rule. Laws such as the *CIA* were designed to promote access, yet it is facing its own challenges, because the internet or rather, the information proliferated by way of law reporting on the internet, cannot be regulated, which breaches the statute's own privacy provisions.⁶⁹⁹ Statutory exceptions currently in place designed to deal with traditional crimes with modern forms of application, such as identity theft, are relatively ineffective due to the Following the Event nature of such statutory measures, and their lack of reach in preventing internet based mishandling of personal information.

The next chapter discusses privacy laws currently in operation in various jurisdictions. The chapter also discusses and provides analysis on the way in which they interact with

⁶⁹⁹ *Court Information Act 2010* (NSW), see Part 4, Privacy Protection.

the open court rule and *vis-a-vis* the way in which the open court rule deals with personal information.

CHAPTER 6

PRIVACY

INTRODUCTION

In the previous chapter the thesis discussed the scope and limitations of the open court rule in light of advances in technology and law reporting. Exceptions to the open court rule are few and strictly defined. In each of these exceptions, the applicant or the court exercising its inherent jurisdiction has had to consider the competing interest underlying the specific exception against the principle of open justice. Furthermore, ruling in favour of open justice does not always equate to ruling in favour of open courts. The courts have clearly demonstrated this in a number of recent cases, where they have preferred other interests to the open court rule.⁷⁰⁰

French CJ stated in *Hogan v Hinch*:

In my opinion the better view is that there is inherent jurisdiction or implied power in limited circumstances to restrict the publication of proceedings conducted in open court. The exercise of the power must be justified by reference to the necessity of such orders in the interests of the administration of justice. Such an order may be made to and bind the parties, witnesses, counsel, solicitors and, if relevant, jurors and media representatives, or other persons present in court when the order is made, or to whom the order is specifically directed. It is not necessary for present purposes to reach a concluded view on the full extent of the power in relation to the general public.⁷⁰¹

The discretionary power of a court to exercise its inherent or implied power to restrict the publication and dissemination of law reports for the interest of justice is open ended and binds all parties.⁷⁰² However, as discussed in Chapter 4, Whilst Inferior courts lack the power to restrict publication involving a deliberate interference with the administration of justice, the Supreme Court, in the exercise of its inherent jurisdiction,

⁷⁰⁰ See, *Hogan v Hinch* [2011] HCA 4; *R v Perish*; *R v Lawton*; *R v Perish* [2011] NSWSC 1101.

⁷⁰¹ *Hogan v Hinch* [2011] HCA 4, at 26.

⁷⁰² *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 per McHugh JA at 477; *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 at 160; *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 per Mahoney AJ at 345; *Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [24]–[37].

has power to protect inferior courts from contempt by publication.⁷⁰³ This includes those who operate outside the courts, such as the media. However, because the open court rule is not a right, and is only there to serve the principle of open justice, which in turn serves the administration of justice, other competing interests must be taken into account.⁷⁰⁴

The concept of privacy is notoriously difficult to define.⁷⁰⁵ Except for some limited judicial references⁷⁰⁶ to the right of privacy, the underlying reasons why privacy emerged as a legal principle are not entirely clear. Privacy has been defined as being "vague" to understand and to describe⁷⁰⁷ by many of the most notable modern law scholars, including Roscoe Pound,⁷⁰⁸ Paul Freund,⁷⁰⁹ Erwin Griswold,⁷¹⁰ Carl Friedrich,⁷¹¹ William Prosser,⁷¹² Laurence Tribe,⁷¹³ Daniel Solove⁷¹⁴ and James Rule.⁷¹⁵ The requirement has meant different things to different people throughout the ages and

⁷⁰³ *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, at [332]-[334].

⁷⁰⁴ See *Hogan v Hinch* [2011] HCA 4 at 90 referring to the comments of Gibbs J in *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, at 520; *Rinehart v Welker* [2011] NSWCA 403 (7 December 2011); *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* (2005) 62 NSWLR 512 in particular see comments of Spigelman J; the application of the *Court Suppression and Non-Publication Orders Act 2010* (NSW): *Rinehart v Welker* [2011] NSWCA 403 (7 December 2011); restrictions on publication of evidence see *R v Miroslav Jovanovic* [2014] ACTSC 98 at [12]; and the application of the open court rule in *Jackson and Ors v Johnson and Ors and Scott v Johnson and Ors* [2010] SASC 133.

⁷⁰⁵ Law Commission of New Zealand, *Privacy: Concepts and Issues*, Review of the law of privacy stage 1, Study Paper No 19 (2008) at 2.

⁷⁰⁶ S. Warren and L. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193. See reference to Judge Cooley referring to privacy as the right "to be let alone" at fn 10, Cooley on Torts, 2d ed., p. 29. (p 195 Note 4 in original).

⁷⁰⁷ Ken Gormley, 'One Hundred Years of Privacy' (1992) 1992(5) *Wisconsin Law Review* 1335, 1336.

⁷⁰⁸ Ibid, Roscoe Pound, 'Interests in Personality' (1915) 28 *Harvard Law Review* 343.

⁷⁰⁹ Ibid, Paul A. Freund, 'One Concept or Many?', in *PRIVACY 182*' (1971) *J. Roland Pennock & John W. Chapman eds.*

⁷¹⁰ Ibid, Erwin N. Griswold, 'The Right to Be Let Alone' (1960) 55 *Northwestern University Law Review* 216.

⁷¹¹ Ibid, Carl J. Friedrich, 'Secrecy Versus Privacy: The Democratic Dilemma, in *Privacy*' (1971) 105 *J. Roland Pennock & John W. Chapman eds.*

⁷¹² Ibid, William L. Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

⁷¹³ Ibid, Laurence H. Tribe, *American Constitutional Law Ch. 15* (Foundation Press, 2 ed, 1988).

⁷¹⁴ Daniel J. Solove, 'Conceptualizing Privacy' (2002) 90(4) *California Law Review* 1087; Daniel J. Solove, 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' (2001) 53(6) *Stanford Law Review* 1393.

⁷¹⁵ James B. Rule, *Privacy In Peril* (Oxford University Press, 2007).

throughout different ethnicities and cultures.⁷¹⁶ Nevertheless, as discussed subsequently in this Chapter, privacy has generally been recognised as a basic human right.⁷¹⁷ Australia is a signatory to the International Convention of Civil and Political Rights (ICCPR), which specifically recognises a right to privacy.⁷¹⁸

The concept of privacy, as understood today, has only been fully recognised and coherently analysed in recent times.⁷¹⁹ In 1890 in the opening paragraph of 'The Right to Privacy' written by two United States Supreme Court judges, Samuel Warren and Louis Brandeis stated:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.⁷²⁰

The authors characterised privacy as "a right to be left alone" and as such the right to be protected when such a right was contravened. They saw the legal need for protection arising as individuals were becoming increasingly "more sensitive to publicity, so that solitude and privacy became more essential" to them.⁷²¹ Specifically, that right was described as a right to have information withheld from the public at large, and the intrusive activities of the press.⁷²²

⁷¹⁶ B. Moore Jr., *Privacy: Studies in Social and Cultural History* (M.E. Sharpe, Armonk, 1984), from opening chapter on p3; Charles D. Raab, Colin J. Bennett, *The Governance of Privacy: Policy Instruments in Global Perspective* (Massachusetts Institute of Technology (MIT), 2006).

⁷¹⁷ 'The Universal Declaration of Human Rights (UDHR) Article 12 (1948) (UN) <<http://www.un.org/en/documents/udhr/index.shtml>>; 'International Covenant on Civil and Political Rights (ICCPR) entry into force 23 March 1976, in accordance with Article 49', (16 December 1966) UN <<http://www2.ohchr.org/english/law/ccpr.htm>>.

⁷¹⁸ 'International Covenant on Civil and Political Rights (ICCPR) entry into force 23 March 1976, in accordance with Article 49', (16 December 1966) UN <<http://www2.ohchr.org/english/law/ccpr.htm>>. See, Appendix C, pp 2-4, Art. 17: (1) No one shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, nor to unlawful attacks on his/her honour and reputation; (2) Everyone has the right to protection of the law against such interference or attacks.

⁷¹⁹ Diane L. Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291.

⁷²⁰ S. Warren and L. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

⁷²¹ *Ibid.*

⁷²² *Ibid.*, 195, 196.

It is not clear as to what Warren and Brandeis meant by "personal information", their reference to that term seemingly entirely subjective. An inference may be drawn as to the types of personal information which may result in damage of some form to the individual should it be made public.⁷²³ The substance of the Warren and Brandeis article, not surprisingly, formed the basis of Brandeis' dissenting judgment in the United States Supreme Court case, *Olmstead v United States*.⁷²⁴

In 1967, the Brandeis' view was adopted when the Supreme Court overturned *Olmstead* in *Katz v United States*.⁷²⁵ In the same year a further influential piece of writing by Professor Alan Westin, entitled 'Privacy and Freedom' was published.⁷²⁶ This book was important because it narrowed its focus to agencies which systematically collected personal data on individuals. The publication was timely as information technology was becoming more common, and increased surveillance by both government and private organisations had started to attract scepticism and scrutiny from the public.⁷²⁷

Since the decision in *Katz*, privacy as a right and the protection of that right has been raised often in western legal discourse. In the United States, it has been extended beyond arguments regarding the Fourth Amendment to such matters as contraception and abortion.⁷²⁸

⁷²³ Ibid, the principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

⁷²⁴ *Olmstead v United States* [1928] USSC 133; 277 U.S. 438; 48 S.Ct. 564; 72 L.Ed. 944; No. 493.; No. 532.; No. 533 (4 June 1928).

⁷²⁵ *Katz v United States* [1967] 389 US 347; 19 L Ed 2d 576; 364 P 754.

⁷²⁶ Alan F. Westin, *Privacy and Freedom* (Atheneum, New York, 1967), cited from p 22; James B. Rule, *Privacy In Peril* (Oxford University Press, 2007).

⁷²⁷ In Chapters 6 and 7, the thesis discusses the consequences arising from breaches of privacy values in the context of this thesis.

⁷²⁸ Law Commission of New Zealand, *Privacy: Concepts and Issues, Review of the law of privacy stage 1*, Study Paper No 19 (2008) at 2.9.

THE IMPORTANCE OF PRIVACY

Privacy remains an area of concern.⁷²⁹ Privacy values promote a healthy, autonomous, creative, and democratic society, and allow people to maintain meaningful relationships with one another⁷³⁰. Privacy values also protect against paranoia and insecurity.⁷³¹ Broadly speaking, privacy promotes a healthy society and allows the preservation of human dignity.

Early in the last century privacy was recognised as a human right. Internationally, Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) specifically recognises the right to privacy,⁷³² as well as Article 12 of the *Universal Declaration of Human Rights* (UDHR)⁷³³, and Article 8 of the European Convention on Human Rights (ECHR)⁷³⁴ which do the same. In the United States,⁷³⁵ Canada,⁷³⁶ New Zealand⁷³⁷ and the United Kingdom,⁷³⁸ a tort based on the right to privacy has been recognised, developed, and is still evolving in response to encroachments upon privacy by media and others.

⁷²⁹ Charles D. Raab and Colin J. Bennett, *The Governance of Privacy: Policy Instruments in Global Perspective* (Massachusetts Institute of Technology (MIT)(2006), 3.

⁷³⁰ Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89(3) *The Yale Law Journal* 421, 442.

⁷³¹ Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007), see general discussion on the topic in Chapter 7.

⁷³² See Appendix C, Privacy Rights under the ICCPR, 2.

⁷³³ *Ibid*, 2, 3.

⁷³⁴ 'European Convention on Human Rights as amended by Protocol No.14', (2010) Art. 8(2)

<<http://www.echr.coe.int/echr/en/header/the+court/events+at+the+court/60+years+of+the+convention>>.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁷³⁵ *Cox Broadcasting Corporation v Cohn* (1975) 420 US 469.

⁷³⁶ Applicable to both natural persons and corporations, see: *Motherwell v Motherwell* (1976) 73 DLR (3rd) 62; *Burnett v The Queen in right of Canada* (1979) 94 DLR (3d) 281 (1979) 94 DLR (3d) 281; *Ontario (Attorney-General) v Dieleman* (1994) 117 DLR (4th) 449; *Aubry v Duclos* (1996) 141 DLR (4th) 683.

⁷³⁷ *P v D* [2000] 2 NZLR 591.

⁷³⁸ *Douglas v Hello! Ltd* [2000] EWCA Civ 353; [2001] QB 967; [2001] 2 All ER 289, although the role of breach of confidence has played a major role in that development; *Campbell v MGM Ltd* [2004] 2 AC 457.

Unlike the above jurisdictions, constitutional privacy protection is lacking in Australia. Privacy is seen as a right only incidental to other recognised torts such as trespass,⁷³⁹ or where the individual's reputation is concerned under defamation,⁷⁴⁰ breach of confidence, or the duty of good faith - applicable to confidential information and trade secrets nuisance,⁷⁴¹ and emotional distress.⁷⁴²

DEVELOPING TORT OF PRIVACY IN AUSTRALIA

A new tort of privacy may be developing, following the decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*⁷⁴³ (*Lenah Game Meats*), which questioned the previous common law notion that privacy rights did not exist in Australia⁷⁴⁴. One important implication of this case is that the High Court may have opened the way for the recognition of a tort of invasion of privacy.⁷⁴⁵

In *Lenah Game Meats*, the High Court raised some important points in relation to the tort of privacy in Australia and how Australia's view had matured from its past position in *Victoria Park Racing and Recreation Grounds v Taylor*⁷⁴⁶ (*Victoria Park Racing*), where the High Court stated that a tort of privacy did not exist in Australia. However, the court did set the stage for a future action in privacy by indicating that it might be receptive to recognising an inherent right to privacy, as seen in other jurisdictions, such as the United States.⁷⁴⁷

⁷³⁹ *Grosse v Purvis* [2003] QDC 151 (16 June 2003); *Maynes v Casey* [2011] NSWCA 156. See p 95, 96 for further discussion, Pam Stewart; Anita Stuhmcke, *Australian Principles of Tort Law* (The Federation Press, 3rd ed, 2012).

⁷⁴⁰ *Australian Consolidated Press Ltd v Ettingshausen* [13 October 1993] Unreported, Court of Appeal of New South Wales); *Rana v Google Australia Pty Ltd* [2013] 60 ((Unreported, FCA, 11 October 2012).

⁷⁴¹ *Gee v Burger* [2009] 149 (Unreported, NSWSC 13 March 2009).

⁷⁴² *Giller v Procopets* [2004] VSCA 236; *Giller v Procopets (No 2)* [2009] 72 (Unreported, VSCA, 8 April 2009).

⁷⁴³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199.

⁷⁴⁴ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45; (1937) 58 CLR 479.

⁷⁴⁵ See Appendix C for detailed discussion, Australian privacy amendment legislation and a statutory cause of action, and developing tort of privacy, pp 13-20.

⁷⁴⁶ *Ibid*, *Victoria Park Racing*.

⁷⁴⁷ See, eg, *Roe v Wade*, USSC 43; 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed.2d 147; No. 70-18 (1973); et al. D. Barnard, 'The Evolution Of The Right To Privacy After Roe v. Wade' (1987-1988) 13(2-3) *American Journal of Law & Medicine* 365; Louise A. Wheeler Shirley L. Kovar, 'Roe v Wade: The Right of

Lower Australian jurisdictions have seen judicial willingness to accept a tort of privacy. This was observed in *Grosse v Purvis*,⁷⁴⁸ where Skoien J went as far as recognising an actionable right of an individual person to privacy.⁷⁴⁹ The issue was also considered by Gillard J in *Giller v Procopets*,⁷⁵⁰ where he considered that the law in Australia has not developed to a point where it recognises an action for breach of privacy.⁷⁵¹ The most interesting Australian case to date regarding the tort of privacy is the County Court of Victoria case of *Jane Doe v ABC*⁷⁵², where damages were awarded to the plaintiff for breach of her privacy.⁷⁵³

The most relevant aspect of that case is its role in the evolutionary process attributed to the common law regarding the development of a new tort of privacy in Australia. Specifically, the impact that development might potentially have on the open court rule and the impact on the potential for free access to law to continue to operate successfully in the future. For example, where there is a breach of privacy arising from the disclosure of private facts on the internet or otherwise. Private facts can also be described as personal information.⁷⁵⁴ Generally, when reference is made to protecting personal information or data, it is meant to protect or guard against the misuse of personal information which can be used to identify someone. Such personal information may include: name, address, date of birth, contact details, financial, medical and social work details, identifiable photos, relationship status, political connections and or allegiances, sexual, generic, biometric, racial and ethnic details, school records, domestic situation and so forth.⁷⁵⁵ *Jane Doe v ABC* is significant because the court found that there was an actionable breach of confidence and a breach of privacy, and in doing-so held that this

Privacy Revisited' (1972-1973) 21(4) *University of Kansas Law Review* 527; Paul A. Smith, 'Right to Privacy: Roe v. Wade Revisited' (1985) 84/85 *Law & Justice - The Christian Law Review* 34.

⁷⁴⁸ *Grosse v Purvis* [2003] QDC 151 (16 June 2003).

⁷⁴⁹ *Ibid*, at 442.

⁷⁵⁰ *Giller v Procopets* [2004] VSCA 236.

⁷⁵¹ *Ibid*, at 187-189.

⁷⁵² *Jane Doe v Australian Broadcasting Corporation & Ors* [2007] VCC 281 (3 April 2007).

⁷⁵³ *Ibid*, pp 43-47.

⁷⁵⁴ See Chapter 8, Privacy Procedure Standards, Tertiary - Quinary Data.

⁷⁵⁵ See Chapter 8, PPS, Primary-Tertiary Data. See also, Lilian Edwards, *Law and the Internet* (Hart Publishing, 3rd ed, 2009), 444, 445.

was an appropriate case in which to recognise that there ought to be a tort of breach of privacy in Australia.⁷⁵⁶

The foundation for the development of a new tort of breach of privacy focuses upon the protection of human autonomy and dignity, the right to control the dissemination of information about one's private life, and the right to the esteem and respect of other people.⁷⁵⁷ As Gleeson CJ stated in *Lenah Game Meats*,⁷⁵⁸ "the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity".⁷⁵⁹

In *Doe v ABC*, Hampel J stated that the actionable wrong arose from:

The publication of personal information, in circumstances where there was no public interest in publishing it, and where there was a prohibition on its publication. In publishing the information, the defendants failed to exercise the care which could reasonably be required of them to protect the plaintiff's privacy and comply with the prohibition on publication imposed by [the statute].⁷⁶⁰

Both *Grosse v Purvis* and *Jane Doe v ABC*, represent decisions directly relevant to the development of a new tort of invasion of privacy in Australia, and specifically a tort in relation to the breach of disclosure of private facts. This is also occurring in the United Kingdom.⁷⁶¹ These cases demonstrate clearly that private facts are also defined as personal information, and as such may also form part of decisions earmarked for suppression if there is no reasonable public interest in them being published.⁷⁶² Whilst the position in Australia on the tort of breach of privacy is more complicated and less developed than in the UK, any development of the tort will have a definitive impact

⁷⁵⁶ Ibid, *Jane Doe v ABC*, at 166, 167.

⁷⁵⁷ *Campbell v MGM Ltd* [2004] 2 AC 457, at 31 per Hoffman LJ who referred to the statement of Seddley LJ in; *Douglas v Hello! Ltd* [2000] EWCA Civ 353; [2001] QB 967; [2001] 2 All ER 289.

⁷⁵⁸ Ibid, *Lenah Game Meats*.

⁷⁵⁹ Ibid, per Gleeson CJ at 43.

⁷⁶⁰ The defendant owed a statutory duty of care to the plaintiff under s 41(A) of the *Judicial Proceedings Reports Act 1958* (VIC) not to identify the plaintiff as a victim of sexual assault. Also see relevant commentary in Neil Foster, 'The Merits of the Civil Action for Breach of Statutory Duty' (2011) 3(1) *Sydney Law Review* 67, 92.

⁷⁶¹ Ibid, *Douglas v Hello*; *Campbell v MGM*. See also, *Von Hannover v Germany* [2004] ECHR 294; *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446; *Murray v Express Newspapers PLC* [2007] EWHC 1908.

⁷⁶² See discussion and analysis in Chapter 7, 'The Open Court Rule and Privacy'.

upon the open court rule and FALM. This will be in combination with the possible recognition of privacy as a competing interest to the open court rule to prosecute breaches of privacy when law reports do not comply with local privacy law.

IMPACT OF PROPOSED AMENDMENTS TO COMMONWEALTH PRIVACY LEGISLATION

At the time of writing this thesis and influenced by the recommendations of the Australian Law Reform Commission, the Federal government proposed changes to the National Privacy Principles (NPPs) and Information Privacy Principles (IPPs) in the form of the release of an Exposure Draft of the Australian Privacy Principles (APPs).⁷⁶³ These APPs replaced the IPPs and the NPPs contained in the *Privacy Act* on 12 March 2014.⁷⁶⁴ It is important to examine the extent of the changes and to discuss the way in which privacy might impact the operation of the open court rule.⁷⁶⁵

The proposed changes effectively force all government agencies and private sector organisations, subject to the *Federal Privacy Act*, to amend or rewrite their approved privacy policies to provide additional information regarding whether any disclosure has been made to entities or individuals overseas, and where necessary, the countries the entities or individuals are located in. Additionally they would have to consider the nature and circumstances in which they continue to transfer personal information to entities and or individuals overseas subject to new rules.⁷⁶⁶

Organisations would also need to consider whether to amend and or redraft their privacy disclosure statements when they have collected personal information from a third party, and to take into account the circumstances in which they collected that personal information. They may also need to consider changing their marketing practices, in order to ascertain whether they can continue to market to individuals in circumstances

⁷⁶³ See Appendix B.

⁷⁶⁴ *Privacy Act 1988* (Cth) s 14 and Sch. 3. As of 12 March 2014, the NPPs and IPPs were replaced by the new APPs, see Appendix B, 'Australian Privacy Principles (APPs)'.

⁷⁶⁵ See Chapter 7, 'Limiting the Presumption of Openness'.

⁷⁶⁶ Exposure Draft-Australian Privacy Amendment Legislation-Australian Privacy Principles 2010 (Cth).

where their information has been gathered from a third party,⁷⁶⁷ to ascertain whether their organisation is in the practice of collecting unsolicited information, and if so, whether they are in a position to retain or destroy the information; and allow for the option for individuals to deal with them anonymously or to use pseudonyms.

The first stage of the reform process would aid in exposing the seriousness with which the public takes the issues specifically relating to information privacy protection. As such, private organisations and government agencies subject to the new APPs in the *Privacy Act* (Cth), would be remiss not to take compliance issues seriously.⁷⁶⁸ Similarly, the courts would need to reconsider the significance of privacy and the open court rule in light of the greater public concerns regarding privacy.⁷⁶⁹

Stage two of the recommendations cover related areas such as the introduction of a statutory cause of action for invasion of privacy of a serious nature, and notification of information privacy breaches on a serious level.⁷⁷⁰ The new statutory cause of action would most probably replace any common law action with respect to invasion of privacy.⁷⁷¹

These changes come at a time when privacy is increasingly seen as a "defining issue of the modern era, especially as new technology provides more opportunities for communication and storage and dissemination of information".⁷⁷² In the context of this thesis, the recommendations contained in Chapter 74 of the Australian Law Reform

⁷⁶⁷ The recommendation seems to be directed at targeted advertising organisations or that use social networking websites to target specific audiences.

⁷⁶⁸ See Office of the Australian Information Commissioner, *Own Motion Investigation Report - Vodafone Hutchison Australia* (2011). As a result of the inquiry and publicity, Vodafone suffered tremendous harm to its reputation when it was revealed that the personal information of thousands of its customers was published and disseminated on the internet.

⁷⁶⁹ See Chapter 7.

⁷⁷⁰ ALRC, *For Your Information*, Australian Privacy Law and Practice No 1 (2008) Practice No's 2 and 3; *ibid.*

⁷⁷¹ ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008) Rec. 74-6.

⁷⁷² The print media reported in July 2011, that the Federal Minister for Privacy, The Hon. Brendan O'Connor, on the topic of a right to privacy, committed the government to seriously look into this area of the law, in particular, serious consideration and adoption of Ch. 74 of the 2008 ALRC recommendations, see *ibid.*, 2535-2586.

Commission (ALRC)⁷⁷³ report's recommendations are particularly relevant. These recommendations discuss and outline the best avenues for protecting an individual's right to privacy.⁷⁷⁴ The recommendations go far beyond the notion of whether Australia should or should not have a cause of action for breach of privacy, but rather address the way in which the scope of a breach giving rise to a cause of action should be framed, particularly due to the strong support for the enactment of a statutory cause of action for a serious invasion of privacy.⁷⁷⁵

The ALRC recommendations propose a list of the types of privacy breaches which would automatically give rise to the cause of action such as: instances of direct physical privacy breaches involving interference with the individual's home or family life; unauthorised surveillance; the interference, misuse, and disclosure of personal correspondence or private written, oral or electronic communication; and the disclosure of sensitive facts relating to an individual's private life.⁷⁷⁶

The new federal legislation will provide relief, for the purpose of establishing liability under the statutory cause of action, an individual making a claim, must demonstrate that in the circumstances, there is a reasonable expectation of privacy and that the action or conduct subject to the complaint is highly offensive⁷⁷⁷ to a reasonable person of ordinary sensibilities.⁷⁷⁸ The recommendations make reference to international standards. Whilst the recommendations propose leaving the determination of what constitutes reasonable expectation of privacy to the courts, the narrower interpretation of when public actions can be private, as enunciated in the United Kingdom case of *Campbell v MGM*⁷⁷⁹, is

⁷⁷³ Australian Law Reform Commission (ALRC) <<http://www.alrc.gov.au/>>.

⁷⁷⁴ ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008).

⁷⁷⁵ *Ibid.*, at 74.85, see also Liberty Victoria - Victorian Council for Civil Liberties, Submission PR 540, 21 December 2007; Australian Lawyers Alliance, Submission PR 528, 21 December 2007; Human Rights and Equal Opportunity Commission, Submission PR 500, 20 December 2007; Cyberspace Law and Policy Centre UNSW, Submission PR 487, 19 December 2007.

⁷⁷⁶ *Ibid.*

⁷⁷⁷ The phrase 'highly offensive' is suggestive of a stricter test as indicated by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199, at 22 and therefore should be differentiated from what should be considered private than 'a reasonable expectation of privacy', see *Campbell v MGM Ltd* [2004] 2 AC 457, at 22.

⁷⁷⁸ ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008) Rec. 74-2.

⁷⁷⁹ *Campbell v MGM Ltd* [2004] 2 AC 457.

preferred, as compared with the more broadly expressed view of the European Courts in *Von Hannover v Germany*.⁷⁸⁰

EUROPEAN PRIVACY CASES

Although different to the common law system central to this thesis, it is important to examine how the European Union and the United Kingdom and their different jurisdictions have helped develop codified laws and case laws (respectively) in relation to privacy rights and protection and the reasons why those laws are applied to different cases. The European Court of Human Rights (ECHR) and the United Kingdom superior courts have been active in regulating privacy. The *Human Rights Act 1998* (UK)⁷⁸¹ contains provisions that require the courts to have particular regard to the relevant Articles of the ECHR.⁷⁸² Since the introduction of the *Human Rights Act 1998*⁷⁸³ in the United Kingdom, the focus has been on competing rights, such as the right to privacy versus the freedom of expression.⁷⁸⁴

In *I v Finland*,⁷⁸⁵ the state was held responsible for not providing adequate protection to personal information. The ECHR found that if personal data is not secured adequately, and the State does not take positive steps, such as legislative schemes and procedural and technical steps, then the State is in breach of Art. 8 of the *European Human Rights Act*.⁷⁸⁶ Other cases of a similar nature include: where the court had to determine the balance between the disclosure of the identity of the anonymous accused, for the benefit

⁷⁸⁰ *Von Hannover v Germany* [2004] ECHR 294; ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008 at 74.127.

⁷⁸¹ *Human Rights Act 1998* (UK).

⁷⁸² Such as Arts 8 and 10.

⁷⁸³ *Ibid*, *Human Rights Act*.

⁷⁸⁴ Helen Fenwick, 'Clashing Rights, the Welfare of the Child and the Human Rights Act' (2004) 67 *Modern Law Review* 889, 892.

⁷⁸⁵ *I v Finland*, Case 20511/03 (17 July 2008) ECHR.

⁷⁸⁶ 'European Convention on Human Rights as amended by Protocol No.14', (2010) Art. 8 <<http://www.echr.coe.int/echr/en/header/the+court/events+at+the+court/60+years+of+the+convention>>; *I v Finland*, Case 20511/03 (17 July 2008) ECHR. See, *ibid*, Art. 8: Right to respect for private and family life. See also, Jari Råman, 'European Court of Human Rights: Failure to take effective information security measures to protect sensitive personal data violates right to privacy – I v. Finland, no. 20511/03, 17 July 2008' (2008) 24 *Computer Law & Security Review* 562.

of the community at large, and the privacy interests of the accused;⁷⁸⁷ or where the court determined in favour of privacy, that the rights of parents not to have their child's photograph taken in hospital without their express consent was enforced;⁷⁸⁸ or more controversially, where the court found that it was not legal that the DNA samples of suspects be kept on police databases.⁷⁸⁹

An important case rising out of Europe brought in fresh life to the issue of privacy rights. In *Von Hannover v Germany*,⁷⁹⁰ a breach of privacy claim was brought by Princess Caroline of Monaco on the basis that certain decisions of the German courts had infringed her privacy rights under Art. 8, to have respect for her private life. One of the most significant elements arising out of that case was the fact that the ECHR established the threshold from which any analysis of the applicability of Art. 8 would be based, in recognition of the fundamental importance of protecting private life from the development of a human being's personality⁷⁹¹ perspective. The court noted that the privacy protection would extend beyond the family circle and also includes a social dimension. Anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection and respect for their private life.⁷⁹² However, it is observed that this threshold is slightly lower than what the ALRC recommendations proposed for the legislative cause of action regarding "a legitimate expectation".

The *Von Hannover* decision is also significant because it acknowledges the impact of technology with respect to the protection of individual privacy. The Court observed that

⁷⁸⁷ *K and T v Finland*, Case 25702/94 [2001] ECHR 465, and more recently in; *R and H v the United Kingdom* Case 35348/06 [2011] ECHR 844.

⁷⁸⁸ *Reklos and Davourlis v Greece*, Case 1234/05 [2009] ECHR 200, see also; Lindsay Hodgkinson, 'Reklos and Davourlis v Greece' (2009) 20(186) *Entertainment Law Review*.

⁷⁸⁹ *S and Marper v the United Kingdom*, Case 30562/04 [2008] ECHR 1581; see also, Liz Heffernan, 'Dna and fingerprint data retention: *S and Marper v United Kingdom*' (2009) 34 *European Law Review* 491; Laura Tatham Edwina Higgins, 'Human rights The national Dna database and a step too far *S and Marper v United Kingdom*, Echr, 4 December 2008' (2009) 43 *Law Teacher* 209.

⁷⁹⁰ *Von Hannover v Germany* [2004] ECHR 294, ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008), at 74.4.

⁷⁹¹ *Von Hannover v Germany* [2004] ECHR 294, at 69.

⁷⁹² *Ibid.*

"increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce data".⁷⁹³

In *McKennitt v Ash*⁷⁹⁴ the court noted *Von Hanover's* treatment of privacy rights for the width of the notion of private life which is recognised by the European Court of Human Rights. The court here again reiterated that the concept of private life, as protected by Art 8, extended to matters of 'personal identity' including photographs able to be used to identify the person. The court elaborated further on the notion of 'private life':

Furthermore, private life, in the court's view, includes a person's physical and psychological integrity; the guarantee afforded by Art. 8 of the convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings ... There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" ...⁷⁹⁵

Whilst the notion of private life, and privacy in general, may cover a broad field, any information which is able to be used to identify an individual, with or without their consent, is subject to recommended privacy measures, discussed in later chapters. This also encroaches into other areas of discussion such as, the public versus private space paradigm, which is also important for the purpose of shedding light on the nature of the internet and the way in which it is used as a medium of data dissemination.⁷⁹⁶ Nevertheless, the ECHR in *Von Hanover* made it clear that in so far as the onus of responsibility to provide privacy protection to individuals is concerned, public authorities are not immune by simple abstinence from interfering with individual privacy. Moreover, there may be a positive obligation by public authorities to provide effective privacy protection to individual. Although, it is unclear as to what those positive obligations might entail, such obligations may involve the adoption of

⁷⁹³ Ibid, at 70, see ALRC report at 74.48-74.49 at; ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008).

⁷⁹⁴ *McKennitt and others v Ash and another* [2005] EWHC 3003 (QB), see also, *Pfeifer v Austria* (2007) 24 BHRC 167 (App no. 12556/03).

⁷⁹⁵ Ibid, at 50.

⁷⁹⁶ Litigants should consider the need for disclosure of personal information in order to gain access to justice, see Chapter 4.

measures designed to secure respect for 'private life' even in spheres of individuals between themselves.⁷⁹⁷

Whilst there has been judicial consideration of the right to privacy protection, or the lack thereof, regarding public spaces, the issue has arisen that the virtual space, as opposed to the physical space, should be distinguished from each other, since the latter has experienced limited judicial exposure.⁷⁹⁸ In relation to public spaces broadly, in *Murray v Express Newspapers PLC*,⁷⁹⁹ the court found that 'even in *Von Hanover* there were activities which are considered to shun any expectations of privacy when conducted in public'.⁸⁰⁰ However, the decision in *Murray* was overturned on appeal, because it was found that the celebrity parents (JK Rowling and husband) of the infant child who was photographed, were not seeking privacy protection arising out of their child's right, but that the child in its own right was entitled to privacy protection.⁸⁰¹

The issue of the level of control over one's personal information is relevant and important to the dissemination of personal information on the internet. The world wide web comprises of an environment where it is technically impossible to exercise any form of control Following the Event.⁸⁰² Where the level of control may be considered as minimal, it would be a direct reflection on the level of autonomy and dignity. Whilst it is unclear as to what the stand-alone value of autonomy and dignity might represent, it has since been associated with the 'physical and psychological integrity' of a person,⁸⁰³ which values are protected by privacy rights as its central objective⁸⁰⁴ and which is considered to focus upon the protection of human autonomy and dignity—"the right to

⁷⁹⁷ The description afforded to public authorities is considered in this research broad enough to cover courts registries as discussed in Chapter 5, in particular relevant the serious privacy issues posed by Identity Theft, Chapter 7, in relation to the application of the privacy principles to court registers, and Chapter 8, in relation the proposed privacy models for implementation into the open court rule.

⁷⁹⁸ See Chapter 5, for analysis of *R v Perish; Perish & Lawton* [2012] NSWSC 355.

⁷⁹⁹ *Murray v Express Newspapers PLC* [2007] EWHC 1908, per Patten J.

⁸⁰⁰ *Ibid*, see ALRC report at 74.54 at; ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008).

⁸⁰¹ *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, at 14.

⁸⁰² See Chapter 5, *R v Perish; R v Lawton; R v Perish* [2011] NSWSC 1101.

⁸⁰³ *Von Hannover v Germany* [2004] ECHR 294, at 50, see also at 66; *S and another v United Kingdom* (2008) 25 BHRC 557 (App nos 30562/04 and 30566/04).

⁸⁰⁴ *R (on the application of Wood) v Metropolitan Police Commissioner* [2009] EWCA Civ 414, at 20.

control the dissemination of information about one's private life and the right to the esteem and respect of other people".⁸⁰⁵

In the context of anonymisation for the purposes of privacy protection, the court in *Re Guardian News and Media Ltd and others*⁸⁰⁶ considered the defendant's interest in his private and family life against the publication of a report of the proceedings, including a report identifying the defendant in favour of the public interest in the open court rule. The question for the court was whether there was sufficient general, public interest in publishing a report of the proceedings which identified the defendants, to justify any resulting curtailment of his right and his family's right to respect for their private and family life. Citing Article 8, the fact that the defendants were not able to demonstrate that publication of their names might potentially attract other harms, putting any of them or their families at risk of physical violence. The court noted the positive obligation of public authorities, pursuant to Articles 2 and 3, to have in place 'structures' which would stave off such harms.

The power of a court to make an anonymity order to protect a witness or party from a threat of violence arising out of proceedings can be seen as part of that structure. In appropriate cases, where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield. A newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed. In such a situation the court may make an anonymity order to protect the individual and to comply with its Article 8 obligations.⁸⁰⁷ This provides some further insight into the way in which the modern notion of privacy has evolved, and continues to evolve, in dealing with important areas, such as freedom of expression.⁸⁰⁸

⁸⁰⁵ *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, Sir Anthony Clarke MR, giving the judgment of the court, referred (at [31]) to Lord Hoffmann's emphasis, at para [51] of; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

⁸⁰⁶ *Re Guardian News and Media Ltd* [2010] UKSC 1.

⁸⁰⁷ *Ibid.*

⁸⁰⁸ Particularly interesting where it contributes to the public vs private debate, where the courts found that no violation of the right to respect for private and family life pursuant to Article 8 of the ECHR had occurred as was seen in *Von Hannover v Germany (no 2)* 40660/08 [2012] ECHR 228, and; *Von Hannover v Germany (No 3) - 8772/10 - Chamber Judgment (French Text)* [2013] ECHR 835.

The later cases provide important guidance on the proposed privacy protocols in this thesis regarding the exemptions discussed in Chapter 8. Whilst the Privacy Procedure Standards (PPS)⁸⁰⁹ model in this thesis proposes an automated system to cover private individuals of no interest to the public, the issue of public figures directly of interest to the public (e.g. politicians, monarchs, prominent business figures, and celebrities) means that the onus on the application of PPS is reversed. This means that public figures would have to make an application to the courts to show cause as to the necessity of why their personal information would have to be redacted by the PPS automation system.

In *Von Hannover v Germany (No 2)*,⁸¹⁰ Princess Caroline and Prince Ernst of Monaco, armed with the judgment of the first *Von Hannover* case, sought injunctive relief regarding the publication of other photos published by a German magazine between 2002 and 2004. Whilst the court did grant partial relief against the publication of two photos, on the basis that they failed the public interest test, other photos published by the magazine were found to satisfy the test and were not of a private nature. The German Federal Court of Justice noted that the greater the information value for the public, the more the interest of a person in being protected against its publication had to yield, and vice versa, and that the reader's interest in being entertained generally carried less weight than the interest in protecting the private sphere.⁸¹¹ This approach was later confirmed by the German Federal Constitutional Court.⁸¹²

The relationship between open court rule and privacy rights, and where to draw the line, has to date been a challenging exercise. Whilst the European regulatory framework regarding privacy protection has the advantage of having been in operation for some time, the experience from other jurisdictions, such as the United States, is possibly of less value in the Australian context. This is explained in the context of the

⁸⁰⁹ See Chapter 8, Privacy Protection Standards: Two Tier Policy (Model I) and Appendix A: Privacy Procedure Standards (PPS).

⁸¹⁰ *Von Hannover v Germany (no 2)* 40660/08 [2012] ECHR 228.

⁸¹¹ *Ibid.*

⁸¹² *Von Hannover v Germany (No 3)* 8772/10 - Chamber Judgment (French Text) [2013] ECHR 835.

developmental framework for a statutory cause of action for breach of privacy rights. In the context of this thesis, particularly in relation to free access to law (dealing with the dissemination of judicial decisions on the internet), the principle of open justice does not have to be subservient to other rights, such as the 'freedom of speech' and 'freedom of the press' in order to provide unconditional favour to the open court rule.⁸¹³

Even if the Federal government does take into account freedom of expression concerns, this thesis argues that in doing so, any proposal is likely to adopt the higher threshold suggested by Gleeson CJ in *Lenah Game Meats*⁸¹⁴ in regards to the establishment of the statutory cause of action. The higher threshold specifically deals with the level of seriousness of harm brought on by an offence involving an invasion of privacy. The seriousness factor of the breach is measured against the defendant's conduct, where the court would deem it thoroughly inappropriate and the complainant would suffer serious harm as a result.⁸¹⁵ A high threshold entailing a serious invasion of privacy would ensure that rights such as freedom of expression and the public's right to be informed are respected, and not undermined.

FREE ACCESS TO LAW IN THE EUROPEAN UNION

The above developments regarding privacy, and the right of the public to be made aware of court proceedings *vis-a-vis* freedom of expression, should also be understood in light of the rise of free access to law and its movement in the European Union. Today, the EU enjoys a comprehensive system of law reporting through its EUR-Lex system and unlike court-sanctioned law reporters such as AustLII and CanLII, the EUR-Lex is the official law reporter of EU laws.⁸¹⁶ The cases are generated and then published on the same platform. In other words, the EU law reports originate from the

⁸¹³ *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* (2005) 62 NSWLR 512, see detailed discussion regarding this topic in previous chapters. See also Appendix G, GP 11.

⁸¹⁴ *Ibid.*, *Lenah Game Meats*, at 22.

⁸¹⁵ Establishing the higher threshold for a statutory cause of action seems to also take into account the problems currently being experienced in the United Kingdom, where the *Human Rights Act* (UK) binds that jurisdiction to Art. 8 and 10 of the *EU Human Rights Act*.

⁸¹⁶ See Access to European Union law: Important legal notice, *Eur-Lex*: <<http://eur-lex.europa.eu/content/legal-notice/legal-notice.html>>.

EUR-Lex system, allowing it to both act as the publisher, and also to dictate policies⁸¹⁷ and the infrastructure to assist other law reporters.⁸¹⁸

The developmental stages of FALM in the EU are similar to that of this jurisdiction, where the movement commenced with the recommendation that all EU member states take the necessary steps to ensure all users have access to ELIRS⁸¹⁹ that are available to the public. But the recommendation did not endorse free access. By 2012 (taking up the developments of the Guiding Principles at the Hague conference)⁸²⁰ the approximately 130 legal professionals from more than 35 States representing all continents, gathered from 15th to 17th February 2012 in Brussels, Belgium to discuss 'Access to Foreign Law in Civil and Commercial Matters', in a joint Conference of the European Commission and the Hague Conference on Private International Law, and unanimously endorsed the Guiding Principles of Hague Conference. The outcome of that conference was that States should provide free access to primary legal information (legislation and case law) to the public on the internet. The information should be authoritative, up to date and provide access to precedent and laws previously in force.⁸²¹

AUSTRALIAN INFORMATION PRIVACY

The development of Australian privacy law is specific to the handling of personal information. As such, any development regarding privacy protection, or the extension of that protection to the regulation of law reporting in the context of the open court rule, would specifically be addressing personal information and the level of control the individual may exercise over that information. This is particularly relevant in light of the tremendous increase in the proliferation of personal information since the commencement of free access to law via the publication and dissemination of judicial decisions on the internet.

⁸¹⁷ Ibid.

⁸¹⁸ See EUR-Lex, 'APIs for EU legislation' on the *Legal Informatics Blog*' <<http://legalinformatics.wordpress.com/2013/08/10/apis-for-eu-legislation/>>.

⁸¹⁹ See Chapter 3, Electronic Legal Information Retrieval System (ELIRS).

⁸²⁰ See Appendix G.

⁸²¹ 'Joint Conference of the European Commission and the Hague Conference on Access to Foreign Law in Civil and Commercial Matters', (2012) <http://www.hcch.net/upload/xs2foreignlaw_rpt.pdf>.

Here the thesis argues that the idea of control, as stated in the Declaration on Free Access to Law,⁸²² is significantly related to the idea of ownership of information and the ability to regulate the subject-matter (of the control), namely legal information. In the case of law reporting by courts or court sanctioned law reporting, the ability of the court registry to exercise control over the legal information Prior to the Event of publication and dissemination is the determining factor in regulating the flow of personal information. Accordingly, because the courts are the primary repositories of such information, the ability to exercise control over the legal information is significantly connected to the idea of open court rule in modern times. The issue of control is also discussed in the context of privacy and the ability of the individual to exercise degrees of control over their personal information. Most importantly, the declaration makes it clear that the onus ought to be on the courts to ensure access for re-publication to law reports⁸²³ subject to local privacy laws.⁸²⁴

In other words, the members of FALM delegated the responsibility of all Prior to the Event privacy regulation in law reports to the courts. As previously discussed, the declaration clearly states that the onus for the provision of access to law reporters for the purpose of republication lies with the courts. This statement was then further refined at the Hague conference, where it was established that any law reporting for the purposes of free access to law should be done so subject to local privacy laws, and if need be should be anonymised.⁸²⁵ However, this is in direct conflict with the current open court rule practices where judicial decisions contain vast amounts of personal information, and the practice of law reporting by courts and legal publishers is largely excluded from the operation of the Commonwealth and State Privacy laws.⁸²⁶ Any

⁸²² See Appendix F.

⁸²³ See Appendix F, 'The Declaration on Free Access to Law' and Chapter 3.

⁸²⁴ See Appendix G, 'Hague Conference Guiding Principles', GP 11: Online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymised in order to make them available for free access.

⁸²⁵ See Appendix G, GP 11.

⁸²⁶ *Information Act 2002* (NT); *Personal Information Protection Act 2004* (TAS); *Freedom of Information Act 1992* (WA); *Information Privacy Principles Instruction - PC012 1992* (SA); *Information Privacy Act 2009* (Qld); *Information Privacy Act 2000* (VIC); *Privacy and Personal Information Protection Act 1998* (NSW).

application for anonymisation or non-publication must be undertaken via a court order. Any such application cannot be made for privacy purposes, because as discussed in Chapters 4 and 5, in Australia there are no common law or statutory exceptions to the open court rule specifically for privacy protection.

The reasons for the statutory exemptions are not clear, other than to enable the open court rule, and there is little justification for this in either the various Law Reform Commission Reports or explanatory memoranda. This thesis argues that this public policy needs to be re-examined and that, in the absence of convincing justification, such information ought not to be made public. It is further proposed that provisions in relation to the removal or correction of false information should also extend to reports of court decisions.⁸²⁷

The above should also be considered in light of the ordinary practices of courts regarding collecting personal information. Personal information in relation to parties to court proceedings and witnesses is obtained compulsorily by courts as part of the administration of justice. Such personal information may be re-used and, more importantly, misused Following the Event, due to lax or mostly absent Prior to the Event measures to protect personal information. There is considerable scope for the use of this information for purposes other than for which it was collected. Even if there is implied consent for the purposes of the administration of justice, consent would not be given for such information to be used for any other purpose.⁸²⁸

Once made available, personal information on the internet can never be wholly removed. This is predominantly due to the specific nature of the technology and the infrastructure makeup of the internet.⁸²⁹ A digital print is made of information which can then be retrieved in some form in perpetuity.⁸³⁰ Once information from court documents

⁸²⁷ Reserved for government and non-government agencies and organisations, see Appendix B, APPs.

⁸²⁸ See Chapter 5, shortcomings of the current statutory exceptions to the open court rule, and see Chapter 7 on the analysis of the applicability of the IPPs and APPs to court registries in the context of the open court rule.

⁸²⁹ For further discussion regarding the technology behind the Internet entity, see Chapter 7..

⁸³⁰ Jeffrey Rosen, 'The Right to Be Forgotten' (2012) 64(88) *Stanford Law Review*.

is published and disseminated on the internet, it crosses from the private to the public space⁸³¹ and gives rise to the publication and dissemination of the types of personal information which this thesis argues should be withheld from publication on the internet⁸³². Following the publication and dissemination of judicial decisions in a public place, they are neither controllable nor retractable.⁸³³ Thus, personal information contained in law reports becomes public information which is universally available.

Effective protection of privacy requires regulation that controls the reporting of personal information Prior to the Event.⁸³⁴ Once published, the potential for Following the Event privacy breaches is significant. Data mining and processing companies operate largely without regulation on the world wide web and are able to obtain (mostly indiscriminately) personal information on individuals for their vast data profiling softwares.⁸³⁵ Specifically, personal information may be harvested from law reports, accumulated, stored and processed for commercial purposes, publication and further dissemination. Evidence of such activity is already seen in the current activities of search engines and government agencies,⁸³⁶ social networking websites and third party affiliates,⁸³⁷ and cloud-based servers'.⁸³⁸

Electronic publication and dissemination of law reports on the internet provides for the processing of the information by automated systems. Typically the processing involves collection, extraction, and storage of personal information. Once the processing is complete, the personal information is made searchable by heuristics through powerful

<http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten#footnote_1>.

⁸³¹ See above public v private doctrine.

⁸³² Natalie Gomez-Velez, 'Internet Access to Court Records - Balancing Public Access and Privacy' (2005) 51(3) *Loyola Law Review* 365, at 376.

⁸³³ See Chapter 5 for analysis of the facts in *R v Perish*; *R v Lawton*; *R v Perish* [2011] NSWSC 1101

⁸³⁴ See Chapter 5 and 7 on Prior to the Event analysis.

⁸³⁵ Charles D. Raab and Colin J. Bennett, *The Governance of Privacy: Policy Instruments in Global Perspective* (Massachusetts Institute of Technology (MIT), 2006), opening chapter discussion is on topic.

⁸³⁶ Christopher Soghoian, 'End to Privacy Theater: Exposing and Discouraging Corporate Disclosure of User Data to the Government' (2011) 12(1) *Minnesota Journal of Law, Science & Technology* 191.

⁸³⁷ Junichi P. Semitsu, 'From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance' (2011) 31(1) *Pace Law Review* 291.

⁸³⁸ William Jeremy Robison, 'Free at What Cost: Cloud Computing Privacy under the Stored Communications Act' (Pt Georgetown Law Journal) (2009-2010) 98(4) *Georgetown Law Journal* 1195.

search engines.⁸³⁹ This is of course only part of the transformational nature of law reporting. Once personal information crosses over into cyberspace, it is beyond regulation and any type of meaningful control. Additionally, fluid jurisdictional boundaries in cyberspace⁸⁴⁰ place personal information at risk because different laws in differing jurisdictions apply.⁸⁴¹ It is contended that the digitisation of law reporting has fundamentally altered the way in which law reports are used.⁸⁴²

PRIVACY AND STATUTORY LIMITATIONS

In addition to the statutory limitations previously discussed, we know that the power of courts to restrict publication and dissemination of judicial decisions is only exercised in exceptional circumstances⁸⁴³. These powers must be used only in circumstances which warrant their necessity for the administration of justice.⁸⁴⁴ As was stated by McPherson J in *Ex parte The Queensland Law Society Inc.*⁸⁴⁵

The power of the court under general law to prohibit publication of proceedings conducted in open court has been recognized and does exist as an aspect of the inherent power. That does not mean that it is an unlimited power. The only inherent power that a court possesses is power to regulate its own proceedings for the purpose of administering justice; and, apart from securing that purpose in proceedings before it, there is no power to prohibit publication of an accurate report of those proceedings if they are conducted in open court, as in all but exceptional cases they must be.⁸⁴⁶

It is unclear to what extent privacy as such can form a proper basis for courts to limit publication of judgments for the benefit of the administration of justice. This was seen in earlier discussions, where for example, the thesis discusses the newly implemented

⁸³⁹ Jer Lang Hong, Eu-Gene Siew and Simon Egerton, 'Information extraction for search engines using fast heuristic techniques' (2010) 69(2) *Data & Knowledge Engineering* 169, 170.

⁸⁴⁰ *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575. See also, Megan Richardson; Richard Garnett, 'Perils of Publishing on the Internet - Broader Implication of Dow Jones v. Gutnik' (2004) 13(1) *Griffith Law Review* 74, 75.

⁸⁴¹ Lilian Edwards, *Law and the Internet* (Hart Publishing, 3rd ed, 2009), particularly discussions in Chapter 14, 446-451.

⁸⁴² See Chapters 3 & 4.

⁸⁴³ See Chapter 4.

⁸⁴⁴ *Scott v Scott* [1913] AC 417; *Russell v Russell*; *Farrelly v Farrelly* (1976) 9 ALR 103.

⁸⁴⁵ *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166.

⁸⁴⁶ *Ibid.*

*NSW Suppression Act*⁸⁴⁷ and its impact thus far in restricting law reporting.⁸⁴⁸ To date, no statutory provisions exist to authorise courts to restrict law reporting for the benefit of privacy values.⁸⁴⁹ There has been no privacy perspective applied to the open court rule in order to restrict the publication and dissemination of judicial decisions, in whole or in part, in print or in digital format. Whilst privacy legislative schemes have been present for some time, though notwithstanding some minor exceptions,⁸⁵⁰ they do not apply to the open court rule.

Any further legislative exceptions would be in addition to the existing limited exceptions to the open court rule⁸⁵¹. In *Russell v Russell*,⁸⁵² Gibbs J stated:

Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court. If the [*Family Law Act*] had empowered the Supreme Courts when exercising matrimonial jurisdiction to sit in closed court in appropriate cases, I should not have thought that the provision went beyond the power of the Parliament. In requiring them to sit in closed court in all cases – even proceedings for contempt – the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.⁸⁵³

No existing legislation impacting upon the open court rule is specifically designed or indeed intended to protect privacy values.⁸⁵⁴ Nevertheless, there are legislative provisions that provide for the suppression of information. For example, Part VAA of the *Federal Court of Australia Act*⁸⁵⁵ provides for suppressing information in the public interest when a matter of national security is concerned and for the administration of

⁸⁴⁷ *Court Suppression and Non-Publication Orders Act 2010* (NSW).

⁸⁴⁸ See Chapter 5, detailed analysis of the Rinehart cases, *Rinehart v Welker & Ors* [2012] HCATrans 7 (1 February 2012).

⁸⁴⁹ See Chapter 5, statutory exception to the open court rule.

⁸⁵⁰ *Privacy Act 1988* (Cth) s 6.

⁸⁵¹ *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84 (17 April 1991), per Gaudron J at 150.

⁸⁵² *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

⁸⁵³ *Ibid.*

⁸⁵⁴ *Russell v Russell; Farrelly v Farrelly* (1976) 9 ALR 103.

⁸⁵⁵ *Federal Court of Australia Act 1976* (Cth) Part VAA, Suppression and Non-Publication Orders.

justice.⁸⁵⁶ Specifically s 37AE of the *Act* replaced s 50 because it takes the classic administration of justice qualification a little further, expressly stating that the main objective of the administration of justice is to safeguard the public interest in open justice. Note the reference to open justice. Suppression orders may be considered for any number of sub-elements under the principle of open justice⁸⁵⁷ or when such orders are made specifically for national security reasons.⁸⁵⁸

Again, just as in common law and federal statutory regimes, none of the statutory provisions operating in any of the Australian States⁸⁵⁹ are specifically designed for privacy protection. Generally, legislation can authorise to exclude the public from some part of a hearing, or to make orders preventing or restricting publication of parts of the proceeding or of the evidence adduced. The following Acts do so: the *Suppression Act*,⁸⁶⁰ *Witness Protection Act 1995* (NSW),⁸⁶¹ *Supreme Court Act 1986* (Vic),⁸⁶² *County Court Act 1958* (Vic),⁸⁶³ *Magistrates Court Act 1989* (Vic),⁸⁶⁴ *Evidence Act 1929*

⁸⁵⁶ Ibid, Part VAA, s 37AJ, replaced s 50 of the *Act* which had a similar intention. That section was considered in; *Hogan v Australian Crime Commission* (2010) HCA 21; (2010) 240 CLR 651.

⁸⁵⁷ See Chapter 2, 'The Open Court Rule'.

⁸⁵⁸ *Crimes Act 1914* (Cth) s 85, hearings on camera etc.

⁸⁵⁹ See for example the following statutory provisions discussed in Chapter 4, *Court Suppression and Non-Publication Orders Act 2010* (NSW) ss 7, 8; *Civil Procedure Act 2005* (NSW), s 72; *Witness Protection Act 1995* (NSW), s 26; *Administrative Decisions Tribunal Act 1997* (NSW), s 75. *Supreme Court Act 1986* (Vic) s 18; *County Court Act 1958* (Vic) s. 80; *Magistrates Court Act 1989* (Vic) s 126; *Evidence Act 1929* (SA) ss 69 and 69A; *Witness Protection Act 1996* (SA) s 25; *Children's Protection Act 1993* (SA) s 59A; *Supreme Court of Queensland Act 1991* (Qld) s 128; *Child Protection Act 1999* (Qld) ss 99ZG, 192, 193; *Criminal Procedure Act 2004* (WA) s 171; *Children's Court of Western Australia Act 1988* (WA) s 35; *Family Court Act 1997* (WA) s 243; *Evidence Act 1906* (WA) s 36C; *Justices Act 1959* (Tas) s 106K; *Terrorism (Preventative Detention) Act 2005* (Tas) s. 50; *Evidence Act 2001* (Tas) s 194J.

⁸⁶⁰ *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 7, Court powers to make suppression and non-publication orders, s8, grounds for making suppression and non-publication orders. Although s 8(e) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) provides that a suppression order may be made when it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice, it does not specifically provide protection for privacy when such a right is not explicitly recognised at common law. Second, in the absence of a tort of breach of privacy, it is doubtful that privacy interests would be preferred over other well-established and recognised exceptions to the open court rule. See detailed analysis of the section in this chapter.

⁸⁶¹ *Witness Protection Act 1995* (NSW) s 26, identity of participant not to be disclosed in legal proceedings.

⁸⁶² *Supreme Court Act 1986* (Vic) s 18, power to close proceedings to the public.

⁸⁶³ *County Court Act 1958* (Vic) s 80, power to close proceedings to the public.

⁸⁶⁴ *Magistrates Court Act 1989* (Vic) s 126, power to close proceedings to the public.

(SA),⁸⁶⁵ *Witness Protection Act 1996* (SA),⁸⁶⁶ *Children's Protection Act 1993* (SA),⁸⁶⁷ *Child Protection Act 1999* (Qld),⁸⁶⁸ *Criminal Procedure Act 2004* (WA),⁸⁶⁹ *Children's Court of Western Australia Act 1988* (WA)⁸⁷⁰, *Family Court Act 1997* (WA),⁸⁷¹ *Evidence Act 1906* (WA),⁸⁷² *Justices Act 1959* (Tas),⁸⁷³ *Terrorism (Preventative Detention) Act 2005* (Tas),⁸⁷⁴ and the *Evidence Act 2001* (Tas).⁸⁷⁵

It is suggested that similar types of provisions may be incorporated into existing laws, allowing the courts to grant suppression and non-publication orders specifically for privacy protection. As was explained, in Chapter 2, privacy must be present together with the open court rule for the principle of open justice to function without undermining the administration of justice. This would provide additional safeguards in minimising risks in an internet-based law reporting environment.

CONCLUSION

The application of a privacy perspective to the open court rule may pose a particularly challenging task, particularly since free access to law created new demands and expectations both from the public and the courts, such as the uninhibited publication and dissemination of law reports at no cost and at easy access. This is also true in the context of suppressing and or preventing the publication of law reports in a democratic and open society. FALM is symbolic of the democratisation of access to public

⁸⁶⁵ *Evidence Act 1929* (SA) ss 69, order for clearing the court, s 69A, suppression orders.

⁸⁶⁶ *Witness Protection Act 1996* (SA) s 25, identity of participant not to be disclosed in court proceedings.

⁸⁶⁷ *Children's Protection Act 1993* (SA) s 59A, restrictions on reports of proceedings.

⁸⁶⁸ *Child Protection Act 1999* (Qld) s 99ZG, certain information not to be published, s 192, prohibition of publication of certain information for proceedings, s 193, restrictions on reporting certain court proceedings.

⁸⁶⁹ *Criminal Procedure Act 2004* (WA) s 171, court to be open, publicity (open court rule).

⁸⁷⁰ *Children's Court of Western Australia Act 1988* (WA) s 35, restrictions on reports of proceedings.

⁸⁷¹ *Family Court Act 1997* (WA) s 243, restriction on publication of court proceedings. This section is the equivalent to s 121 of the *Family Law Act 1975* (Cth).

⁸⁷² *Evidence Act 1906* (WA) s 36C, names of complainants not to be published.

⁸⁷³ *Justices Act 1959* (Tas) s 106K, restriction of publication of names of parties.

⁸⁷⁴ *Terrorism (Preventative Detention) Act 2005* (Tas) s 50, closure of Supreme Court and restriction on publication of proceedings.

⁸⁷⁵ *Evidence Act 2001* (Tas) s 194J, printing and publication of certain evidence prohibited.

information. To that end, anything deemed as placing restrictions on the free access to the law may be seen as understandable.

One of the objectives of this research is to establish that there has always been a continuous relationship between privacy and the open court rule. If it can be demonstrated that privacy values have always had a relatively healthy relationship with the open court rule, it may be possible to provide and or suggest practical privacy protection through law reporting. For example, it is argued that court registries must be seen as public repositories of personal information under the jurisdiction of the *Federal Privacy Act*⁸⁷⁶. Because they are public registers, it is argued that they ought to be regulated by privacy legislation. Once this is recognised, and steps are taken to ensure the regulation of personal information on a court registry, then the open court rule might in-turn accordingly be adjusted to incorporate the public's privacy concerns in relation to the publication of court decisions on the internet. It is suggested that privacy principles are not inconsistent with free access to law.

However, in the absence of a tort of breach of privacy in Australia at common law or through the development of a statutory cause of action, it would be improbable that the courts would recognise a new exception to the open court rule regarding privacy protection. This thesis argues that any exception to the open court rule in favour of privacy should be specifically designed for that purpose. The public interest in privacy would be perceived by judges as one of the recognised competing interests to the open court rule. A court would thereafter take into account whether the public interest in the protection of individual privacy outweighs other public interests, such as, the public's interest in being informed of matters of public concern, freedom of expression and privacy.⁸⁷⁷ In acknowledging these challenges in light of free access to law, this thesis proposes measures which may serve both the interests of privacy protection, and the

⁸⁷⁶ See the previous discussion on applying the IPPs to regulate court registries. See, Chapters 7 and 8, see also, *Jane Doe v Australian Broadcasting Corporation & Ors* [2007] VCC 281 (3 April 2007).

⁸⁷⁷ See ALRC, *For Your Information*, Australian Privacy Law and Practice No 3 (2008) 104, 105, in particular Ch. 74 discusses the statutory cause of action and the right of privacy and other competing rights, in particular freedom of expression.

open court rule, for better administration of justice. These proposals are discussed and analysed in detail in Chapter 8.

In the next chapter, the thesis tests the traditional ideas behind the open court rule and explores the dynamics and the applicability of privacy principles on court registers.

CHAPTER 7

THE OPEN COURT RULE AND PRIVACY

It is demonstrably justifiable in a free and democratic society that the openness rule be restricted to protect the innocent when... nothing will be accomplished by publicising the identities of the persons.. In this case, public access to all the facts, except for the names, will be assured. The right of the public to assess the situation, and to be satisfied that justice has been done in a fair and public hearing by an independent and impartial tribunal, will be secure; and the sense that justice has been truly done will be sharpened by the knowledge that, at the same time, the innocent have been protected. Justice Macfarlane, *Hirt v College of Physicians and Surgeons (British Columbia)* (1985)⁸⁷⁸

INTRODUCTION

In previous chapters, the thesis discussed and analysed the important relationship between privacy laws and the open court rule. The open court rule and the openness tradition which embraced technology ushered in free access to law, in order to maintain the principle of open justice. This however, has both given rise to concerns, and obfuscated the practical obscurity which, by and large, provided some basic privacy protection for individuals. This change in the status quo was significant because it opened the way for the inclusion of the complete texts of documents in computerised information retrieval systems (referred to in this thesis as electronic legal information retrieval system or ELIRS).⁸⁷⁹ Online legal publishers have since implemented efficient methods of ELIRS. Commercial and non-commercial internet-based law reporters are utilising ELIRS although they are perhaps motivated by reasons different from those of the original law reporters. There has been a motivational transition in the administration of law reporting and the implementation of the open court rule in light of free access to law.⁸⁸⁰

⁸⁷⁸ *Hirt v College of Physicians and Surgeons (British Columbia)* (1985) 63 BCLR 185, per Macfarlane J at 286.

⁸⁷⁹ See Chapter 3, 'Electronic Legal Information Retrieval System (ELIRS)'.

⁸⁸⁰ See Chapter 4, 'Motivational Transition: Law Reporting'.

Since the dissolution of practical obscurity, there has been no privacy perspective applied to the open court rule, and in particular to court reporting. The existing common law and statutory exceptions to the open court rule, which authorise a court to exercise its inherent jurisdiction to suppress law reporting, is not designed to restrict the flow of personal information, and certainly not designed to protect individual privacy. This is further complicated, since courts are required to recognise that the legislature has the authority to create privacy laws which are designed with respect to the open court rule.⁸⁸¹

As previously covered, the two elements of the open court rule and privacy are not, and have never been, in conflict.⁸⁸² In fact, the two elements have always had a relatively healthy relationship with each other. As such, the thesis argues in favour of the recognition of privacy as one of the main exceptions to the open court rule. At the present moment, this is not the case, due to the downward pressure being applied by internet based technologies, and the lack of effectiveness of Following the Event regulatory measures. The only meaningful way to maintain the principle of open justice is for that recognition to take place at common law and statute.

It is unclear why information handled by government agencies is covered by the new APPs⁸⁸³ and not information contained in court registries. Both entities deal with the handling of public information, and as such should be subject to the same regulations regarding personal information. Court registries by their very nature are public domains which contain public information. As such, this thesis contends that courts have an obligation to safeguard the handling and proliferation of personal information in their care and control. The exemption from the privacy principles also pertains (by proxy) to court sanctioned commercial and non-commercial law reporters. The only jurisdiction not exempted from the IPPs and the new APPs is the Federal Courts, defined as an agency pursuant to the *Privacy Act*. Their functions are only covered by the IPPs and

⁸⁸¹ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520, per Gibbs J at 123.

⁸⁸² See Chapter 2, 'The Open Court Rule'.

⁸⁸³ See Appendix B.

new APPs, should they relate to administrative matters.⁸⁸⁴ Generally, any activity of the open court rule pertaining to non-administrative issues does not operate with respect to privacy, and as such is exempted from the IPPs and the new APPs.⁸⁸⁵

One of the main functions of court registries is dedicated to law reporting. Law reporting, as previously discussed, involves the publication and dissemination of judicial decisions both on paper print and digital formats on the internet. Law reporting, as such, has taken on practical significance since the commencement of free access to law. This practical significance is not only an ancillary requirement of the open court rule, but a driver of its operations with respect to keeping the public informed of court proceedings. However, as discussed in previous chapters, the open court rule is a qualified exemption to the principle of open justice. Other important competing public interests are both recognised and considered by courts from time to time. As such, whilst the open court rule and the exemptions it affords to judicial activity of courts, is exempt from existing statutory regimes designed to safeguard personal information,⁸⁸⁶ it is endangering the very important public interest in privacy protection.

This argument is influenced by the circumstances surrounding the environment in which the open court rule and the practice of law reporting has changed with the technological advances brought on by the internet and driven by free access to law. Technology has now reached a point where it is no longer in harmony with the intended spirit of the principle of open justice. The basic operation of delivering precedent to the public, by way of law reporting, is evolving into something different.⁸⁸⁷ This change is due, not so much to new radical changes in any laws, but the operational nature of the law, or

⁸⁸⁴ *Privacy Act 1988* (Cth) ss 6(1), 7(1)(a)(ii), (b), Privacy laws do not cover the collection, holding, management, use, disclosure or transfer of personal or health information with respect to judicial or quasi-judicial functions of a court or tribunal.

⁸⁸⁵ *N (No. 2) v Director General, Attorney General's Department* [2002] NSWADT 33 (8 March 2002), See in particular, the expansive definition of judicial function. The publication and dissemination of judicial decisions falls under the judicial functions of a court, while the handling of personal information and all issues dealt with by the court registry in relation to the publication and dissemination of judicial decisions is exempted as administrative duties pursuant to the definition afforded to an 'agency' of the Commonwealth pursuant to section 6 of the *Privacy Act 1988* (Cth).

⁸⁸⁶ See APPs, Annexure A.

⁸⁸⁷ Michael Kirby, 'The Future of Courts - Do They Have One?' (1998) *Journal of Law, Information and Science* <<http://www.austlii.edu.au/au/journals/JILawInfoSci/1998/12.html>>.

procedural nature, rather than substantive.⁸⁸⁸ First, because digital forms of judicial decisions are treated and being regulated in the same way as paper law reports. This makes the effective application of any form of regulation very difficult. Second, because the internet is being utilised as a medium to store, display and deliver judicial decisions to the public and the world at large, by both the courts and legal publishers. The internet is not a wooden notice board. The continuously evolving underlying nature of the technology behind the internet presents many modern challenges to the healthy operation of the principle of open justice. This includes the lack of control over content, regulation and jurisdictional application (or the lack thereof)⁸⁸⁹ and the inability to remove information permanently.

In this chapter, the provisions of the old IPPs are applied to a number of scenarios, the underlying current law reporting practices and the way in which personal information is affected.⁸⁹⁰ These examples are analysed and considered with respect to privacy protection, specifically the application of the IPPs. The following important areas of this research are accordingly discussed in that context: the presumption of openness; modern practice of law reporting, Prior to the Event considerations, point of equilibrium; the right to a fair trial, sentencing remarks; freedom of the press⁸⁹¹ (Exempted under the *Privacy Act* s 7B), rapid transition, and secrecy.

LIMITING THE PRESUMPTION OF OPENNESS

Whilst technology has allowed the practical implementation of free access to law through the open court rule, the technology underpinning digital law reporting has placed limitations on the scope and limitations of the open court rule. Those limitations are particularly significant when the judiciary is faced with the modern challenges posed

⁸⁸⁸ J. N. Kirkendall, 'Where Judges Fit into the Electronic Future' (1996) 35(1) *Judges' Journal* 35.

⁸⁸⁹ Megan Richardson and Richard Garnett, 'Perils of Publishing on the Internet - Broader Implication of *Dow Jones v. Gutnik*' (2004) 13(1) *Griffith Law Review* 74. The internet presents jurisdictional problems. First, the potential arbitrariness of territoriality, especially as far as those who publish on the internet are concerned; and second, the constraining effects that national laws might have for free communication on the internet.

⁸⁹⁰ This research considers court registries as public domains pursuant to Part 6 of the *Privacy and Personal Information Protection Act 1998* (NSW) and therefore able to be regulated by the IPPs in the *Privacy Act 1988* (Cth).

⁸⁹¹ *Privacy Act 1988* (Cth) s 7B, 'exemption afforded to the media'.

by internet law reporting. As discussed previously, courts are facing a number of such challenges arising from technology, particularly issues associated with privacy, not only because of the challenges posed, but also because Free access to law was and is supposed to operate subject to local privacy laws.⁸⁹² It is against that backdrop that this thesis proposes policies with respect to the open court rule and privacy in which specific safeguards against the publication and dissemination of personal information are contained in judicial decisions.⁸⁹³

These policies were drafted with privacy protection in mind. This is particularly relevant at a time when there are increasing calls regarding the necessity of balancing the value of privacy with other fundamental values including freedom of expression and open justice.⁸⁹⁴

Generally, except for those judgments where other competing public interests to court publicity were found to have outweighed the public interest in the open court rule,⁸⁹⁵ the presumption in favour of the open court rule is the default modus.⁸⁹⁶ There are also rare occasions where judges have stepped in to prevent the publication of personal information via law reports when it was deemed that doing so would undermine the administration of justice,⁸⁹⁷ or the purpose of which would be purely for commercial purposes.⁸⁹⁸

⁸⁹² Appendix F, GP 11.

⁸⁹³ See Chapter 8.

⁸⁹⁴ See Chapter 9 and Appendix E, 'Serious invasions of privacy in the digital era' - TR 2: 'The necessity of balancing the value of privacy with other fundamental values including freedom of expression and open justice' ALRC, 'New Commissioner appointed to the ALRC for the Serious Invasions of Privacy Inquiry' (2013) <<http://www.alrc.gov.au/news-media/media-release/new-commissioner-appointed-alrc-serious-invasions-privacy-inquiry>>.

⁸⁹⁵ *R v Lodhi* [2006] NSWCCA 101; (2006) 65 NSWLR 573, at 584-585, see also general common law exceptions and statutory exceptions to the open court rule discussed in Chapters 4 & 5.

⁸⁹⁶ New South Wales Law Reform Commission, *Contempt by publication*, Discussion paper No 43 (2000) at 10.20.

⁸⁹⁷ *Hogan v Hinch* [2011] HCA 4.

⁸⁹⁸ *Globe Newspaper Co v Superior Court* [1982] 457 US 596; 73 L Ed 2d 248; 102 SCt 2613; 73 L Ed 248.

In relation to legislation, subject to the statutory exceptions discussed in Chapter 4, the *Commonwealth Privacy Act* in Australia is not binding on State courts and is limited to only administrative duties of Federal Courts.⁸⁹⁹ That jurisdiction is considered as a government agency only for the purpose of administrative activities⁹⁰⁰ of that jurisdiction and not for the purposes of judicial functions.⁹⁰¹ It is argued that despite the open court rule, information which is generated by a court registry ought to be safeguarded (and therefore) treated as public information (and as a result) should be regulated pursuant to the privacy principles of the *Privacy Act*. Most importantly, a court registry ought to ensure that the information obtained from the public is used for the purpose for which it was intended.⁹⁰² Additionally, law reports should contain accurate and truthful information about the individual. This places the onus on court registries to ensure that the individual is able to exercise the right of having that information corrected⁹⁰³ (particularly relevant to non-parties to proceedings). This poses a particular challenge when the law report has already been published and disseminated on the internet. The application of EIRS further complicates the issue, by spreading the information in different formats on the world wide web.

In contrast to paper-based forms of records, a digital record is impossible to erase on the world wide web. Once personal information from law reports enters the public domain, because of the complications posed by the nature of internet publication and the way in which that information is handled thereafter, it gives rise to what this thesis describes as Following the Event complications. For example, authorities opting for permanent or

⁸⁹⁹ *Privacy Act 1988* (Cth) s 7(1)(b), an act or practice of a Federal Court is covered under the IPPs/APPs, only regarding administrative matters.

⁹⁰⁰ *Ibid*, ss 6(1), 7(1)(a)(ii) and 7(1)(b), Privacy laws do not cover the collection, holding, management, use, disclosure or transfer of personal or health information with respect to judicial or quasi-judicial functions of a court or tribunal.

⁹⁰¹ *N (No. 2) v Director General, Attorney General's Department* [2002] NSWADT 33 (8 March 2002), See discussion on 'judicial functions' of a court.

⁹⁰² *Ibid*, IPP 1 - Manner and purpose of collection of personal information: require that agencies have a lawful purpose for collecting personal information, and that the purpose is related to the functions or activities of the agency. That the personal information is obtained by lawful means.

⁹⁰³ *Ibid*, IPP 3, reasonable steps be taken by a court registry to ensure that the information is collected, is relevant, up to date and complete, and for the proper purpose for which it is collected. See, APP10 - Quality of Personal Information.

temporary removal, storage and or any other form of regulation regarding personal information from online entities will find it impossible to do so.

For instance, although the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980)⁹⁰⁴ which form the basis of the *Commonwealth Privacy Act*, were not specifically formulated to deal with information contained in judicial records (and indeed exempt court records), many of the guiding principles would be relatively effective in preventing many of the Following the Event complications described in this thesis, if court registries were to comply with them Prior to the Event.⁹⁰⁵ Much of the Following the Event complications arise due to modern court registry practices in handling large quantities of personal information (acting as repositories).⁹⁰⁶ The most relevant element being the fundamental element of control of personal information which is absent once information is released online.⁹⁰⁷ The indiscriminate way in which information is handled in cyberspace applies to law reports as it does universally to every other piece of unregulated information.

This is not to say that law courts are unaware and do not acknowledge that there is a problem. However, the taxing and technically challenging task of implementing regulatory measures pertaining to Following the Event publication, and a general lack of control over that information once it is outside the court's jurisdiction, is a main unresolved issue⁹⁰⁸ as discussed in previous chapters.

One of the solutions proposed in this thesis, is to moderate for personal information prior to it being published and disseminated on the internet or Prior to the Event

⁹⁰⁴ 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data' (1980) <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>.

⁹⁰⁵ See Chapter 8, 'Privacy Protection: Two Tier Policy (Model I)' and Appendix A, 'Privacy Protection Standards' (PPS).

⁹⁰⁶ See Appendix C, the type and nature of the records of personal information, the main purpose the record is being kept, the period of time it is being kept and the ability to request the immediate removal of that information upon request from the applicant, are all relevant considerations regarding law reporting.

⁹⁰⁷ This also contradicts the underlying intention of the declaration on free access to law, see and FALM guiding principles which recognise the court's responsibility in ensuring privacy Prior to the Event, see Appendices F and G.

⁹⁰⁸ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, per Kirby P at 56.

regulation. A set of policies and technical modalities implemented for Prior to the Event regulation of law reports, may be one effective form of ensuring that privacy rights are maintained for litigants and third parties in court proceedings. Whilst the topic of privacy protection with respect to law reporting may be relatively new, there is a body of decisions which look at the judicial balancing act, in comparing the benefits of the public's right to know, versus the damage and harm publication of personal information through law reporting might bring to those concerned.⁹⁰⁹

Whilst the open court rule is paramount for the functioning of a democratic society particularly in light of free access to law, there must be limits imposed by court registries on the way in which personal information is handled. These limits should be formulated by firstly, working closely with the OECD Guidelines⁹¹⁰ and subsequently with the APPs⁹¹¹ which have been specifically designed to safeguard personal information and prevent its misuse; and secondly, formulating specifically designed custom-made targeted regulatory measures regarding the open court rule, and in particular court registries and law reporters.⁹¹²

Additionally, the presumption of openness ought to at all times be adhered to, and that presumption should never interfere with the fair and impartial administration of justice. Nor must that presumption ever prejudice the reasonable expectation of safety of the public who rely on the open court system to do justice. Even in jurisdictions such as the United States, which has a Bill of Rights,⁹¹³ there is no absolute rule to openness in court proceedings.⁹¹⁴ For example, there is no general public right of access to Federal

⁹⁰⁹ *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520; *Hogan v Hinch* [2011] HCA 4; *Griffiths v Rose - BC201100170* [2011] FCA 192 (Unreported, FCA); *Rinehart v Welker & Ors* [2012] HCATrans 7 (1 February 2012).

⁹¹⁰ Appendix C and the original OECD principles implemented in the Australian Privacy Act 1988 (Cth) found at 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980) <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>.

⁹¹¹ See Appendix B.

⁹¹² See Chapter 8.

⁹¹³ *United States Bill of Rights* (1-10 Amendments) 1791 (US); *The Constitution of the United States with Index and The Declaration of Independence* 24th Ed. 1789 (United States).

⁹¹⁴ See, *Globe Newspaper Co v Superior Court* [1982] 457 US 596; 73 L Ed 2d 248; 102 SCt 2613; 73 L Ed 248, see also, Jeanne L. Nowaczewski, 'Comment, The First Amendment Right of Access to Civil Trials After *Globe Newspaper Co v Superior Court*' (1984) 51(1) *The University of Chicago Law Review*

grand jury proceedings.⁹¹⁵ In civil proceedings for instance, there is no constitutional right of access to court documents.⁹¹⁶

However, at common law, the right to inspect and copy public records and documents, which include court documents and other records does exist,⁹¹⁷ although with limitations.⁹¹⁸ Additionally, in the same jurisdiction, issues relevant to publication and dissemination of judicial decisions such as privacy, technical details of dissemination, authentication, and copyright authentication were recently formulated into important principles covering many FALM common principles,⁹¹⁹ which were implemented in the draft *Uniform Electronic Legal Material Act*,⁹²⁰ and already enacted in nine of the

286. Also see, *Center for National Security Studies v US Department of Justice* [2003] USCADC 134; 331 F.3d 918 (17 June 2003); *United States v McVeigh* [1997] USCA 10 282; 106 F.3d 325; 65 USLW 2543, 97 CJ C.A.R. 196 (11 March 1997); *United States v R Amodeo Newsday Inc.* [1995] USCA2 1300; 71 F.3d 1044; 24 Media L. Rep. 1203 (8 December 1995).

⁹¹⁵ *United States v John Doe, Inc I* [1987] USSC 62; 481 U.S. 102; 107 S.Ct. 1656; 95 L.Ed.2d 94; No. 85-1613 (21 April 1987); *United States v Sells Engineering, Inc* [1983] USSC 161; 77 L.Ed.2d 743; 103 S.Ct. 3133; 463 U.S. 418; No. 81-1032 (30 June 1983); *Douglas Oil Co of Cal v Petrol Stops Northwest* [1979] USSC 70; 60 L.Ed.2d 156; 99 S.Ct. 1667; 441 U.S. 211; No. 77-1547 (18 April 1979); *United States v Procter & Gamble Co* [1958] USSC 102; 356 U.S. 677; 78 S.Ct. 983; 2 L.Ed.2d 1077; No. 51 (2 June 1958). Also in the United States, see proceedings conducted in closed courts pursuant to the Federal Rule of Criminal Procedure 6 (e) in order to protect the privacy and reputation of parties to the proceedings and to safeguard the administration of justice if they are found guilty see *United States v Johnson* [1943] USSC 145; 319 U.S. 503; 63 S.Ct. 1233; 87 L.Ed. 1546; Nos. 4 and 5 (11 October 1943). For further detailed discussion in how the United States courts deal with closed court proceedings see, Peter A. Winn, 'Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information' (2004) 39 *Washington Law Review* 307.

⁹¹⁶ *The Constitution of the United States with Index and The Declaration of Independence* 24th Ed. 1789 (United States) see Amendment XI. See *Nixon v Warner Communications, Inc.* [1978] USSC 59; 435 U.S. 589; 98 S.Ct. 1306; 55 L.Ed.2d 570; No. 76-944 (18 April 1978), at 573.

⁹¹⁷ *Nixon v Warner Communications, Inc.* [1978] USSC 59; 435 U.S. 589; 98 S.Ct. 1306; 55 L.Ed.2d 570; No. 76-944 (18 April 1978), at 597.

⁹¹⁸ *Ibid*, per Powell J at 598: the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.

⁹¹⁹ See ten principles 'for the dissemination of primary legal materials in the United States', found at *Public Resources.Org*, <<https://law.resource.org/index.html>>.

⁹²⁰ *American Association of Law Libraries, Uniform Electronic Legal Material Act Bill Chart*, (5 July 2013) <<http://www.aallnet.org/Documents/Government-Relations/UELMA/uelmabilltrack2013.pdf>>.

The Uniform Electronic Legal Material Act establishes an outcomes-based, technology-neutral framework for providing online legal material with the same level of trustworthiness traditionally provided by publication in a law book. The Act requires that official electronic legal material be: (1) authenticated, by providing a method to determine that it is unaltered; (2) preserved, either in electronic or print form; and (3) accessible, for use by the public on a permanent basis.

United States' fifty one jurisdictions and proposed in six others.⁹²¹ The United States legislation also extensively refers to the Hague Guiding Principles which cover law reporting with respect to privacy.⁹²²

Whilst courts in Australia continue to define the presumption of openness, and highlight occasions when restricting judicial publication and restrictions on open access is justified,⁹²³ there are those who argue that any restriction on the open court rule is tantamount to undermining the rule of law, and as such is a threat to democracy in Australia.⁹²⁴ Although, this research aims to demonstrate that placing proper regulatory measures on the open court rule, in order to prevent the unnecessary spread of personal information, not only serves the ends of justice, but ultimately strengthens the rule of law. The legitimate privacy concerns of individuals from unregulated law reporting on the internet ought to be taken much more seriously. The resulting dissemination of personal information potently attracts real harm, such as, identity theft and fraud, harm to reputation many years after the resolution of a matter in court, financial hardship resulting from bad credit reports, and credit defaults, and many other such instances including the negative impacts of prejudicial publicity on litigants before the commencement and or during substantive hearings; the undermining of investigative law enforcement gathering evidence, tainted juries, inadmissibility of evidence, jury misconduct, mistrials, and harming the administration of justice.

ONLINE LAW REPORTING

As discussed above, although the open court rule is exempt from statutory intervention, the fact that court registries are large repositories of personal information, means that

⁹²¹ Uniform Law Commission: The National Conference of Commissioners on United States Laws, <<http://www.uniformlaws.org/Act.aspx?title=Electronic%20Legal%20Material%20Act>>.

⁹²² See Chapter 3 and Appendix G, see also Barbara Bintliff, 'The Uniform Electronic Legal Material Act ss ready for legislative action' on *Vox PopuLII* (15 October 2011) <<http://blog.law.cornell.edu/voxpath/tag/barbara-bintliff/>>.

⁹²³ *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* (2005) 62 NSWLR 512; *Hogan v Hinch* [2011] HCA 4; *Rinehart v Welker & Ors* [2012] HCATrans 7 (1 February 2012).

⁹²⁴ The difficulty of leaning heavily towards more privacy protection is that it seems impossible to avoid reinforcement of trends towards more secrecy on matters where public debate is essential for the proper functioning of a liberal democracy, see Ryan Inez, 'Access to Court Documents' (2006) 18(3) *Australian Press Council*.

the current unregulated practice of law reporting (by courts and law reporters) on the internet, is in breach of the provisions of the privacy principles in the *Privacy Act*.⁹²⁵ As a result, every single time a law report is made available and disseminated on the internet; it places the individual at risk of potential privacy harm.⁹²⁶

If one is to consider the issue of consent, for instance, when disclosure of personal information is first undertaken to a court registry, or during court proceedings, the following analysis is of particular relevance. Firstly, a person is generally unlikely to provide consent for the handling of their personal information unless it is being specifically used for the administration of justice by a court. The act of publication and dissemination of court documents on the internet may therefore breach the 'consent test' pursuant to Commonwealth privacy principles.⁹²⁷

Secondly, in the event a member of the public seeks access to open justice, it may be unreasonable to expect that the individual would voluntarily submit their personal information to any other source other than the court registry. The person would have a reasonable expectation that the information would be used for the purpose, or related purpose, for which it was intended and collected.⁹²⁸ Any third party seeking access to the personal information of that individual would certainly require the authority of the individual to gain access.⁹²⁹ The very practice of law reporting via the world wide web, in itself, creates the assumption that the information is public and not private. This is due primarily to the fact that, the internet is generally viewed as a public space.⁹³⁰ It is therefore argued that releasing personal information, which might lead to the identity of the individual and the invasion of their privacy, would not be in the public's privacy interest or good for the administration of justice.

⁹²⁵ See Appendix B, 'Australian Privacy Principles (APPs)'.

⁹²⁶ Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007), see general discussion in Chapter 2, particularly pp 29-34.

⁹²⁷ See Appendix B, APP 3(2)(ii), 3(3)(ii); and 7(1)(a), (2)(c)(ii), APP 6(1)(a), 6(2)(c)(ii).

⁹²⁸ *Ibid*, APP 1(4)(c).

⁹²⁹ *Ibid*, APP 4, APP 11.

⁹³⁰ Elizabeth Paton-Simpson, 'Private Circles and Public Squares: Invasion of Privacy by the Publication of Private Facts' (1998) 61(3) *The Modern Law Review* 318, see discussion on invasion of privacy by publication of private facts in a public forum.

Public expectation related to the handling of personal information, is also relevant when deciding on what the court registry does with that information. Specifically, the individual has a legitimate expectation that the information be used for the purpose for which it was collected⁹³¹ and not be given to the world at large through the internet. Personal information relating to court evidence may also be disclosed during court proceedings and published on social networking sites.⁹³² This may be done without the knowledge or indeed the consent of the individual.⁹³³ Complications arise when that information is not able to be retrieved thereafter by the individual from the organisation.⁹³⁴

In addition to what has already been discussed, law reporting serves two important functions. First, it is able to personify the open court rule and demonstrate that the judicial system is dedicated to accountability and transparency. Second, it provides essential educational information, not only for the legal profession, but also for the wider community comprising politicians, policy makers, students, researchers; self represented litigants and the general public.⁹³⁵

Unfortunately, the modern practice of law reporting on the internet can interfere with due process offered by the principle of open justice, which guarantees the individual a fair trial. This is ironic, given that one of the main reasons for publishing court decisions, whether paper or electronic, is to promote the open court rule and serve to uphold due process at common law. The ease of access to online information, combined

⁹³¹ See Appendix B, APP 5 (2)(d); and 7(1), APP 6(1), 'Use and Disclosure of Personal Information'.

⁹³² See recent commentary from Professor Ian Cram regarding the dangers of tweets generated in court proceedings at Ian Cram, 'Twitt(er)ing Open Justice?' (2012) *Justice Wide Open*, and dangers to the conduct of a fair trial <<http://www.city.ac.uk/centre-for-law-justice-and-journalism/projects/open-justice-in-the-digital-era>>; Lord Judge, 'Practice Guidance: The use of live text-based forms of communication (including twitter) from court for the purposes of fair and accurate reporting (The Lord Chief Justice of England and Wales)' (2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/lbcb-guidance-dec-2011.pdf>>.

⁹³³ Ibid.

⁹³⁴ See Appendix B, APP 5 (2)(d); and 7(1), APP 6(1), 'Use and Disclosure of Personal Information' Generally, part of the broader online publication issues flowing from Following the Event' negative consequences discussed in this thesis.

⁹³⁵ Lyn Newlands, 'Lifting the Veil, The Changing Face of Judgments Publishing in the Family Court of Australia' (2009) 17(4) *The Australian Law Librarian Journal* 250.

with the power of efficient modern search engines, provides the opportunity for access to an individual's past, while serving its more noble purpose. Such information includes any court involvements or convictions against individuals.⁹³⁶

As a result of the above this thesis argues that, in light of the mentioned possible misuses of personal information, law reports ought to be treated in the same manner as any other record which may lead to a miscarriage of justice and impact adversely upon the administration of justice.⁹³⁷ The importance of this extends beyond privacy to other unforeseen issues, such as the implications of breaching spent conviction legislation. This area, arising out of internet law reporting, gives rise to some inconsistencies in the way society treats individuals who spend several years serving a sentence.⁹³⁸ There is a lack of attention afforded to the time served, or the rehabilitation process of, former offenders.⁹³⁹ The obvious point is that spent conviction legislation should not be breached by law reporting, but also it should ensure that civil liberties are respected. In particular, those liberties should be respected when the individual completes the rehabilitation process and repays their (metaphorical) debt to society for the wrongs they committed. There are also issues of anti-discrimination that might arise from the disclosure of personal information to third parties, which are beyond the scope of this thesis, but which could have tremendous impact on our way of life.⁹⁴⁰

The problems discussed so far are further exacerbated because law reports, in many respects, are official documents which portray an accurate and complete image.⁹⁴¹ Court

⁹³⁶ *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344, at 64, also see; *HM Advocate v Beggs (No 2)* [2002] SLT 39; *DPP v Weiss* [2002] VSC 153; *R v McLachlan* [2000] VSC 215; *R v Long* (2002) 128 A Crim R 11 at 38, 39.

⁹³⁷ *R v Long* (2002) 128 A Crim R 11 at 38, 39; *R v Cogley* [2000] VSCA 231 at 10-18; *R v Crowther-Wilkinson* [2004] NSWCCA 249.

⁹³⁸ See above discussion regarding sentencing remarks and spent convictions. *Crimes Act 1914* (Cth) Pt VIIC; *Spent Convictions Act 2000* (ACT); *Criminal Records Act 1991* (NSW); *Criminal Records (Spent Convictions) Act* (NT); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Annulled Convictions Act 2003* (Tas); *Spent Convictions Act 1988* (WA).

⁹³⁹ Moira Paterson, Bronwyn Naylor and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32 *Melbourne University Law Review* 171.

⁹⁴⁰ See Appendix C, ICCPR, Article 14(7).

⁹⁴¹ Stuart Wilder, 'All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records' (1979) 52(2) *Temple Law Quarterly* 311, 314.

documents are also permanent records.⁹⁴² In *Hirt v College of Physicians and Surgeons (British Columbia)*, Macfarlane J observed:

It is demonstrably justifiable in a free and democratic society that the openness rule be restricted to protect the innocent when... nothing will be accomplished by publicising the identities of the persons. In this case, public access to all the facts, except for the names, will be assured. The right of the public to assess the situation, and to be satisfied that justice has been done in a fair and public hearing by an independent and impartial tribunal, will be secure; and the sense that justice has been truly done will be sharpened by the knowledge that, at the same time, the innocent have been protected.⁹⁴³

Other areas of concern regarding permanent digital records include digital foot printing. The concept of digital foot-printing is a new phenomenon, and there is evidence to show that it is also technically impossible to remove information from the internet once such information is released on to it.⁹⁴⁴ In addition, the voluntary removal of damaging and personal information from indexing and other search results is not something that the major search engines are known for.⁹⁴⁵

Finally, further evidence of incompatibility of current open court practices with IPPs arise from the fact that organisations and government agencies would be subject to the *Privacy Act* to update personal information they hold on members of the public.⁹⁴⁶ This is practically impossible in circumstances where that information is proliferated via law reports onto the internet. Legal issues also arise when there are suppression orders in place against publication, and the information is "leaked" on the web. These represent significant challenges in relation to the individual's right to privacy and the publication

⁹⁴² Ibid, 38.

⁹⁴³ *Hirt v College of Physicians and Surgeons (British Columbia)* (1985) 63 BCLR 185, per Macfarlane J at 286.

⁹⁴⁴ Daniel J. Solove, 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' (2000-2001) 53(6) *Stanford Law Review* 1393, 1412, see also, Chapter 5, regarding *R v Perish*; *R v Lawton*; *R v Perish* [2011] NSWSC 1101.

⁹⁴⁵ Although, the European Commission has earmarked legislation for implementation, which forces power search engines to retain information about you only for short period of time of eighteen months, see, Jeffrey Rosen, 'The Right to Be Forgotten' (2012) 64(88) *Stanford Law Review* <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten#footnote_1>; John Hendel, 'Why Journalists Shouldn't Fear Europe's "Right to be Forgotten"' (25 January 2012) <<http://www.theatlantic.com/technology/archive/2012/01/why-journalists-shouldnt-fear-europes-right-to-be-forgotten/251955/>>.

⁹⁴⁶ See Appendix B, APP 5, APP 13.

of law reporting on the internet. This thesis argues that the process of law reporting on the internet is potentially breaching current IPPs and NPPs and the APPs in the *Federal Privacy Act*.

EXPRESSING PRIVACY

The open court rule provides for access to law reports through the court registry and the publications units of a court registry. The function of the open court rule is to validate the principle of open justice by operating in the public eye and to promote transparency. This transparency upholds the integrity of the judiciary. To allow for future functioning of this rule this thesis contends that the internet requires limits to be placed on the amount of information, in particular personal information that a court ought to publish and disseminate there.

Is it appropriate for a court to make available and disseminate the personal information⁹⁴⁷ of the public, under the pretext of carrying out its judicial functions pursuant to the open court rule? It is argued that one way in which the court registry may try to address publication concerns is to set guidelines in place which try to address privacy concerns. It is argued that a court registry ought to consider whether it is proper and necessary to publish personal information without proper consideration for the public interest.

In addressing the issue of expressing privacy values through the open court rule, a court registry ought to ascertain whether releasing personal information to the world at large, might bring harm or endanger the individual's right to exist without harm or danger outside the courtroom. The reason is that the open court rule is expressed through the functions and duties of a court registry. If there are no restrictions upon permitting the disclosure of personal information in the proceedings, a registry could implement guidelines as to whether the personal information in question should be published and whether it is proper to do so. This entails considering the public interest of publicity, as

⁹⁴⁷ Personal information able to be used to identify the individual and therefore breach their privacy. See Appendix A, 'Privacy Protection Principles (PPS)' and Chapter 8, regarding the definitions of Primary to Quinary data pursuant to the proposed PPS model.

to whether releasing the personal information is necessary to protect the public from one of the well established grounds.⁹⁴⁸

In circumstances where the release of the personal information is necessitated by one of the above mentioned grounds, the court registry should consider whether the personal information: (1) should be released to the world at large; (2) is correct in its detail; (3) is relevant in the context in which the personal information was submitted to the court; (4) is such that an individual to whom the information relates may be unfairly exposed to monetary, reputational or other harm as a result of a disclosure; (5) may affect the prospects of future proceedings (such as, an appeal) and (6) might have any other impacts which might breach individual privacy.

After reviewing all the relevant factors mentioned herein, a court registry must decide whether publishing the personal information in digital form on the internet, is absolutely necessary to satisfy the public interest. If there are no reasons why the personal information should not be protected, then the court registry should inform (prior to releasing the personal information to the public at large) the affected party that the law report earmarked for publication contains personal information which might impact the individual.

One of the most challenging aspects behind the idea of proportionality between the open court rule and privacy, is the idea that a single 'balance' might be struck to create some sort of equilibrium between the two open justice elements. Theoretically, proportionality may be created through first, the recognition of a tort of privacy protection at common law in this jurisdiction and second, the removal of the privacy legislative exemptions on law reporting (both State and Federal). The problem with the

⁹⁴⁸ (1) to preserve the peace and good order of the proceedings: to protect the judge, the parties and all other persons present, against annoyance. (2) To prevent the receipt of mendacity-serving information. (3) To prevent the receipt of information subservient to the evasion of justifiability in respect of person or property. (4) To preserve the tranquillity and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreements among themselves. (5) To preserve individuals and families from unnecessary vexation, producible by the unnecessary disclosure of their pecuniary circumstances. (6) To preserve public decency from violation. (7) To preserve the secrets of state from disclosure. See detailed discussion in Chapter 4.

above scenario is that it is not a practical option, given the nature of the internet and the impact of current methods of law reporting upon individual privacy.⁹⁴⁹

As a result this thesis proposes that in order to better create such proportionality, a practical (and possibly pragmatic) method would be to first demonstrate that privacy values have always had a relatively healthy relationship with the open court rule. Recognising this symbiotic relationship will negate the requirement for the development of the tort of privacy protection at common law. Rather, the thesis suggests novel privacy protection measures to be expressed through law reporting.⁹⁵⁰ One reason why this approach is taken is that implementing practical technological methods will not impede the relationship between the open court rule and privacy values, but rather strengthen that very relationship and result in proportionality.

SENTENCING REMARKS

As discussed previously, legislation can authorise to exclude the public from some or part of a hearing, or to make orders preventing or restricting publication of parts of the proceeding⁹⁵¹ or of the evidence adduced.⁹⁵²

Significantly, as part of a long established tradition of judicial activity, personal information is published via law reports which may contain sentencing remarks. As a rule, such activities by judges endanger individual privacy, by authorising the release of

⁹⁴⁹ Wendy Seltzer, 'Privacy, Option Value, and Feedback' (2012) *Yale Law School Information Society Project, Berkman Center for Internet & Society at Harvard University* 48, 39 to 40.

⁹⁵⁰ See Chapter 8.

⁹⁵¹ See for example, the following statutory provisions discussed in Chapter 5, *Family Law Act 1975* (Cth) ss 97, 121; *Federal Court of Australia Act 1976* (Cth) s 50; *Administrative Appeals Tribunal Act 1975* (Cth) s 35. *Court Suppression and Non-Publication Orders Act 2010* (NSW) ss 7, 8; *Civil Procedure Act 2005* (NSW) s 72; *Witness Protection Act 1995* (NSW) s 26; *Administrative Decisions Tribunal Act 1997* (NSW) s 75. *Supreme Court Act 1986* (Vic) s 18; *County Court Act 1958* (Vic) s 80; *Magistrates Court Act 1989* (Vic) s 126; *Evidence Act 1929* (SA) ss 69 and 69A; *Witness Protection Act 1996* (SA) s 25; *Children's Protection Act 1993* (SA) s 59A; *Supreme Court of Queensland Act 1991* (Qld) s 128; *Child Protection Act 1999* (Qld) ss 99ZG, 192, 193; *Criminal Procedure Act 2004* (WA) s 171; *Children's Court of Western Australia Act 1988* (WA) s 35; *Family Court Act 1997* (WA) s 243; *Evidence Act 1906* (WA) s 36C; *Justices Act 1959* (Tas) s 106K; *Terrorism (Preventative Detention) Act 2005* (Tas) s 50; *Evidence Act 2001* (Tas) s 194J.

⁹⁵² *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520, per Gibbs J; *Hogan v Hinch* [2011] HCA 4, per French CJ at 27.

personal information through their remarks on the internet. Prior to the advent of the internet, the publication and dissemination of law reports in paper format was a fraction of what it is today.⁹⁵³ With the introduction of digital law reporting, together with the inclusion of reports containing sentencing remarks in certain Australian jurisdictions, there has been a dramatic increase in the proliferation and dissemination of personal information as a result.⁹⁵⁴ Personal information, which judges often include as part of their judgment commentary, is inappropriate for publication on the internet. Sentencing remarks also contain a substantial amount of readily accessible information about particular offenders.⁹⁵⁵

This practice is carried out despite the loss of that practical obscurity which was present at the time such pontificating by judges was delivered, and which practice nobody seemed to have minded at the time. There is a need to adapt current practices to cope with the loss of practical obscurity, because modern technology and the way in which law reports are accessed on the internet is raising serious privacy concerns, most of which are founded on the premise that law reporting as it is practiced today breaches the *Privacy Act*.⁹⁵⁶

This research shows that personal information generally extrapolated from litigants and third parties and included in law reports (including those in sentencing remarks) has no real judicial value as far as delivering the law to the public is concerned, and is not necessary to fully analyse and develop the reasons for a decision.

⁹⁵³ See discussion in Chapter 3, and also, Lord David Neuberger, 'Law Reporting and the Doctrine of Precedent: The Past the Present and the Future' (2007) *Halsbury's Laws of England Centenary Essays*.

⁹⁵⁴ Dr. Lawrence McNamara, 'Judicial Perspectives on Open Justice and Security' (Paper presented at the Justice Wide Open, City University London, <<http://www.city.ac.uk/centre-for-law-justice-and-journalism/projects/open-justice-in-the-digital-era>>; David Banisar, 'Catching Up with the Transparency Revolution', *ibid*.

⁹⁵⁵ Justice Debra Mullins, 'Judicial Writing in an Electronic Age, Supreme Court of Queensland, 21 December 2004, 1' (2004) *Supreme Court Of Queensland Publications* 1 <<http://archive.sclqld.org.au/judgepub/2004/mullins211204.pdf>>; James J. Spigelman, 'Open Justice and the Internet' (2004) 16(1) *Judicial Officers Bulletin* 5.

⁹⁵⁶ See detailed discussions above.

Members of the judiciary acknowledge that sentencing remarks are detrimental to individual privacy in the modern electronic age as per Mullins J:⁹⁵⁷

When editing sentencing remarks that are intended for electronic publication:

- (a) Consider whether a victim's name or any witness' name needs to be disclosed in full or at all.
- (b) Avoid identifying the residential address of any person involved in the sentencing.
- (c) Avoid disclosing family relationships when that information is unnecessary for the sentence.

In preparing reasons for judgment, the following list may be of assistance:

- (a) Consider whether it is necessary to disclose a person's complete date of birth. Is the month and year of birth sufficient or is the year of birth sufficient for the purposes of the judgment?
- (b) Consider the extent to which the personal information about a witness or party is essential to support the decision.⁹⁵⁸

Whilst sentencing remarks are of tremendous significance in serving important functions for the administration of justice, the level of detailed personal information published by way of law reports is not necessary, and as this research shows, in light of online privacy concerns, may not be in the interest of justice. For instance, the

⁹⁵⁷ Cited in, Justice Virginia Bell, 'How to Preserve the Integrity of Jury Trials in a Mass Media Age' (2005) *Supreme Court of NSW Publication* 1; James J. Spigelman, 'The Internet and the Right to a Fair Trial' (2006) 7 *The Judicial Review* 403.

⁹⁵⁸ *Ibid*, Mullins, 7.

identification of individuals by their names, religious beliefs, sexual orientation and a plethora of other forms of personal information is not necessary to administer justice.⁹⁵⁹

Indeed, once personal information is released on the internet, that information would form part of a compilation of data, which is then commercialised or used for other purposes by the various online data mining entities.⁹⁶⁰ Such data mining is often conducted as part of a collaboration of government and business entities.⁹⁶¹ Certainly, the world wide web has over the years grown to become a large repository of information pertaining to individuals which can be either true or false.⁹⁶² Records of individual personal information are captured with EIRS and maintained which include, but are not limited to; internet service providers (ISPs); merchants; bookstores; phone companies; supermarkets and so forth. Personal information in law reports may be collected by such organisations, which then supply it to various governments or third parties around the world.⁹⁶³

In addition, the multi-jurisdictional nature of the internet may not attract any constitutional protection for the wronged individual.⁹⁶⁴ These include wrongs committed in jurisdictions with constitutional protections, such as those provided by the Fourth Amendment in the Constitution of the United States of America.⁹⁶⁵ The publication and dissemination of official law reports on the internet, while *prima facie* harmless,

⁹⁵⁹ 'Courts Administration Authority of South Australia' <<http://www.courts.sa.gov.au/Pages/default.aspx>>

⁹⁶⁰ Sarah Joseph and David Harris, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford University Press, 1995), 334. See also, discussion on commercial interests revolving around personal information, J. Zittrain, 'Privacy 2.0' (2008) 2008 *The University of Chicago Legal Forum* 65, 81.

⁹⁶¹ J. Zittrain, 'Privacy 2.0' (2008) 2008 *The University of Chicago Legal Forum* 65, 82.

⁹⁶² See, James J. Spigelman, 'Open Justice and the Internet' (2004) 16(1) *Judicial Officers Bulletin* 5.

⁹⁶³ Daniel J. Solove, 'Data Mining and the Security-Liberty Debate' (2008) 75(1) *University of Chicago Law Review*, 356.

⁹⁶⁴ *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575. See also, Megan Richardson and Richard Garnett, 'Perils of Publishing on the Internet - Broader Implication of Dow Jones v. Gutnik' (2004) 13(1) *Griffith Law Review* 74.

⁹⁶⁵ Daniel J. Solove, 'Data Mining and the Security-Liberty Debate' (2008) 75(1) *University of Chicago Law Review*, 356 Amendment IV [1791]: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized: *United States Bill of Rights (1-10 Amendments) 1791* (US). Also see Thomas C. Dienes and Jerome A. Barron, *Constitutional Law* (West Publishing Co., 6th ed, 2005), LXXXIV.

guarantees the legitimacy of any information pertaining to that individual. with respect to the due diligence undertaken by the ordinary administrative judicial functions of a court registry, prior to publication and dissemination on the internet.⁹⁶⁶ True or false information floating around in cyberspace is immediately connected with the data contained in the law report and indexed, categorised and listed by powerful EIRS.

FREEDOM OF THE PRESS

Although the Australian jurisdiction functions under a democratic system of government and the media is exempted from the *Federal Privacy Act*, pursuant to journalistic endeavours,⁹⁶⁷ it does not have an express constitutionally guaranteed freedom of speech⁹⁶⁸ as expressed in some other jurisdictions⁹⁶⁹. What Australia does have is a limited implied right to freedom of speech in regards to governmental and political affairs.⁹⁷⁰ Nevertheless, these values are crucial to the operation of the rule of law and the administration of justice. The open court rule within the principle of open justice, represents accountability of the court system, and promotes the integrity of the judiciary and the administration of justice. Accordingly, the open court rule is fundamentally the opposite of secret courts, which promotes unethical conduct by judges and perverts the course of justice.⁹⁷¹ The open court rule also promotes

⁹⁶⁶ See Chapter 5, 'Courts Embrace Technology'.

⁹⁶⁷ *Privacy Act 1988* (Cth) s 7B.

⁹⁶⁸ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. See the relevant commentary in the case, per Mason CJ at 139 (Freedom of communication in relation to public affairs and political discussion), per Brennan J at 149 ('freedom of discussion of political and economic matters'), per Deane and Toohey JJ at 168 ('freedom within the Commonwealth of communication about matters relating to the government of the Commonwealth'), per Gaudron J at 212 ('freedom of political discourse'), per McHugh J at 233 ('right of the people to participate in the federal election process').

⁹⁶⁹ For example, *The Constitution of the United States with Index and The Declaration of Independence 24th Ed. 1789* (United States) First Amendment, 'Congress shall make no law... abridging the freedom of speech, or of the press...'.
⁹⁷⁰ *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, providing certainty to the position of the right in Australia; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 (5 October 2012); *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013); *Monis v The Queen* [2013] HCA 4 (27 February 2013).

⁹⁷¹ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, per Gibbs J at 520; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, per Diplock LJ at 450. See also, Murray Gleeson, 'Judicial Accountability' (1995) 2(2) *The Judicial Review* 117.

transparency by providing an atmosphere where witnesses are more likely to state the truth if they make submissions in an open court.⁹⁷²

However, as mentioned, the above rights pursuant to the principle of open justice in Australia ought to be differentiated from other jurisdictions, which have express rights pertaining to the freedom of expression and freedom of the press.⁹⁷³ In Australia, the principle of open justice was never intended or designed as a means by which to further the cause and rights of the freedom of the press or the individual freedom of expression.⁹⁷⁴

The underlying misappropriation of the principle of open justice to advance the causes of freedom of the press and freedom of speech is not a new idea. The issue was also commented on by Lord Justice Diplock in *Home Office v Harman*⁹⁷⁵ when he said:

...justice in the courts of England is administered in open court to which the public and press reporters as representative of the public have free access and they can listen to and communicate to others all that was said there by counsel or witnesses. The common law system of trial in which the evidence is given orally upon oath before the court of trial itself, in contrast to the practice followed by the courts of countries whose legal systems are based upon the civil law, thus results in the 'public hearing...by an independent and impartial tribunal established by law that is called for by article 6 of the European Convention on Human Rights being a good deal more informative in England about the details of particular cases than it is in most civil law countries.'⁹⁷⁶

The open court rule should not be an avenue whereby the popular media can exercise freedom of the press and risk bringing harm to the administration of justice. The open court rule was created to maintain the principle of open justice for justice to be administered by the courts. The open court rule is neither a forum for the public to

⁹⁷² Jeremy Bentham, *Rationale of Judicial Evidence* (Garland Facsimile ed. 1978, 1827); Sir William Blackstone, *Commentaries on the Laws of England*, Book III, ch. 23, II (Dawson reprint 1966).

⁹⁷³ *Ibid*, Bill of Rights provided in the Constitution of the United States of America and those provided in the Canadian Constitution pursuant to its Charter of Rights. In New Zealand for example, s 14 of the *Bill of Rights Act 1990* (NZ), allows for journalists to report court proceedings and as such is regarded as an extension to the freedom of expression talked about in this thesis.

⁹⁷⁴ *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* (2005) 62 NSWLR 512, per Spigelman CJ.

⁹⁷⁵ *Home Office v Harman* [1981] QB 534; [1981] 2 All ER 349; [1981] 2 WLR 310, per Diplock LJ at 302, 303.

⁹⁷⁶ *Ibid*.

exercise freedom of expression nor to vent personal opinions. Diplock LJ stated that the process and the precise role of the open court was ultimately charged for the purpose of administering justice:⁹⁷⁷

So far as England is concerned the principle that civil actions must be heard in open court was accepted by this House as being the established general rule in *Scott v Scott*, and is often referred to by the name of that case, although most of the speeches were devoted to discussion of exceptions to that rule. In the speech of Lord Shaw of Dunfermline, however, is to be found a useful quotation from Bentham that states the reason for the rule. It is not to satisfy public curiosity about the private affairs of individuals who have recourse to courts of justice for the resolution of their disputes rather than each agreeing with the other to submit them to arbitration; nor is it, even, what might be regarded as a less unworthy reason, to facilitate public discussion on matters of general public interest that may happen to have been involved in the dispute between the particular parties to the suit - as was undoubtedly the case in *Williams v Home Office* itself. The reason is, as Bentham put it in one of the passages cited by Lord Shaw of Dunfermline, at p 477: Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial. (Benthamiana, or Selected Extracts from the Works of Jeremy Bentham (1843), 115)

Thus several rights collide with each other, that of the open court rule and freedom of expression, the right of the public to be informed of the conduct of court proceedings, the right to privacy, freedom of the press and so forth. As these principles converge in their operation, it follows therefore that the role of the popular media is important, as through broadcast and print media, the public is kept abreast of the conduct of court proceedings. Not surprisingly the press media and other openness advocates enthusiastically argue that a court's powers to restrict access to information should be limited.⁹⁷⁸ Certainly any judicial orders issued by any court or tribunal interfering with the ability of the media to publish anything and everything from court proceedings, pursuant to the open court rule, is likely to be regarded as a hostile act by the courts, in breach of the open court rule, and as such, challenged on the grounds that the public has a right to know of the day-to-day activities of the courts.⁹⁷⁹

⁹⁷⁷ Ibid.

⁹⁷⁸ *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [1999] VSC 136, per Mandie J at 248.

⁹⁷⁹ *Hogan v Hinch* [2011] HCA 4; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465.

This was commented on by Hedigan J in *Herald & Weekly Times Ltd v Medical Practitioners Board*:

The reason for the favouring of open hearings is intimately connected with the conduct of public affairs in a democracy, namely, that it is, as a general principle, in the public interest that disputes between State and citizen, and citizen and citizen, not be tried behind closed doors but so that the work of those appointed to decide, the evidence given by witnesses, and the decisions can be scrutinised by all who care to visit. Since not everyone can visit, citizens in a democracy depend to a substantial extent upon accurate and published reporting of what takes place. Restrictions on access to the courts and on the dissemination of events which take place in court ought, it seems to be generally thought, only be imposed if it is necessary to do so for the proper administration of justice... In an open and truly democratic society, the right of various forms of the media (that is, the media as a means of communication of the issues, parties and the hearing) to be present and publish is generally regarded as being in the public interest, so long as the reports are accurate and do not misrepresent, by omission or unbalanced selection, the evidence and its effect. The right to report is seen as an adjunct to the right to attend.⁹⁸⁰

Whilst free access to law ushered in possibilities and opportunities regarding access to the law, the broad advances in technology, and the absence of legal restrictions upon law reporting on the internet,⁹⁸¹ have made the limits to the open court rule apparent. In that context, the comments of Hartigan J, above seem out of touch, since they were made at a time when online law reporting was still at its infancy and when the romantic notions of openness and transparency were persisting in the absence of online risks to privacy and other unintended consequences arising from the internet.

The propositions outlined in this thesis do not suggest restrictions regarding access by the media to law reports. Indeed, the media ought to enjoy uninhibited access to court proceedings and be able to provide details of court proceedings to inform the public. The public should be able to express opinions of court proceedings *vis-a-vis* the media, as this is not only part of the principle of open justice but also part of an open and healthy democracy.⁹⁸²

⁹⁸⁰ *Herald & Weekly Times Ltd v Medical Practitioners Board (Vic)* [1999] 1 VR 267, per Hedigan J at 278.

⁹⁸¹ See Chapters 4 and 5.

⁹⁸² *R v Felixstowe Justices; Ex parte Leigh* (1987) QB 582; [1987] 1 All ER 551; [1987] 2 WLR 380; *Herald & Weekly Times Ltd v Medical Practitioners Board (Vic)* [1999] 1 VR 267; *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [1999] 3 VR 231, per Mandie J at 248.

As discussed, in the absence of practical powers of the courts,⁹⁸³ and due to the existing inherent powers of superior courts and the implied powers of inferior courts,⁹⁸⁴ in the restricted publication of court reports (obtained from open courts) outside the courts (by print media or other publishers and or institutions) privacy policies must be implemented to not only protect the public's right to privacy, but also protect the right of access by the media, in order to maintain the principle of open justice.

THE OPEN COURT RULE IS NOT ABSOLUTE

As discussed in Chapter 2, this thesis differentiates between the principle of open justice and the open court rule. This is predominately because the principle of open justice is defined as a principal and not a "freestanding right".⁹⁸⁵ The principle is able to provide guidance to the court, when the open court rule should be restrained in favour of other competing interests.⁹⁸⁶ To that end and within that frame of thinking, while the principle in its core values may be absolutely conclusive, the open court rule is not.⁹⁸⁷ The exceptions to publicity of trial proceedings which have been recognised in common law have long been around to heed the pressures of public demand for privacy, even in a democratic system of government comprising of an open court system.⁹⁸⁸

The open court rule may require adjustments and further amendments to better appreciate the technological advances. These advances are particularly relevant when

⁹⁸³ See Chapter 5, regarding the analysis of *R v Perish*; *R v Lawton*; *R v Perish* [2011] NSWSC 1101. See also, articles by the print media regarding the vast nature of the internet: Paul Bibby, 'Judge's order to remove net articles on Ibrahim futile' (2012) *The Sydney Morning Herald* <<http://m.smh.com.au/technology/technology-news/judges--order-to-remove-net-articles-on-ibrahim-futile-20120613-209hz.html>>; 'The right to know versus the right to withdraw', (2012) *The Sydney Morning Herald* <<http://m.smh.com.au/national/the-right-to-know-versus-the-right-to-withdraw-20120626-210fe.html>>.

⁹⁸⁴ *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, see comments by Mahoney JA and McHugh JJ at 471-477.

⁹⁸⁵ *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* (2005) 62 NSWLR 512, at 29.

⁹⁸⁶ See detailed discussion in Chapter 4.

⁹⁸⁷ *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334, per Gleeson CJ at 56, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Hogan v Hinch* [2011] HCA 4.

⁹⁸⁸ See detailed discussion and analysis in Chapter 2, particularly the section on the exceptions to publicity.

law reporters, both court and non-court sanctioned,⁹⁸⁹ are publishing and disseminating court verified personal information on the internet.

In *John Fairfax Group v Local Court of New South Wales*, Kirby J, remarked:

If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case.⁹⁹⁰

Kirby J's remark was taken even further in *R v Lodhi*,⁹⁹¹ when McClellan J, commented⁹⁹² that the common law would, in appropriate circumstances, protect the identity of informers and the interests of national security.

Whilst the open court rule, might, at first, be confused with the principle of open justice, courts have recognised the distinction by stating that implied freedom of speech or communication does not extend to the principle of open justice. The principle was designed for the purposes of administering justice, rather than being used to express other implied rights.⁹⁹³ This is so, even though proponents of increased openness⁹⁹⁴ argue that because of the open court rule's characteristic of sitting in public,⁹⁹⁵ privacy measures cannot and should not be implemented, as they might make the courts secretive⁹⁹⁶ and as such undermine public trust in the judiciary, where the separation of powers doctrine embedded in the Australian Constitution demand judicial

⁹⁸⁹ Both main commercial media and non-commercial and in the case of AustLII, charitable organisations are involved in the publication of law reports.

⁹⁹⁰ *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, per Kirby P at 141.

⁹⁹¹ *R v Lodhi* [2006] NSWCCA 101; (2006) 65 NSWLR 573.

⁹⁹² *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, per Kirby P at 141.

⁹⁹³ *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450, per Diplock LJ.

⁹⁹⁴ *Hogan v Hinch* [2011] HCA 4, see commentary regarding the naming of sex offenders. For a broad understanding of the media openness perspective see; *Australian Press Council*, <<http://www.presscouncil.org.au/about/>>.

⁹⁹⁵ *Daubney v Cooper* [1829] EngR 48; (1829) 10 B & C 237, at 240; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Scott v Scott* [1913] AC 417; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

⁹⁹⁶ Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89(3) *The Yale Law Journal* 421, privacy and secrecy discussion on pp 421 and 422; Owen Bowcott, 'Privacy law should be made by MPs, not judges, says David Cameron' (2011) *The Guardian* <<http://www.guardian.co.uk/media/2011/apr/21/cameron-superinjunctions-parliament-should-decide-law?INTCMP=SRCH>>.

impartiality⁹⁹⁷. Furthermore, that the underlying theme operating the open court rule is driven by subjecting the court proceedings to public scrutiny⁹⁹⁸ and that scrutiny will somehow diminish with stronger privacy measures adopted by the courts.⁹⁹⁹

Furthermore, due to the longstanding relationship between privacy and the open court discussed previously,¹⁰⁰⁰ the formal recognition by the courts of a cause of action in breach of privacy may not legally be necessary. It is on that basis that this thesis puts forward that hypothesis, that we might be able to suggest practical privacy protection through law reporting.¹⁰⁰¹ This suggestion is based on the legal compatibility of the open court rule and privacy values; whereby technology should not impede or undermine that symbiosis. Technology should not be allowed to obfuscate the practical relationship which once existed between privacy and the open court rule. These aims may be achieved, and privacy perspective implemented, with the introduction of privacy measures, by way of technological means.

Additionally, the extraterritoriality of the internet, as a medium of information transformation, should not be overlooked. This has infinitely compounded the privacy problems raised in this thesis.¹⁰⁰² The jurisdictional boundaries of where an offence is constituted, or what laws applies, are blurred, and internet based practices of freedom of speech are different from jurisdiction to jurisdiction. Thus, what is considered as illegal in relation to the publication of certain material on the internet in one jurisdiction, may be perfectly normal in others.¹⁰⁰³

The open court rule requires further strengthening of its privacy values. This may be achieved by implementing Prior to the Event measures, which take into account the

⁹⁹⁷ *Forge v Australian Securities and Investments Commission* [2006] HCA; (2006) 228 CLR 45, per Gummow, Hayne and Crennan JJ at 76 [64], 81 [78]; [2006] HCA 44.

⁹⁹⁸ *Ibid*, *Russell v Russell*, per Gibbs J at 520.

⁹⁹⁹ Ryan Inez, 'Access to Court Documents' (2006) 18(3) *Australian Press Council*.

¹⁰⁰⁰ See Chapter 4, 'Practical Obscurity'.

¹⁰⁰¹ See Chapter 8.

¹⁰⁰² Megan Richardson and Richard Garnett, 'Perils of Publishing on the Internet - Broader Implication of *Dow Jones v. Gutnik*' (2004) 13(1) *Griffith Law Review* 74, 75.

¹⁰⁰³ *Ibid*, 81.

unique characteristic of the internet. These policies as proposed in Chapter 8, are internet-based measures, with the aim of tackling sensitive areas where breaches of privacy may occur.

The problem is compounded and amplified, because as discussed previously, data originating from courts is verified data.¹⁰⁰⁴ Data originating from a court registry is not and should not be considered as ordinary information. Information published in law reports is almost certainly verified by the particular court registry prior to publication. Anyone gaining access to law reports would place tremendous value on its authenticity and reliability (even to verify the correctness of existing data on individuals). The thesis observes that by virtue of this transition to mass digital publication, society is now placed at a crossroad. Whether to continue treating digital law reports as paper reports and the internet as a harmless notice board, or to treat the internet with the caution and respect that it deserves.

It is argued that a shift in judicial thinking is desirable, with ample consideration of the way in which information proliferates in cyberspace being a strong requisite for any such shift. Some of that shift in judicial thinking has already been brought on because the internet has transformed the traditional applicability of laws where an offence occurs.¹⁰⁰⁵ Once data is proliferated on the internet, there is no control thereafter, there is no regulation, and hence the lack of effectiveness of Following the Event regulatory measures. That which is made available on the internet has to be treated with the internet in mind and be made impervious to privacy breaches - Prior to the Event.

Any development of an overriding policy with the internet in mind should serve to maintain the principle of open justice and the rule of law. Technology should not act as a distraction to what the law was designed to do. The overriding purpose of the law, in

¹⁰⁰⁴ See Chapter 5, 'Courts Embrace Technology'.

¹⁰⁰⁵ *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575.

its application to both civil and criminal proceedings, is to facilitate the just, quick and cheap resolution of the substantive issues in the dispute.¹⁰⁰⁶

In the next section, the essential differences between privacy and secrecy are analysed and discussed, addressing common misconceptions relating to restrictions on the operation of the open court rule.

PRIVACY V SECRECY

One of the most important reasons behind the argument this thesis poses, that the open court rule is compatible with privacy values, is because privacy is not the same as secrecy. Whilst, it may successfully be argued that secrecy is incompatible with the open court rule, privacy is not.¹⁰⁰⁷ Traditionally, in order to provide accountability and to prevent self-interested members of the judiciary from abusing their power, the open court rule was considered necessary in order to allow the public to monitor the activities of the courts. The open court rule was critical to the healthy functioning of the principle of open justice, as it seemingly involved the public in the decision making process of judges and ensured a fair and just outcome for court proceedings.

The problem is, of course, the common misconception that arises from associating privacy and secrecy. Privacy and secrecy are connected ideas,¹⁰⁰⁸ in that privacy is also associated with secrecy, anonymity, and solitude.¹⁰⁰⁹ In the general sense, privacy is a much larger concept than the singular notion that secrecy or secret behaviour represents. Privacy is associated with a sense of 'self' and 'existence', as independent and free beings.¹⁰¹⁰ Additionally, privacy is considered a human right, and it involves amongst

¹⁰⁰⁶ See for example, *Civil Procedure Act 2005* (NSW) s 56 - Overriding purpose.

¹⁰⁰⁷ Chantal Bernier, 'The adjudicative process in the Internet age: A new equation for privacy and openness (Assistant Privacy Commissioner of Canada)' (Speech delivered at the Canadian Institute for the Administration of Justice National Roundtable, Montreal, Quebec, 28 May 2010) <http://www.priv.gc.ca/media/sp-d/2010/sp-d_20100528_cb_e.asp#_ftn3>.

¹⁰⁰⁸ Carl J. Friedrich, 'Secrecy Versus Privacy: The Democratic Dilemma, in Privacy' (1971) 105 *J. Roland Pennock & John W. Chapman eds*, cited from p 280 of; William A. Edmundson and Martin P. Golding, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2008).

¹⁰⁰⁹ Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89(3) *The Yale Law Journal* 421, 421.

¹⁰¹⁰ See Chapter 6, discussion and analysis of 'privacy values'.

other things, the right to exercise control over one's own personal information, the main area of focus in this thesis.¹⁰¹¹

A speech given by Canada's assistant privacy commissioner¹⁰¹² regarding the notions of privacy and secrecy included some remarkable statements about privacy and the open court rule attributed to Jeremy Bentham:

In the darkness of secrecy, sinister interest and evil in every shape have full swing... Publicity is the very soul of justice...It keeps the judge himself, while trying, under trial.¹⁰¹³

Lord Justice Atkinson, the Irish bencher and British law lord, also said:

[I]n public trial is to found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means of winning for it confidence and respect.¹⁰¹⁴

Canadian Supreme Court Judge, Justice Morris Fish, said:

The administration of justice thrives on exposure to light and withers under a cloud of secrecy.¹⁰¹⁵

From earlier discussions, the principle of open justice has always been maintained by a delicate yet symbiotic balance between the open court rule (where trials have been conducted in public and reported in public) and privacy protection (due to the practical obscurity afforded by paper law reports). Because of that delicate balance, the principle of open justice was also able to contain other important attributes such as:

¹⁰¹¹ Ibid.

¹⁰¹² Chantal Bernier, 'The adjudicative process in the Internet age: A new equation for privacy and openness (Assistant Privacy Commissioner of Canada)' (Speech delivered at the Canadian Institute for the Administration of Justice National Roundtable, Montreal, Quebec, 28 May 2010) <http://www.priv.gc.ca/media/sp-d/2010/sp-d_20100528_cb_e.asp#_ftn3>.

¹⁰¹³ Ibid, *The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring, (William Tait, 1838-1843) vol 4.

¹⁰¹⁴ *Scott v Scott* [1913] AC 417, 463.

¹⁰¹⁵ *Toronto Star Newspapers Ltd. v Ontario* [2005] 2 S.C.R 188, 2005 SCC 41.

accountability by the judiciary, legitimacy of the legal process, and public trust and confidence in the legal system as a whole.¹⁰¹⁶

Transparency and accountability are inherently linked to openness, while the closed nature of secrecy in courts is seen to promote a lack of judicial accountability. The main point of contention herein of course is expressing privacy through the open court rule. That is, the point at which judicial operations continue being open in the context of electronic law reporting, where all the necessary elements pertaining to court proceedings are published, while regulating the flow of personal information to the world at large.¹⁰¹⁷

As previously discussed, privacy and the open court rule are historically complementary. As such, if privacy is not the same as 'secrecy', then it cannot be opposed to the principle of open justice and as such, may be expressed together with the open court rule, in order to promote the principle of open justice.¹⁰¹⁸ In other words, privacy measures may be compatible with the open court rule and may in fact strengthen the principle of open justice by promoting confidence in the justice system. There is to date, no evidence (either on a doctoral level or any other study) to suggest that implementing practical privacy measures in the open court rule, in any way, undermines open justice.¹⁰¹⁹

The next chapter discusses some reformist models and regulatory measures unique to this thesis. Almost all of which are Prior to the Event regulatory measures, designed specifically to be integrated within the mainframe of the open court rule and designed specifically to provide real practical privacy protection to the public.

¹⁰¹⁶ Ibid, Chantal Bernier, The adjudicative process in the Internet age: A new equation for privacy and openness. See also, Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 14(7) *Judicial Officers Bulletin* 49.

¹⁰¹⁷ Notes, 'Mechanisms of Secrecy' (2008) 121(6) *Harvard Law Review* 1556, 1557.

¹⁰¹⁸ The open justice principle encapsulates some fundamental objectives that may be reconciled with the protection of privacy: accountability of the judiciary, legitimacy of the process; and public confidence in the justice system, see further discussion in Chapters 2 and 3, also see, Murray Gleeson, 'Judicial Accountability' (1995) 2(2) *The Judicial Review* 117; Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 14(7) *Judicial Officers Bulletin* 49.

¹⁰¹⁹ See Chapter 8, discussion on some proposed privacy measures to be incorporated into the workings of the court registry.

CONCLUSION

The internet and indeed in the broader sense, the computerisation of the law, has radically reduced impediments to access to law reports which allowed for the successful implementation of free access to law. The rapid growth of electronic publishing and dissemination of judicial decisions on the internet has brought with it challenges relating to the protection of individual privacy. Courts have been reluctant to accommodate privacy concerns where they could be seen to restrict public information of what goes on in our courts, unless it falls well within one of the established exceptions to the open court rule.¹⁰²⁰ Other jurisdictions, such as the European Commission, have expressed concern over the privacy implications of being able to conduct full text searches over the internet.¹⁰²¹ Specifically, that the publication of case law in electronic form on the internet, which allows for a wide search criteria on court cases, could lead to the creation of information files on individuals.

Conventional paper publishing made possible the recording of judicial decisions and therefore became an important device underpinning the operation of common law legal systems. Electronic publication of judgments and more recently, the free publication of decisions over the internet, has altered the way in which case law can be and is accessed, and has led to significant changes in the way the legal system itself operates.¹⁰²² The computerisation of the law has dramatically increased the efficiency of the law and the way in which cases are disposed of in both substantive and administrative proceedings.

Whilst the presumption in favour of openness must be respected, it is difficult to maintain such a presumption in light of changes in technology. This is compounded by the fact that the current practice of law reporting, as conducted by court registries and

¹⁰²⁰ *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *McPherson v McPherson* [1936] AC 177; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

¹⁰²¹ European Commission, Article 29 - Data Protection Working Party, Working Document: Privacy on the Internet - An Integrated EU Approach to On-Line Data Protection (2000).

¹⁰²² Changes are reflected in the operation of the law. The 'just, quick and cheap' motto underpins the modern methods of court operation most Australian jurisdictions. See for example, s 56 of the *Civil Procedure Act 2005* (NSW).

commercial and non-commercial publishers on the internet, may be in breach of the APPs¹⁰²³ pursuant to the *Commonwealth Privacy Act*.

This chapter discussed and analysed the functionality of the open court rule with a privacy perspective, and the need to limit the disclosure of personal information on the internet. The chapter also discussed the difficulties of maintaining the open court rule in a digital environment, when doing so would undermine the administration of justice in light of privacy concerns. Internet-based law reporting was also analysed against the backdrop of fundamental issues, such as the broad judicial recognition that unregulated and unrestrained law reporting on the internet has had negative consequences. These include, but are not limited to, undermining fair trial in open court proceedings, tainted juries and the recognition of lack of control over the content of law reports following publication and dissemination on the internet. A better understanding and appreciation of the practical steps necessary to implement a meaningful change in the system starts by recognising the inability to exercise control over anything after it is released on the internet. Therefore, it is suggested that the administration and implementation of Prior to the Event policies, will better regulate law reporting and provide privacy protection for litigants.

¹⁰²³ See Appendix B.

CHAPTER 8

MODELS FOR CHANGE

INTRODUCTION

A range of difficulties have been highlighted with respect to digital law reporting, with few viable solutions to address the privacy fears.¹⁰²⁴ The lack of impact and effectiveness of such measures is evidenced by the fact that almost all are Following the Event regulatory measures. This thesis diverges from this approach and instead argues that privacy should be recognised as an exception to the open court rule, allowing for the restriction on the publication and dissemination of private and sensitive information prior to publication and dissemination (Prior to the Event). Until there is such legal recognition, this thesis proposes practical privacy measures aimed at regulating digital law reporting.

It is difficult (if not impossible) to control the flow of personal information following its publication and dissemination though law reporting on the internet. With respect to law reporting, the core of the problem is the tension between the modern open court rule and privacy, which culminated in forming the underlying principles of free access to law and FALM.¹⁰²⁵ As a result, it is important to acknowledge that the modern concept of the open court rule is challenged, as it advocates the publication of law reports without any regulatory or privacy measures in place, both as part of the court's own law reporting process and through other law reporters. This thesis argues that expressing privacy measures within the constraints of the existing open court rule is not only possible, but achievable. This may be achieved, even prior to any general recognition of tort of breach of privacy at common law. Implementing specific practical privacy protection measures into the open court rule will promote the principle of open justice by providing surety to the public seeking access to justice. In order to have any

¹⁰²⁴ See Chapters 4 and 5, particularly general discussions relating to the lack of privacy protection flowing from common law exceptions and statutory exceptions to the open court rule.

¹⁰²⁵ See Chapter 3, 'The Legal Information Institute (LII) & The Free Access to Law Movement (FALM)', Appendix F and G.

meaningful and practical impacts this thesis attempts to demonstrate that any such policy must be visceral in its nature and implementation. Any privacy policy to be adopted by the court registry and publications must be fundamentally integrated into the open court rule.

Digital measures in conjunction with the proposed measures in relation to privacy are designed to address the limitations of the open court rule, to ensure a fair trial and maintenance of the principle of open justice. It is argued that the principle of open justice ought to operate for the purpose and the spirit for which it was intended. The key lies with administering and implementing Prior to the Event policies to better regulate law reporting and provide privacy protection for parties and non-parties to proceedings.

One of the intended aims of this thesis is to demonstrate that the open court rule is compatible with privacy values. As discussed in Chapter 7, there is no reason, according to that hypothesis, no technical or legal impediment, which dictates that technology impedes the relationship between the two. It is argued that there is no demonstrable conflict between privacy protection and the open court rule. This thesis attempts to demonstrate that the relationship between the two has now been upset with the arrival of free access to law, and advancements in technology, specifically in law reporting on the internet.

This chapter highlights two important issues. Firstly, the burden and responsibility of providing privacy for parties to proceedings lies with the courts. Secondly, the chapter proposes models for implementation into the open court rule designed to be effective on a Prior to the Event basis - for maximising privacy protection. This includes a two-tier privacy protection system entitled Privacy Protection Standards (PPS)¹⁰²⁶ to be adopted by the courts through, (1) a uniform anonymisation methodology through automation by a machine learning method; and (2) anonymisation of identifying personal facts or stories. The second proposed model involves implementing a restricted online system (ROS) based on a restriction classification system. The third proposed model involves

¹⁰²⁶ See Appendix A.

the use of robot exclusion standard (RES) in technology implemented by courts and law reporters, to restrict and prevent the indexing of web pages by unauthorised EIRS.

RESPONSIBILITIES OF THE COURTS

Until now, responsibility for publication and dissemination of law reports lay predominately with the publishers.¹⁰²⁷ The courts produced juridical decisions relying (on a good faith basis) on law reporters to publish and disseminate the reports on the internet. Whilst this model has made law reports available to legal publishers and the public, the model has not been in compliance with local privacy laws, as was specifically declared and stated by FALM group of experts which included the European Union.¹⁰²⁸ As a direct result, it is impossible to ensure uniformity of privacy protection with reports from the various publishers in light of the increased demands placed on the legal industry.

This thesis argues that the onus of responsibility ought to lie with the courts to ensure that judicial decisions earmarked for publication and dissemination on the internet have appropriate privacy protections implemented in them. This may be achieved by the courts producing the official de-personalised copy of each law report on their website as the primary source. This would mean that the courts themselves become the primary publishers. Alternatively, the courts can simply provide the de-personalised reports to official court sanctioned publishers for dissemination and publication. This will ensure that the open court rule is being adhered to, while ensuring adequate privacy protection for litigants, witnesses and other parties.

It is suggested that policies specifically designed for privacy protection ought to be implemented by court registries. There are two main differences in this approach compared to the current methods. Firstly, the current system is based on an anonymisation policy which is not specifically designed for privacy protection, although

¹⁰²⁷ See Chapters 3 and 4.

¹⁰²⁸ See Appendix F and Appendix G, GP 11.

it has the practical effect of privacy protection.¹⁰²⁹ Such policies are designed to prevent identity theft which, as discussed in the previous chapter, normally arises when the individual's privacy is breached. Secondly, the current approach is entirely discretionary and triggered by way of a court's inherent powers to make an anonymisation order.¹⁰³⁰ The model proposed by this thesis is first, specifically designed for privacy protection within the open court rule¹⁰³¹ and second, compulsory or uniformly applicable to all judicial decisions. The traditional methods of anonymising names are also becoming obsolete as technology in this area evolves and becomes more sophisticated in the ability to connect other personal information to the identity of the individual.¹⁰³²

This model will also alleviate the need for extraordinary resources that would be required, and indeed expected, from court-sanctioned law reporters. This is because no other organisation is better placed than the courts themselves to assess the law report prior to publication for the regulation of personal information.¹⁰³³ In other words, the courts are best placed to implement Prior to the Event regulatory measures through digital methods. This issue is further discussed in this chapter.

IMPLEMENTING PRIVACY IN THE OPEN COURT RULE

As earlier discussed, there are two pressing issues which necessitate the implementation of immediate privacy measures into the open court rule in the context of law reporting on the internet.

The first is that the law has failed to keep pace with rapid changes in technology, which is having a tremendous impact on the open court rule and law reporting in general. In

¹⁰²⁹ See, Supreme Court of NSW - Identity theft prevention and anonymisation policy 2010 (NSW).

¹⁰³⁰ *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, per McHugh J at 479. See also, detailed discussion in Chapter 4.

¹⁰³¹ See Chapter 2.

¹⁰³² The research highlights the findings of a Massachusetts Institute of Technology (MIT) study conducted in early 2001 demonstrating that 87% of the entire population of the United States could easily be identified with the combination of two or more of three pieces of personal information: their post code, gender and/or age... See Latanya Sweeney, *Computational Disclosure Control, A Primer on Data Privacy Protection* (Ph.D. Thesis, MIT, 2001) cited from fn 24 in; Farzaneh Kazemi, 'An Anonymizable Entity Finder in Judicial Decisions (Unpublished)' (Ph.D., Université de Montréal, 2008).

¹⁰³³ See Chapter 6, discussion on 'Prior to the Event' considerations.

this regard, this thesis suggests technological and policy measures by the courts themselves might address the privacy concerns raised, and do this relatively successfully - without having to anticipate the development and recognition of a tort of privacy protection by the courts. The second issue relates to the immediate negative impact which law reporting is having on the open court rule and the principle of open justice.

In light of these issues, this thesis proposes the immediate introduction and implementation of privacy policy measures into the open court rule. These include: judicial self review, where judges themselves review their written judgments (prior to publication by the court) to ensure that unnecessary personal information is not being disclosed in judgments, and privacy policy training. The training program includes training court staff on the impacts (both negative and positive) of publication and dissemination of law reports on the internet, and the serious nature of the internet in the way it deals with data. Additional measures include, providing applicants with copies of written directives of privacy policies, to protect their privacy in light of law reporting on the internet, and any avenues of recourse if they wish to seek a complete suppression and or non-publication order on valid grounds.¹⁰³⁴ This includes guidelines on steps which an applicant may take to withhold personal information from the proceedings (prior to or during the course of proceedings).

Additionally, proposed technological measures should be introduced to implement uniform anonymisation of judicial decisions.¹⁰³⁵ The privacy measures proposed by this thesis are designed to work symbiotically with the open court rule, in that they may be approved, adopted and implemented by the courts themselves. This would treat the problem at its source (as it were), with the content of law reports examined prior to their

¹⁰³⁴ See Chapters 3 and 4, circumstances where minors were involved; those complaining of sexual offences and the mentally incapacitated; where the disclosure of the identity of an individual involved a national security issue; where a commercially sensitive issue was concerned, or required that the confidentiality of certain materials be preserved; and where it was required for the administration of justice, secret technical processes, or a public hearing where evidence of the secret process could "cause an entire destruction of the whole matter in dispute", or where an publication might undermine the administration of justice.

¹⁰³⁵ See Appendix A, 'Privacy Procedure Standards' (PPS).

publication by courts. This also alleviates the need for reliance on law reporters outside the courts to act in good faith (in the context of privacy), or to devise or enforce privacy measures of their own.¹⁰³⁶ It also removes any liability issues which might fall on reporters and popular media which inadvertently publish personal information.

The proposed policy ensures law reports are always publishable, removing any burden from the courts in having to deal with each law report on a case-by-case-basis.¹⁰³⁷ It also removes the privacy protection liability, because the appropriate measures have been implemented for privacy protection Prior to the Event. Most importantly, such a system is able to be expressed through the open court rule in a practical sense.

As discussed throughout this thesis, the open court rule is integral to the smooth operation of the principle of open justice, due to the way it interacts with other elements within the principle. It is therefore unreasonable to expect any reduction in the volume of publication of law reports, based on the fact that one of those elements (in our case privacy protection) is not as valued as other public interests. The judicial system of government requires the reporting of the law regardless of other interests which may be competing with the open court rule.¹⁰³⁸ As such there is no viable reason why the public interest, to be kept informed of court proceedings, should be undermined in any way. It is argued therefore, that the removal from law judgments of personal information likely to bring harm to the individual, or which information has the potential to prejudice a fair trial, prior to the reporting of the case, would not prevent the public from knowing the relevant facts, or the obiter or ratio of the case.

Additionally, there may be circumstances where judicial exercise of inherent or implied powers warrants that the privacy measures proposed in this thesis not be applied at all, because no other competing interest outweighs the public interest in the open court

¹⁰³⁶ Although, some practical steps have been taken, which this thesis proposes could be implemented on a uniform basis across all online law reporting. See below, 'regulatory measures by online publishers'.

¹⁰³⁷ For instance, when deciding if a suppression or non-publication order should apply, based on numerous party applications.

¹⁰³⁸ Lord David Neuberger, 'Law Reporting and the Doctrine of Precedent: The Past the Present and the Future' (2007) *Halsbury's Laws of England Centenary Essays*.

rule.¹⁰³⁹ Generally, the policy would not apply in cases where the private facts are directly relevant to the administration of justice, and would otherwise not make sense to the public reading the law report. Online law reports should be read in a manner which is able to make rational sense from beginning to end.

PRIVACY PROTECTION STANDARDS: TWO TIER POLICY (MODEL I)

The first proposed policy incorporates detailed provisions regarding privacy protection in a two-tier process - termed in this thesis as Privacy Protection Standards (PPS).¹⁰⁴⁰ In addition to its own standards,¹⁰⁴¹ the system requires the courts to adopt the eight (8) principles of the OECD Guidelines on the protection of privacy and trans-border flows of personal data, which were instrumental in the development of the IPPs and NPPs in the *Commonwealth Privacy Act*.¹⁰⁴² These include: collection limitation, data quality, purpose specification, use limitation, security safeguards, openness, Individual participation, and accountability.¹⁰⁴³

The first part of PPS involves a uniform anonymisation method, which would apply to names, dates of birth, financial account numbers and so forth. This would be applied across all law reports in all jurisdictions in Australia¹⁰⁴⁴. Second, the policy involves redacting any information the disclosure of which on the internet or otherwise, would lead to the identification of the litigant or a third party, and any further information which, if published, might breach the APPs of the Federal *Privacy Act*.¹⁰⁴⁵ A court ought to collect information from those seeking access to justice pursuant to and with the

¹⁰³⁹ See for instance, the discussion in Chapters 4 & 5 for common law and statutory exceptions to the open court rule, and where the proceedings involve a persons of public interest, e.g. politicians, celebrities, a Minister of the Church and many other such example, where law reporting privacy measures ought not apply.

¹⁰⁴⁰ See Appendix A, 'Privacy Procedure Standards (PPS)'.

¹⁰⁴¹ See Appendix A.

¹⁰⁴² 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980) <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>; 'Privacy Online: OECD Guidance on Policy and Practice' (Pt Organisation for Economic Cooperation and Development) (2003) *OECD* 390.

¹⁰⁴³ *Ibid.*

¹⁰⁴⁴ See Appendix D, 'Hierarchy of Australian Courts'.

¹⁰⁴⁵ See Appendix B, this is based on the premise that court registries are public registries and as such should be regulated by the provisions of the APPs.

knowledge and consent of the individual.¹⁰⁴⁶ Courts should specify to the applicant the purpose for which the personal information is being collected. Such information should be kept accurate, complete and up to date.¹⁰⁴⁷

PPS is essentially an automated personal information regulator designed to provide privacy protection Following the Event. PPS ensures that the personal information collected by courts and incorporated into law reports does not unnecessarily end up being published and disseminated on the internet. The personal information covered by PPS is categorised into its first tier (Primary, Secondary, and Tertiary Data, Quaternary Data)¹⁰⁴⁸ and second tier (Quinary Data).¹⁰⁴⁹ The system is designed to put in place a mechanism by which to restrict the flow of personal information pertaining to the individual through publication and dissemination on the internet - unless specifically authorised by the individual¹⁰⁵⁰ or by law.¹⁰⁵¹

A court registry should ensure that the public provision of personal information to the courts for the administration of justice does not result in privacy breaches, for example, as through unauthorised access, and or disclosure.¹⁰⁵² A court registry ought to ensure that full and frank disclosure is made to the individual at the time of collection of the personal information regarding its purpose and use of that information.¹⁰⁵³ Additionally,

¹⁰⁴⁶ 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980) <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>, see 'Collection Limitation Principle'.

¹⁰⁴⁷ This is in line with APPs, see Appendix B; and OECD guidelines and 'Data Quality Principles', see Appendix C.

¹⁰⁴⁸ See Appendix A, PPS, 'Primary Data' defined as names, dates of birth, health information, bank account numbers and so forth.

¹⁰⁴⁹ Ibid, 'Quaternary Data': other factual information, which might lead to the identification of the individual; and 'Quinary Data': factual stories containing private facts. The second tier must be granted by court leave before being redacted by PPS automation.

¹⁰⁵⁰ Here a court registry might obtain the authority of the individual at the time of filing to ensure that the individual consents to the disclosure of the personal information prior to the event.

¹⁰⁵¹ Ibid, OECD Guidelines, 'Use Limitation Principle'.

¹⁰⁵² Ibid, 'Security Safeguards Principle'.

¹⁰⁵³ Ibid, 'Openness Principle'.

a court must notify the individual of the disclosure of the information to any other party for publication,¹⁰⁵⁴ at any time prior to, during the proceedings or thereafter.¹⁰⁵⁵

A court ought to provide the means to the individual to be able to contact the third party at any time during the proceedings, in order to ascertain whether the personal information is in the possession of the third party, and to request that personal information and or to have it destroyed.¹⁰⁵⁶ A court should be held accountable for the way it handles the personal information and for not complying with the above, especially where there is a privacy breach directly linked to that non-compliance.¹⁰⁵⁷

As discussed in Chapter 7, this thesis argues that the open court rule cannot and ought not be justified to exempt law reports generated by a court registry from the privacy protection provisions of State and Federal Privacy laws.¹⁰⁵⁸ It is almost impossible to regulate law reports, or indeed any information in Following the Event breaches on the internet. It is also argued that the principle of open justice is absolutely better served when privacy protection is implemented in conjunction with the open court rule.¹⁰⁵⁹

Accordingly, the initial steps of PPS ensure that the proposed uniform anonymisation process is completely compatible with the open court rule. The type of information aimed at being withheld from the public and the world at large, serves no purpose other than to identify the individual and to ultimately attract harm from online privacy breaches. Additionally, the types of harm discussed in earlier chapters, have been exacerbated by advancements in technology, with the additional potential for abuse of the judicial process. The availability of this type of information also leads to identity

¹⁰⁵⁴ Both commercial or non-commercial law reporters engaged in the publication and dissemination of law reports on the internet.

¹⁰⁵⁵ Ibid.

¹⁰⁵⁶ Ibid, OECD Guidelines, 'Individual Participation Principle'.

¹⁰⁵⁷ Ibid, 'Accountability Principle'.

¹⁰⁵⁸ See Chapter 7, court registries are large repositories of public personal information which means that the current unregulated practice of law reporting by the courts (and as a result) court authorised law reports on the internet, is in breach of the provisions of local privacy laws. Specifically the APPs in the *Federal Privacy Act*, see Appendix A.

¹⁰⁵⁹ See discussions in Chapters 2 and 6.

theft.¹⁰⁶⁰ Otherwise, unless directed by a judge, there is no single qualified reason why personal information is made available on the internet.

The second tier is also designed to prevent the publication of personal information, but goes further in redacting information which is otherwise not relevant to the proceedings at hand and which might lead to identification. This step however, is unique and separate from any other policy, because it recognises the applicability of the privacy principles of the *Federal Privacy Act*¹⁰⁶¹ and (as part of its compliance with PPS) to all information handled by court registries. Additionally, this step recognises that stories associated with individuals which are not subject to proceedings, such as the trade and profession of a third party in a small town (e.g. a dentist in a small town where otherwise no other dental practice exists) poses privacy issues, and ought also to be redacted from any law report prior to publication. So, both steps of the policy have to be implemented to ensure effective privacy protection on the internet. It would also be up to the presiding judge and counsel to identify and apply privacy protection to such issues during the proceedings.

The way in which the actual private information is first identified and standardised in the methods to secure the document are discussed below.

Dealing with the rationale of a case involves ensuring that the two tier approach is correctly implemented. At the same time the law report must still be understandable when read, and must make logical sense. It is important that the court is careful to ensure that specific facts of the case are subject to publication, while other facts which have little or no relevance or bearing on the case are redacted. For example, a seemingly harmless personal fact about a witness might be his profession or his field of employment and or trade. However, that information takes on a different light when there are few or no others in that profession located in a specific geographic location.¹⁰⁶²

¹⁰⁶⁰ See Chapter 5.

¹⁰⁶¹ See Appendix A.

¹⁰⁶² Ibid, 'Quinary Data'. Hypothetical example, 'the local dentist' in Wagga Wagga, NSW, whilst cooperating with the police in identifying the figures connected with shooting of underworld boss 'Joe

To that end, such information is effortlessly utilised to identify the individual (e.g. the only dentist in Woollahra is the chief suspect of the police).

The privacy test is applied to each judicial decision earmarked for publication. The factual data when read should not lead to the release of the identity of the individual. This would only occur when Primary to Quaternary data is identified in the decision.¹⁰⁶³ Where a court or tribunal decides to leave fact-based information in the law report, it should ensure that in doing so it does not lead to the identity of the person in question being revealed. Generally however, the two tier system should be effective in regulating the flow of personal information.

In relation to funding and resourcing for this model, it is beyond the scope of this thesis to discuss the financial aspects of implementing the PPS throughout the various applicable jurisdictions in Australia and its Territories. It is envisaged that courts would require grants and specific funding allocation, both for uptake of additional staff and upgrades to existing and new applicable technology.¹⁰⁶⁴ This would alleviate any additional burden on existing resources. Additionally, the deployment of the PPS automated system is specifically designed to ensure that FALM principles regarding compliance by courts with local privacy laws are desirable.¹⁰⁶⁵

Smith' was identified in the report. Such information, on the face of it, may seem harmless, but have the potential to pose serious privacy risks to the individual (in this case the dentist) where for instance, there is only one dentist in the town of Wagga Wagga. The identification of the person of interest becomes effortless, particularly in circumstances where such information is published and disseminated via law reports on the internet.

¹⁰⁶³ Ibid, 'Primary to Quaternary Data'. Examples of Quaternary data include: gender and sexual orientation, race, ethnicity and national origin, district, jurisdiction and country of birth and residence, professional status and occupation; marital and family status, and religious beliefs, political affiliations and so forth.

¹⁰⁶⁴ See for example, budgetary figures of 2008–09, the High Court's funding was \$17.8 million rising to \$19.4 million in 2011–12. The 2013-14 Budget provides funding of \$20.4 million. In 2008–09, the Federal Court's funding was \$107.3 million and \$108.4 million in 2011–12 with little movement in the intervening years. [12] The 2013–14 Budget provides for funding of \$128.5 million. The funding for the Family Court was \$139.8 million in 2008–09 and \$164.1 million in 2010–11. The 2012–13 Budget provided funding of \$121.4 million. In 2008–09 funding for the Federal Magistrates Court, as it was then called, was \$80.6 million rising to \$95.9 million in 2010–11. The 2012–13 Budget made provision of \$101.4 million. For a complete list, see *Parliament of Australia: Federal Court Funding: Budget Review 2013–14 Index* <<http://www.aph.gov.au>>.

¹⁰⁶⁵ See Appendix F and Appendix G, GP 11.

TECHNICAL MEASURES: IMPLEMENTING MODEL I

By far the most challenging aspect of implementing model I would be to program its machine learning system to identify the type and category of data to be targeted by the system. In other words, setting up the system to de-personify or de-identify via an automated system. This is practically achievable, due to the large amounts of information generated by court registries on a daily basis. Accordingly, it would be possible to create computer generated software to detect personal information and to redact personal information from law reports primed for publication and dissemination on the internet.

This model is a relatively new approach, due to the automated nature of detection of personal information. That, in effect, is the factor which differentiates it from what is currently in place (to a limited extent) in other jurisdictions.¹⁰⁶⁶ As a result, the system is more practical than current measures, as it is able to cover much larger quantities of law reports more quickly and efficiently. This alleviates the need for backlogs in the registry, and is a practical method in line with the modern judicial motto of 'just, quick and cheap'.¹⁰⁶⁷

In implementing PPS into the database of a court registry, every document would need to be processed autonomously, while also redacted for personal information, prior to publication. The PPS data identification protocol is designed to scan each page to see whether any information falls within the three categories (covered under the two tier process of PPS) marked for anonymisation or redaction. The first category of personal data to be anonymised, entitled Primary Data (numbers),¹⁰⁶⁸ would include numbers and all information in address format; and Primary Data (Names and Other Information)¹⁰⁶⁹

¹⁰⁶⁶ See case management at *Federal Circuit Court of Australia*, <<http://www.federalcircuitcourt.gov.au/>> *The Migration Review Tribunal (the MRT) and the Refugee Review Tribunal (the RRT)* <<http://mrt-rrt.gov.au/default.aspx>>; *Family Court of Australia*, <<http://www.familycourt.gov.au/>>. See also NOME user guidelines below.

¹⁰⁶⁷ James J. Spigelman, 'Opening of Law Term: Just, Quick and Cheap - A Standard for Civil Justice' (2000) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_310100>.

¹⁰⁶⁸ See Appendix A, Privacy Procedure Standards (PPS), at 1.

¹⁰⁶⁹ *Ibid*, at 1.1.

would include information such as names, dates of birth, addresses, unique numbers (drivers licence numbers, bank account numbers, medical file numbers etc). The second category, entitled Secondary Data,¹⁰⁷⁰ would include information which is directly connected to the person, such as the names and other personal information of the persons or organisations the person is directly involved with. These include, the names of extended family members: parents, children, brothers and sisters, in-laws, grandparents, cousins and so forth.¹⁰⁷¹

The third category of personal information to be redacted, entitled Tertiary Data,¹⁰⁷² includes names of communities or geographic locations, names of accused or co-accused persons, expert witnesses and so forth.¹⁰⁷³

The fourth category of information to be redacted, entitled Quaternary Data,¹⁰⁷⁴ pertains to information which, if published, would bring harm to the innocent persons not directly involved in the proceedings, pertaining to third parties in the proceedings. This includes information relevant to race, ethnic and national origin, professional status and occupation, marital status, religious beliefs and political affiliations.

The fifth category of information, entitled Quinary Data,¹⁰⁷⁵ includes the private facts directly connected to the person of interest or a third party. Here a judge must exercise the court's inherent powers to balance this consideration with the open court rule, by asking how much information must be included in the law report to ensure that the public understands the decisions and the law. If the disclosure of the personal information serves no public interest purpose, then a judge may order the partial or complete redaction of the information.¹⁰⁷⁶ Court transcripts with such orders will have a special electronic tag, which would alert registry staff that the document would require

¹⁰⁷⁰ Ibid, at 2.

¹⁰⁷¹ Ibid.

¹⁰⁷² Ibid, at 3.

¹⁰⁷³ Ibid.

¹⁰⁷⁴ Ibid, at 3.1.

¹⁰⁷⁵ Ibid, at 4.

¹⁰⁷⁶ See also Chapter 7, 'Sentencing Remarks', regarding the proper protocol regarding judicial sentencing remarks, per Mullins J.

manual redaction. Once manual redaction takes place, the removal of the personal information must be confirmed by a judicial officer¹⁰⁷⁷ of the court, prior to its approval for publication and dissemination on the internet.

The automated steps involved in the process for anonymisation and or redaction would also include the use of technology in the form of a scripted program such as NOME.¹⁰⁷⁸ NOME was developed by the (then) University of Montreal's LexUM¹⁰⁷⁹ (Faculty of Law) and RALI (Department of Computer Science).¹⁰⁸⁰ The system automates the process of anonymising names in law reports, in compliance with legal bans on publication. The Canadian Legal Information Institute (CanLII) has been using the software effectively in that jurisdiction,¹⁰⁸¹ albeit on a limited basis.¹⁰⁸² A modified version of NOME is also used by the Federal Circuit Court of Australia (previously Federal Magistrate Court of Australia).

NOME was developed to simplify and help in the automation process of anonymisation of law reports. The system is currently in use based on compliance with legal bans on publication. However, in line with the spirit with which it was developed,¹⁰⁸³ this thesis proposes its adoption and implementation as part of PPS by integration into the open court rule. The implemented version of the software would be utilised uniformly and throughout all Australian jurisdictions.

¹⁰⁷⁷ See the duties allocated to a duty registrar of a court. Usually found in higher jurisdictions such as the *District Court of New South Wales* and the *Supreme Court of New South Wales*, <<http://www.lawlink.nsw.gov.au/sc>>.

¹⁰⁷⁸ 'NOME user guidelines', (Updated: November 7, 2005) https://lexum.com/nome/nomeMan_20051107.pdf.

¹⁰⁷⁹ Lexum is a software company that provides products and services to legal information users as well as various other organizations and companies that prepare, manage and publish large collections of documents. See, *Lexum*, <<http://www.lexum.com/en/about-us>>.

¹⁰⁸⁰ Ibid, 'NOME user guidelines', at 3.

¹⁰⁸¹ *Cornell Legal Information Institute LII (Cornell)*, *Cornell University Law School* <<http://www.law.cornell.edu/>>.

¹⁰⁸² The editorial team at CanLII, were the first to adopt the NOME anonymisation system. Although, they apply it to only a limited number of cases and mostly to specific cases ordered by the courts. Ibid, 'NOME user guidelines'.

¹⁰⁸³ The Lexum/CanLII team who developed NOME, did so with the main objective with the intention making the software available to any court, tribunal, bar association or similar decisions issuing institutions, which are in the best position to perform this type of editorial work since they have better knowledge of applicable bans on publication. See *ibid*.

The coding behind the software is by way of script and functions by application through Microsoft Word and other compatible documents. The software is able to detect names and other marked data and can replace initials or redact entirely. Primary and Secondary data are anonymised by way of automation,¹⁰⁸⁴ while Tertiary and Quaternary data will need to be specifically programmed in to the system. The application of the system would be implemented based on the hierarchy of the court and the types of law reports generated by the various courts in that jurisdiction.¹⁰⁸⁵ The application process of PPS would depend on the direction of the hierarchical system.¹⁰⁸⁶ For example, the automation system of PPS may be modified and adopted to transcripts in both the Territory Magistrates Courts and Territory Supreme Courts. The State Magistrate Courts and District Courts would have a similar format based on the level of disclosure.¹⁰⁸⁷

As technology develops in this area, so will the level of accuracy and the need for less human intervention in the implementation of PPS be required. In an unpublished thesis entitled: 'An Anonymisable Entity Finder in Judicial Decisions',¹⁰⁸⁸ Farzaneh Kazemi discusses the "machine learning" approach through an Anonymizable Entity Finder (AEF). Personal information can be anonymised, by determining the anonymizable proper names in order to reduce the human filtering time.

The unpublished research is important because it proposes redacting of personal information by automation in judicial decisions. The research argues that the need for privacy protection is especially significant in the justice system. This is so because of the nature of court documents (law reports) which contain personal information (personal data) and which necessitate anonymisation. The machine learning method she proposes works by detecting AEF by using a maximum entropy model as a

¹⁰⁸⁴ See, see Privacy Procedure Standards (PPS).

¹⁰⁸⁵ See Appendix D, 'Hierarchy of Australian Courts'.

¹⁰⁸⁶ See Appendix C.

¹⁰⁸⁷ Ibid.

¹⁰⁸⁸ Farzaneh Kazemi, 'An Anonymizable Entity Finder in Judicial Decisions (Unpublished) (Ph.D., Université de Montréal, 2008).

classification learning method, which can sift through large numbers of documents in several languages if need be.¹⁰⁸⁹ This thesis recommends the integration of AEF into the PPS (model I) at a later stage, although, for the purposes of this thesis, the current system will be utilised as a starting point. Additionally, the AEF does not yet explain the requirements of an automated system to detect and redact Tertiary and Quinary data, without manual intervention by court registry staff. Nevertheless, it is only a matter of time before the necessary technology is developed or integrated to recognise complex data packages and recognise them as being irrelevant, or (by cross comparison) to calculate the privacy risk factors contained within a subset of data packages in scripts.¹⁰⁹⁰

RESTRICTED ONLINE ACCESS (MODEL II)

The second model suggested in this thesis requires courts to make available (publish) all their law reports via a restricted online system or (ROS). The ROS would limit access to court authorised law reporters and media organisations. Members of the general public may gain access to the interface only through an application with the court registry, whereupon a temporary username and password is provided for viewing access. Although the onus remains on courts to ensure that breaches of the ROS and maintenance of judicial documents listed on the ROS are enforced, the responsibility of making an ROS application lies with the parties to proceedings and or their legal representatives. This may be done at the commencement or conclusion of proceedings, by demonstrating that the presence of personal information in the relevant court materials, or in the judicial decision, has the potential to breach their privacy rights and potentially attract harm to the individual, if published and disseminated on the internet.

Once an application is granted ROS status, the level of access is classified based on the level of personal information the judicial document of interest contains. For example, a

¹⁰⁸⁹ Ibid, the Maximum Entropy model proposed, is an effective statistical tool for the development of classification tasks, such as part of script tagging for classification of documents.

¹⁰⁹⁰ This is already seen in the use of Artificial Intelligence utilising heuristic software which reduce improbable results in data searches. See, Jer Lang Hong, Eu-Gen Siew and Simon Egerton, 'Information extraction for search engines using fast heuristic techniques' (2010) 69(2) *Data & Knowledge Engineering* 169.

document containing Primary Data is designated a level 1 ROS classification, whereas a document containing Primary to Quinary Data is classified as a level 5 ROS classification for maximum sensitivity. This is predetermined by the judge or magistrate based on the submissions made in the application from the party of interest. Once an ROS is granted, each record is electronically marked for processing by an administrative court registry staff. Members of the media publishing or disseminating any ROS listed law reports and or other court documents ought to ensure that they observe the document classification. Reporters may opt to report a redacted version to ensure that no personal information is unnecessarily disseminated.

The system places greater responsibility on law reporters and the media alike to ensure that the contents of reports listed on the ROS are not published without careful consideration. The difference between this model, and the existing 'good faith' standards expected of media outlets and reporters, is that any breach of the proposed ROS guidelines on the publication and dissemination of personal information would be binding and would attract heavy penalties for the offender.¹⁰⁹¹

This system would appear to be less resource intensive than model I. While model I advocates for an automated and editorial system to ensure maintenance and complete implementation of PPS,¹⁰⁹² model II works only on the level of access granted through ROS. In the United States for instance, an online access system without any sort of privacy oversight is currently active and operational.¹⁰⁹³ The system provides for electronic public access service for users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and 'its unique case finder' via the

¹⁰⁹¹ See Chapter 5, 'National Register for Suppression and Non-Publication Orders'. For instance, any breaches non-publication by media outlets are not binding and not able to be prosecuted. See also, discussion on actionable contempt of court and breaching suppression and non-publication orders of a court in Chapter 5.

¹⁰⁹² The Commonwealth, Attorney General would have to dedicate a sizable portion of judicial funding to obtain additional staff and resources regarding editorial services including the upgrade of all hardware and software of all court computer systems and servers in all State and Federal jurisdictions. See, 'Attorney-General's Department', <<http://www.ag.gov.au/Pages/default.aspx>>.

¹⁰⁹³ See, *Public Access to Court Electronic Records (PACER)*, <<http://www.pacer.gov/>>.

internet.¹⁰⁹⁴ Although, the American system has tremendous support from anti-privacy advocates in the context of further strengthening the open court rule, nevertheless, the system places no restrictions on search engines or bots¹⁰⁹⁵ regarding access of sensitive materials.

While useful as a model, the American system is flawed, as it is precisely the source of many of the privacy issues subject to the arguments presented in this thesis. In addition to being contradictory to the hypothesis of this thesis, it is not only in contrast to the principle of open justice and the place of privacy,¹⁰⁹⁶ but also in contrast to the declaration on free access to law and FALM guiding principles which recognise the role of the courts with respect to privacy and law reporting.¹⁰⁹⁷ The American model overtly favours the open court rule with very little (if any) privacy regulation.¹⁰⁹⁸

Model II is based on the second approach found in a report conducted by the staff of the Administrative Office of the United States Courts.¹⁰⁹⁹ Just as in model I, access to ROS requires the involvement of judicial and administrative staff of the court, and is capable of providing access to other court documents, in addition to law reports. The model proposes the formation of a central online system for the operation of the ROS. Each jurisdiction may be allocated a central online registry with resources allocated from the Commonwealth Attorney General's department. Access is granted to non-parties on a

¹⁰⁹⁴ Ibid, PACER is provided by the Federal Judiciary in keeping with its commitment to providing public access to court information through a central service.

¹⁰⁹⁵ See Chapter 7.

¹⁰⁹⁶ See Chapter 2, 'The Open Court Rule and the Principle of Open Justice'.

¹⁰⁹⁷ See Appendix F, organisations such as legal information institutes have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published by other parties; Appendix G, GP 11, online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymised in order to make them available for free access". See also, Appendix H, AustLII principles in line with the Declaration on Free Access to Law.

¹⁰⁹⁸ Peter A. Winn, 'Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information' (2004) 39 *Washington Law Review* 307, 321. In supporting this decision, the judiciary took the position that attempting to recreate the "practical obscurity" of the brick and mortar world was simply too complicated an exercise for the courts to undertake. Although, there is however a recognition that some personal information, such as names, social security numbers and so forth, should not be published, see 314 - 322 for detailed discussion.

¹⁰⁹⁹ Office of the U.S. courts, privacy and access to electronic case files in the Federal Courts (1999) <<http://www.uscourts.gov/privacyn.pdf>>, fn 76 of *ibid*.

classification basis. For instance, parties to proceedings, judicial staff, Commonwealth authorities and other government agencies may be granted unrestricted remote access to the files and the law reports.¹¹⁰⁰ The general public and the media would have remote access only by requesting and being granted such access by the court registry. The underlying notion behind the model II format is to treat digital court records in the same manner as paper records. Just as paper files were and are made available for inspection at the registry, but not generally made available on the internet,¹¹⁰¹ this system is designed to prevent harm coming to those seeking access to justice.¹¹⁰²

The major theoretical difference between model I and model II is that while the onus of regulating personal information remains on courts, the responsibility of lodging an ROS application lies with the parties and or their legal representative. One glaring challenge is that applications for ROS on privacy grounds would be difficult (if not impossible) to make in Australian jurisdictions at the present moment. As discussed, the reasons are mainly attributed to the absence of recognition of a tort of breach of privacy at common law. Accordingly, stand-alone reasons based on privacy regarding restricting access to judicial documents remain challenging.¹¹⁰³ However, in addition to recent other competing grounds and exceptions to the open court rule covered under various legislative schemes in Australia, such reasons may be evoked to grant an ROS.¹¹⁰⁴

¹¹⁰⁰ Ibid, Winn, 322, 323.

¹¹⁰¹ Office of judges programs, admin. Office of the U.S. courts, privacy and access to electronic case files in the Federal Courts (1999), fn 84, *ibid*.

¹¹⁰² See Chapter 5, 'Modern Exceptions', 'Identity Theft Prevention and Anonymisation', and the general Following the Event regulatory limitations by authorities, Chapter 6, 'European Privacy Cases', on the lack of control Following the Event, and Chapter 7 regarding discussion on kinds of harm applicable in Following the Event circumstances.

¹¹⁰³ See Chapter 6.

¹¹⁰⁴ See detailed discussion in Chapter 4 and 5, see also, *Family Law Act 1975* (Cth) ss 97, 121; *Federal Court of Australia Act 1976* (Cth) s 50; *Administrative Appeals Tribunal Act 1975* (Cth) s 35. *Court Suppression and Non-Publication Orders Act 2010* (NSW) ss 7, 8; *Civil Procedure Act 2005* (NSW) s 72; *Witness Protection Act 1995* (NSW) s 26; *Administrative Decisions Tribunal Act 1997* (NSW) s 75. *Supreme Court Act 1986* (Vic) s 18; *County Court Act 1958* (Vic) s. 80; *Magistrates Court Act 1989* (Vic) s 126; *Evidence Act 1929* (SA) ss 69 and 69A; *Witness Protection Act 1996* (SA) s 25; *Children's Protection Act 1993* (SA) s 59A; *Supreme Court of Queensland Act 1991* (Qld) s 128; *Child Protection Act 1999* (Qld) ss 99ZG, 192, 193; *Criminal Procedure Act 2004* (WA) s 171; *Children's Court of Western Australia Act 1988* (WA) s 35; *Family Court Act 1997* (WA) s 243; *Evidence Act 1906* (WA) s 36C; *Justices Act 1959* (Tas) s 106K; *Terrorism (Preventative Detention) Act 2005* (Tas) s 50; *Evidence Act 2001* (Tas) s 194J.

REGULATORY MEASURES BY ONLINE PUBLISHERS

In introducing the above models, it is important to consider the measures aimed at online law reporters. Online law reporters play a crucial role in working with the courts in implementing measures aimed at stopping the indexing of law reports. In other words, law reporters gain their court authorisation to publish and disseminate law reports only if they have measures in place to prevent the unauthorised dissemination of law reports on the world wide web. This thesis proposes that the measures proposed herein should be adopted uniformly by all law reporters together, with either models I and or II.

Pursuant to its own free access to law principles,¹¹⁰⁵ AustLII operates restrictions on the mass proliferation of law reports through the categorisation and indexing mechanisms of search engines.¹¹⁰⁶ This is done, apparently, without impeding the free flow of access to law reports or, broadly speaking, without compromising FALM principles.¹¹⁰⁷ The method has been relatively successful due to its early implementation. The technique seeks to prevent access by search engines from indexing judicial decisions and other legal documents, stored in AustLII databases, and connecting it with other searchable information on the internet. This has been quite successfully achieved by adopting Robot Exclusion Standards (RES) also known as the Robots Exclusion Protocol or robots.txt protocol.¹¹⁰⁸ RES is a file used to advise co-operating robots or web spiders, also known as web crawlers.¹¹⁰⁹

'Robots' are programs that traverse many pages on the internet, by recursively retrieving linked pages. There have been occasions where robots have visited world wide web

¹¹⁰⁵ See Appendix H, 'Australasian Legal Information Institute Free Access to Law Principles'.

¹¹⁰⁶ See EIRS and general search engine description in Chapter 3.

¹¹⁰⁷ See Appendices F and G.

¹¹⁰⁸ *The Web Robots Pages* <<http://www.robotstxt.org/robotstxt.html>>. Also see, *Telecommunications (Interception and Access) Act 1979* (Cth).

¹¹⁰⁹ *Telecommunications (Interception and Access) Act 1979* (Cth). A web crawler is a computer program that browses the World Wide Web creating copies of all the visited pages for processing at a later date by a search engine that will index the downloaded pages providing more efficient searches. Web spiders also may also be used for automated maintenance tasks on web sites, such as checking links or validating html codes.

servers where they were not welcome for various reasons. Sometimes these reasons are brought about because of RES, with which search engines generally comply voluntarily.

RES is technically a Following the Event regulatory tool and is limited in scope and effectiveness due to its advisory nature. It does not provide privacy protection, but it does prevent (on most occasions) the law report from being cannibalised and indexed by automated systems (such as those used by Google).¹¹¹⁰ Generally, law reporters use RES by partially or completely blocking access to an otherwise publically accessible website. Provided that a website wishes to prevent or partially restrict access to another site, it must give instructions by placing a RES in the root of the website hierarchy.¹¹¹¹ In other words, the information specifying the parts that should not be accessed is specified in a file called RES in the top-level directory of the website. Usually, robots choosing to follow the instructions try to fetch this file and read the instructions before fetching any other file from the website. If the RES file doesn't exist, web robots will assume that the web owner does not wish to provide any specific instructions,¹¹¹² leaving that website open to data mining and indexing.

An RES is effective to the extent where an EIRS complies with the specific instructions in the RES file. There are occasions where search engines and robots from other sites do not comply with the RES instructions. In such circumstances the privacy policies of online legal publishers outline the specific requirement that personal data not be left open on their websites. This is where law reports containing personal information are at their most vulnerable. In such circumstances law reports are able to be target searched, indexed, mined, stored and proliferated in cyberspace in perpetuity.

¹¹¹⁰ Block or remove pages using a robots.txt file Google:

<<http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=156449>>.

According to Google: While Google won't crawl or index the content of pages blocked by robots.txt, we may still index the URLs if we find them on other pages on the web. As a result, the URL of the page and, potentially, other publicly available information such as anchor text in links to the site, or the title from the Open Directory Project (www.dmoz.org), can appear in Google search results. Also Google has decided to publish more than two million US legal cases on Google Scholar which has put Alt Law (A website funded by charity organisations similar to the Legal Information Institutes, but based in the United States and hosting only decisions from that jurisdiction) out of business and threatening other US sites containing Court cases.

¹¹¹¹ See, e.g., <<http://www.example.com/robots.txt>>.

¹¹¹² See *Telecommunications (Interception and Access) Act 1979* (Cth).

The final limitation on the use of an RES is that data which is flagged to be excluded is usually data of a non-sensitive nature, or data designed for general public access. However, the instruction does serve to communicate with other web owners that the data is only viewable from a specific website, and is not intended for mass distribution through a search engine or any other website.¹¹¹³ This is predominately the way in which modern law reporters operate, whereby they retain limited control over the published law reports on the internet.¹¹¹⁴

As discussed previously, the danger arising out of applying an RES to a website (as a law reporter) is that it really is a courtesy protocol. To that end, RES lack enforcement powers. It is a well known fact, that at any given time, multitudes of nasty and malicious robots are active on the internet.¹¹¹⁵ What makes these robots so dangerous, as far as law reporters are concerned, is that they are specifically designed to ignore an RES. Moreover, these robots are specifically coded to crawl through pages scripted with an RES.¹¹¹⁶ In such instances; the affected party has limited options available to it. These include completely blocking the malicious robot from gaining access to the site, or using a firewall designed to restrict any type of movement from such malicious crawlers.¹¹¹⁷ It should be noted that at this stage, the robot would have already extracted the necessary files. This is another reason why, even in a technical sense, Following the Event regulatory measures are limited in scope and application. This is particularly

¹¹¹³ Block or remove pages using a robots.txt file Google:

<<http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=156449>>.

¹¹¹⁴ Andrew Mowbray, Graham Greenleaf and Philip Chung, 'Emerging Global Networks for Free Access to Law: WorldLII's Strategies' (2007) *University of New South Wales Faculty of Law Research Series* 16.

¹¹¹⁵ *Web Spider - Data Harvesting and Scraping*, <<http://www.mozenda.com/web-spider>>; *The Web Robots Pages*, <<http://www.robotstxt.org/robotstxt.html>>.

¹¹¹⁶ (S) Mail address harvesting bot: spider visiting the site harvesting mailto: mail addresses to send spam later; (M) Misuse of robots.txt: bot reads /robots.txt and then deliberately jumps right into the Disallowed directory; (I) Ignoring robots.txt: bot reads /robots.txt but then during spidering forgets and ignores the Disallow: directive; (N) Not looking at robots.txt: bot starts spidering the site without even looking for a /robots.txt; (C) Chinese spambot: some of the dumb and silly spam bots using user agent strings 'Indy Library' or 'internet Explorer 7'; (G) Guestbook harvester: bot spiders guestbook pages only, often very aggressively (several pages per second), and of course ignoring /robots.txt. See *Telecommunications Act 1997* (Cth); *ibid*.

¹¹¹⁷ AustLII regularly engages in such conduct by utilising RES scripts to restrict access of search engines such as Google, Yahoo and Microsoft's Bing from scripting AustLII data. See also, *Telecommunications (Interception and Access) Act 1979* (Cth).

relevant in light of the limited availability of technical means and resources to restrict access without impacting the free flow of legal information.

CONCLUSION

The two models suggested in this chapter allow the open court rule to embrace privacy measures in order to provide meaningful and practical privacy protection by effectively regulating the flow of personal information without compromising free access to law. The differentiating theoretical factor between the two models is that, although both models place the onus of privacy protection in relation to law reporting on the courts, model II places the responsibility of applying for any such protection with the parties to proceedings. Both are powerful Prior to the Event measures designed to address privacy concerns at its source. The two models may be applied separately (in isolation from each other) or axiomatically (in conjunction with each other).

In the absence of privacy as an exception to the open court rule, the idea put forward is that the open court rule is compatible with privacy values. This is due to the absence of any studies or other convincing arguments to the contrary which might suggest that the open court rule is incompatible with privacy.

Additionally, model I requires a comprehensive re-evaluation of the way the open court rule operates, and its desire to ensure the objective expression of the public interest in privacy and the open court rule. Additionally, the two tier system of PPS is designed with the internet in mind. In other words, the system is designed to prepare judicial documents marked for publication and dissemination on the internet in order to withstand the long term effects imposed on digital documents.

Similarly, model II is designed to ensure that law reporting is kept for the very purpose it was intended for; the reporting of the law for the administration of justice. The effectiveness of either model will only be practically tested if adequate funding and testing is undertaken. Nevertheless, the proposed policy measures are ultimately

designed to serve the intentions of the principle of open justice, by providing surety to the public seeking access to the open courts and by being designed to support the spirit behind free access to law.

Both models take into account centuries old traditions of openness and the relative privacy values that existed prior to the advent of free access to law and new intrusive technologies. The models, together with the broad application of RES technology from both law reporters and the courts, are designed to safeguard privacy in the absence of a tort of breach of privacy at common law. These act to ensure that individual privacy is protected, the open court rule continues to operate and the principle of open justice able to be maintained.

As the technology has changed and continues to change, so too must the way in which justice is administered change in order to maintain pace with evolving technology. One of the intended aims of this thesis is to provide analysis of the modern challenges to law reporting and to propose possible solutions. The research and the work invested in this thesis was always undertaken against the background that the benefits offered by free access to law and the digitisation of law reporting on the internet, should not be allowed to be used in such a way by those with private and commercial designs, and others involved in nefarious activities, that may lead to identity theft, data mining and other fraudulent and criminal activities, or to bring harm to court proceedings and ultimately the administration of justice. The proposed models provide that necessary privacy protection to ensure that free access to legal information is able to continue.

CHAPTER 9

CONCLUSION

The principle of open justice traces its origins back to ancient legal systems and doctrines dealing with important areas of legal jurisprudence. Evolving over many centuries, the principle has emerged as being much more than just a singular concept at law. Indeed, amongst various legal elements the principle accommodates both privacy and the open court rule as part of its judicial functions with respect to the administration of justice. The open court rule is fundamental to the proper operation of the principle of open justice and in turn, the rule of law. In the traditional sense, open justice promotes and upholds the rule of law through keeping courts open and ensuring proceedings are conducted in public, resulting in accountability and strengthening the public perception that justice is being done in a transparent and credible manner.

The reporting of the law, based on the oral tradition, experienced significant early shortcomings in reference to duplication, variations and a general lack of credibility. The arrival of the printing press heralded a new era for the open court rule, introducing uniformity, both in presentation of reports and the methodology of reporting. This was also seen as an important development in promoting judicial authority and accountability. Judicial accountability is a natural result of the scrutiny that is placed on the courts. Public scrutiny of the courts is an essential means by which society ensures that judges administer justice according to law. Whatever the political inclinations underlying secret trials, the methods of secretive trials are seen in a modern society to be undesirable. The right to an open trial has generally been recognised as a safeguard against attempts to employ law courts as instruments to legitimise unfair or unjust decisions made in secret. In addition to other benefits, the public's knowledge that court proceedings are subject to judicial review acts as a restraint on the possible abuse of judicial power.

An important aspect which should be made clear is that open justice is not necessarily linked to a right of free speech and that the principle has purposes related to the

operation of the legal system. Its purposes do not extend to encompass issues of "freedom of speech" and "freedom of the press". However, the right to an open trial has to be considered against other rights, particularly in light of other interests, such as, privacy to ensure a fair trial.

The maintenance of public confidence in the open court rule is increasingly significant at a time when there are confronting issues related to changes in technology. Similarly, theoretical obscurity fails to provide any meaningful privacy, due to the searchability of the internet and the development of ever-more powerful EIRS using heuristic techniques. The notable absence of online privacy has meant that personal information is now able to be harvested, compiled, stored and sold as a valuable commodity by virtue of the effective application of EIRS. The coding behind such software was never designed to discriminate between private and public information. All information is captured based on the specific search request. Cynically, at the same time, some companies are commercialising and creating monopolies on privacy. This is noted in active stages of taking privacy away, charging fees for its provision and dictating limitations on the type and extent of privacy.

Privacy existed because of practical obscurity. While the practical obscurity of the past afforded a certain degree of privacy to the public, the arrival of new forms of technology, in particular the publication and dissemination of law reports on the internet, has diminished that privacy. Significantly, the arrival of free access internet and the establishment of Legal Information Institutes marked a significant change in that public perception and culminated in the fall of barriers and impediments regarding access to legal information. FALM commenced approximately two decades ago where the declaration on the free access to law heralded new opportunities and tremendous potential with free access to judicial decisions, but also ushering in a shift in paradigm from theoretical openness and practical obscurity to the practical openness and theoretical obscurity model. The practical obscurity of the past and with it privacy, is almost completely absent. The shift occurred due to the absence of recognition of the

important role of privacy, not only in the principle of open justice, but also due to free access to law.

The open court rule, amongst its other roles, is represented by the functions and duties of court registries, particularly its duties specific to the reporting of the law. At any given time, a court register maintains large quantities of personal information as a public registry. This would automatically implicate the register (due to its public nature) under the jurisdiction of state and federal privacy laws for the regulation of personal information. This point is highlighted by the fact that the adjudicative functions of a court registry are administrative in nature, and are not judicial functions, which are exempt from the application of statutory privacy regimes. Whilst the present privacy statutory regimes in operation throughout Australian jurisdictions cannot interfere with the reporting of judicial decisions, this thesis argues that because of their public characteristics, court registries ought to comply with local privacy laws.

This thesis argues that the open court rule, in the context of free access to law, is due for regulation. The main reason for this is that FALM has never advocated that free access to law be done so without privacy considerations. Nor was free access to law ever intended to operate without privacy. The Free Access to Law Declaration is unambiguous regarding its intentions; that the onus ought to fall on the courts to provide law reports intended for republication to law reporters, and that the reports should be compliant with local privacy laws. In other words, according to FALM experts the courts hold the ultimate responsibility for regulating personal information Prior to the Event. Presently, Australia does not have a tort of breach of privacy and in the absence of any statutory and common law exceptions to the open court rule, any such breach arising from law reporting cannot be prosecuted as a result of the failure of courts to comply with local privacy law standards.

The second point is that, because of the absence of such a tort of breach of privacy, and despite the principles underpinning free access to law, which FALM group of experts and the European Commission proposed and endorsed, State organisations (both

Judicial and legislature) have, to date, not complied with local privacy laws when authorising access to law reporters for republication. Notwithstanding other jurisdictions which do take steps to anonymise their judgments prior to publication and dissemination,¹¹¹⁸ the majority of judicial decisions are largely published and disseminated on the internet without any privacy regulation. Australian courts do not recognise privacy as one of the competing interests to the open court rule capable of being invoked to restrict the publication and dissemination of judicial decisions (in any form). Whereas, other recognised competing interests to the open court rule invoked by applicants, including where minors are involved, serious crime, national security, commercially sensitive matters, confidentiality of certain materials, secret technical processes, and where it is required for the administration of justice, are able to be relied on, privacy is not.

The significance of the research question analysed in this thesis is highlighted by the fact that only very recently (30 July 2013) the Federal government commissioned an inquiry to be conducted by the Australian Law Reform Commission pursuant to s 20 of the *Australian Law Reform Commission Act*,¹¹¹⁹ into the broader issue of prevention and remedies of serious invasions of privacy in the digital era. Unlike this research, which has examined the specific area of adjudicative duties of modern law reporting together with the consequences related to breaches of privacy and associated avenues of redress, the newly commissioned inquiry focuses more broadly on the application of existing privacy statutes; the rapid growth in capabilities and use of information, surveillance and communication technologies; community perceptions of privacy; and relevant international standards and the desirability of consistency in laws affecting national and trans-national data flows.¹¹²⁰ Most importantly, the study is testament to the increasing

¹¹¹⁸ See for example, *The Migration Review Tribunal (the MRT) and the Refugee Review Tribunal (the RRT)* <<http://mrt-rrt.gov.au/default.aspx>>; *Family Court of Australia*, <<http://www.familycourt.gov.au/>>.

¹¹¹⁹ *Australian Law Reform Commission Act 1996* (Cth), s 20, Reference to the Commission by the Federal Attorney General, being Mark Dreyfus QC MP, Attorney-General of Australia (at the time of drafting this thesis).

¹¹²⁰ ALRC, 'New Commissioner appointed to the ALRC for the Serious Invasions of Privacy Inquiry' (2013) <<http://www.alrc.gov.au/news-media/media-release/new-commissioner-appointed-alrc-serious-invasions-privacy-inquiry>>.

awareness and concern of the public in relation to the rising privacy risks posed due to unnecessary exposure of personal information on the internet.

The Terms of Reference¹¹²¹ in the study outline some important areas already covered by this thesis. One of the key elements in the reference involves examining the necessity of balancing privacy against other values, including freedom of expression and open justice.

At the present moment there are at least three main fundamental flaws apparent from judicial assumptions. The first is the confusion surrounding privacy and the open court rule. It is often held that the open court rule in the context of free access to law is incompatible with privacy. This is because privacy is often confused with secrecy, whereas these are two different values. Whilst secrecy may be incompatible with the open court rule, privacy is, and has always been, compatible with the open court rule. The traditional forms of printing and publishing law reports on paper have been in place for many centuries. Relatively speaking, the transition from paper to electronic law reporting took place less than two decades ago. Prior to the commencement of online law reporting and free access to law, privacy - in the form of practical obscurity - was always present together with the open court rule due to paper-based law reporting. Fundamentally, privacy has been recognised as a human right and is a much larger and more profound concept than the singular notion that secrecy or secret behaviour represents.

The second flaw lies in the fact that current laws do not recognise privacy as one of the competing interests to the open court rule. Compounding that problem, the open court rule is confused with the principle of open justice.

Finally the third main flaw in the current thinking lie in the methods used to regulate the open court rule with respect to Following the Event measures. Following the Event

¹¹²¹ See Appendix D.

measures are always going to be ineffective in controlling the spread of personal information online.

This thesis makes three main conclusive points:

1. Privacy and the open court rule are not incompatible ideas, because privacy is not the same as secrecy and therefore not opposed to the open court rule;
2. In order to promote the expression of privacy through the open court rule, privacy must be recognised as one of the main exceptions to the open court rule; and
3. The only effective way of regulating law reporting in relation to personal information is the implementation of Prior to the Event regulatory measures to complement the open court rule specifically designed for privacy protection.

It is the proposal of this thesis that the open court rule is not incompatible with privacy, not only because privacy has always existed within the principle of open justice, but because free access to law was formulated in such a way that it would only function properly if privacy is adhered to. In fact, this is reflected in the proposed FALM principles discussed in this thesis. Specifically addressing privacy, the principles recommend that any law reporting should be done with respect to local privacy laws, in order to ensure that the open court rule continues to function with respect to the provision of free access to legal information.

In the absence of a tort of breach of privacy at common law, this thesis proposes privacy measures to be incorporated into the mechanism of the open court rule. These include:

1. Model (I) Privacy Procedure Standards (PPS) a system of automation incorporating the machine learning approach through an Anonymisable Entity

Finder (AEF), designed to detect, redact and anonymise personal information in court documents. (Primary to Quaternary Data by way of automation and Quinary Data by way of application to the court);

2. Model (II) Restricted Online System (ROS) provides restricted access to legal documents in addition to decisions based on a classification system allocated by the court through party applications, provided to law reporters and parties to proceedings; and
3. Robot Exclusion Standards (RES) designed to restrict indexing of online law reports by electronic information retrieval systems (search engines).

Model I and model II are specifically designed for judicial privacy protection in the context of modern law reporting, and also to meet the requirement of FALM principles regarding privacy protection to ensure free access to the law. It is the recommendation of this thesis that taking these steps will ultimately ensure that free access to law continues to operate into the future, and that the principle of open justice continues to function in a viable manner, specifically avoiding conflicts between the open court rule and privacy.

At practical, legal, and theoretical levels, FALM and its powerful notion of free access to legal information as part of the heritage of humanity, continues to grow and adapt. The relevance of FALM in its ability to provide free authoritative and up to date judicial decisions is not just confined to the legal profession and academia, but society as a whole. It forms part of the fabric of the modern administration of justice and the rule of law. If the courts would be inclined to uptake the regulatory mechanisms proposed in this thesis (in accordance with FALM principles) it would ensure not only the success of the administration of justice at a local level, but ensure that in a global environment of jurisdictional absence (such as the internet) risks to litigants and others connected to court proceedings are reasonably mitigated.

Ultimately, the successful operation of the principle of open justice depends on the willingness of the judiciary to recognise the importance of privacy together with the open court rule. Despite all the progress that FALM has made and the liberating effects of the free access internet, there are no guarantees to its success, unless courts act responsibly in dealing with our personal information.

APPENDIX A

PRIVACY PROCEDURE STANDARDS (PPS)¹¹²²

1 PRIMARY DATA (NUMBERS)¹¹²³

Court registry will use an automated substitution process to partially anonymise all personal information in number and address format. The last two numbers of a number sequence will be retained in the transcript.

The presiding judicial officer will receive two documents from the court registry for each hearing – an anonymised transcript (sample **Annexure A**)¹¹²⁴ and a register of substitutions (sample **Annexure B**).¹¹²⁵

This process will be applied on a daily basis for transcripts produced by registry.

1.1 PRIMARY DATA (NAMES & OTHER INFORMATION)¹¹²⁶

Personal information with respect to:

- i Residential addresses of all victims, witnesses and parties should be omitted if it has no relevance to the case. Addresses of the accused should be omitted or anonymised if this will lead to the identification of the victim.
- ii Dates and places of birth of victims and witnesses should be anonymised or omitted.
- iii Residential history of accused and victims should be anonymised if this could lead to identities being revealed, e.g., “the family moved from Queensland to NSW. They lived in Wagga and then moved to a dairy farm in Berry. They then bought a property in Nowra and lived in the garage for 9 months while the house was being renovated”.
- iv Anonymise one or both sets of information if a victim or accused is easily identified because they come from a minority group in a small town. E.g. The accused is of Tongan descent and has been living in Numbugga for 3 years.
- v Omit or anonymise names of schools and places of work if it has no relevance to the case.

2 SECONDARY DATA (DIRECT CONNECTION)

Personal information with respect to:

Personal acquaintances¹¹²⁷ or direct connection information, or names and other personal data of persons or organisations with which a person is directly involved. This type of information would include names and other personal data of:

¹¹²² Based on New South Wales regulatory schemes, see, Supreme Court of NSW - Identity theft prevention and anonymisation policy 2010 (NSW); Local Court of New South Wales, Practice Note 1 2008 (NSW).

¹¹²³ Supreme Court of NSW - Identity theft prevention and anonymisation policy 2010 (NSW) See, point 3, procedure for anonymising information.

¹¹²⁴ Ibid, 5.

¹¹²⁵ Ibid, 6.

¹¹²⁶ Ibid.

- i Extended family members: parents, children, brothers and sisters, in-laws, grandparents, cousins;
- ii Foster family members, tutors, guardians, teachers, babysitters;
- iii Friends, co-habiting persons, lessors, tenants, neighbours; and
- iv Employers, employees, co-workers, business associates, schools, sports teams.

3 TERTIARY DATA (SPECIFIC FACTUAL INFORMATION)¹¹²⁸

- i Names of communities or geographic locations;
- ii Names of accused or co-accused persons (if not already included in the publication restriction);
- iii Names of persons acting in an official capacity (e.g., expert witnesses, social workers, police officers, physicians); and
- iv Extraordinary or atypical information on a person (e.g., renowned professional athlete, very large number of children in the family, unusually high income, celebrity).

3 QUATERNARY DATA (OTHER FACTUAL INFORMATION)¹¹²⁹

If primary, secondary, tertiary data and any other potentially identifying personal information is avoided in the judgment, certain other types of specific factual information may also be considered for redaction, if the publication and dissemination of such information is likely to attract harm to anyone involved in the court proceedings.

This type of information would include:

- i Gender and sexual orientation;
- ii Race, ethnic and national origin;
- iii District, jurisdiction and country of birth and residence;
- iv Professional status and occupation;
- v Marital and family status;
- vi Religious beliefs and political affiliations.

4 QUINARY DATA (FACTUAL STORY)¹¹³⁰

There may be exceptional cases where the presence of egregious or sensational facts or stories of a private nature or private facts, justifies partial or complete redaction from reasons for judgment. However, such protection should only be resorted to where there may be harm to minor children or innocent third parties, or where the administration of justice may be threatened by disclosure, or the information might be used for an improper purpose¹¹³¹.

¹¹²⁷ Canadian Judicial Council, *Use of Personal Information in Judgments and Recommended Protocol*, Judges' Technology Advisory Committee No (2005) at 25.

¹¹²⁸ *Ibid*, 28 to 30.

¹¹²⁹ *Ibid*, at 30.

¹¹³⁰ Described as the Discretionary Protection of Privacy Rights. See, *ibid*, at 31 to 33.

¹¹³¹ *Ibid*, at 31.

The presiding judge must exercise the court’s inherent powers to balance this privacy consideration with the open court rule, by asking how much information must be included in the law report to insure that the public understands the decisions and the law. If the disclosure of the personal information serves no public interest purpose, then the judge must order the partial or complete redaction of the information. Court transcripts with such orders will have a special electronic tag, which would alert registry staff that the document would require manual redaction.¹¹³²

Cases in which it may be appropriate to exercise the court’s inherent powers to order the redaction of such information on privacy grounds include information about those involving allegations of sexual assault or exploitation or the sexual, physical or mental abuse of children or adults; stories, rumours, innuendos, hearsay, and daily habits, likely to bring physical or economic harm to the innocent or a third party.

5 Legislative requirements¹¹³³

In criminal cases, judges need to be aware of legislation that prohibits the identification of people in certain circumstances (e.g. sexual offences).

As well as names, information such as racial characteristics and nationalities may also need to be removed from transcripts and judgments, if these are unique characteristics that would cause a person’s identity to be uncovered.

Individual Judges will need to issue instructions to the registry, on a case by case basis, to anonymise information in transcripts to meet these legislative requirements.

6 Substitution practices*¹¹³⁴

*Judge’s staff and the registry staff are to use the substitution techniques in the table below whenever unique identifiers appear, unless otherwise directed by a judge.

Information	Notes	Suggested Substitutions
a) Dates of birth and anniversaries		<ol style="list-style-type: none"> 1. Refer only to the year for anniversaries, e.g. “the parties married in 1992” 2. Refer only to the month and the year, e.g. “the child was born in July 1996” 3. Record birth dates as xx xxxx 1997
b) Addresses	<p>This includes:</p> <ul style="list-style-type: none"> • Property number • Telephone number • Email address • Fax number 	<ol style="list-style-type: none"> 1. Anonymise the address, egg xx xx Street, xxxx or the xxxxx property” 2. Partially obscure phone and fax numbers, egg xxxx xx99, xxxx xx85 3. Replace email addresses with xx@xx 4. Replace URL address with www.xxxx.com

¹¹³² Ibid, 32.

¹¹³³ Supreme Court of NSW - Identity theft prevention and anonymisation policy 2010 (NSW) at 3.3.

¹¹³⁴ Ibid, at 4.

	<ul style="list-style-type: none"> • URL 	
c) Unique numbers	<p>These include bank account, tax file, Medicare, credit card, car registration, driving license, passport student identification</p>	<p>Remove all or a sequence of the numbers to obscure the reference, egg</p> <ul style="list-style-type: none"> • Medicare No xxxx xxxx xx34 or • “the accused removed money from the following accounts: xxx59, xxxx28 and xxxx68.”

7 **Register of substitutions**

Registry staff should maintain a register of substitutions for verification purposes. Judge’s staff are required to notify registry staff of any further substitutions that are implemented in the absence of registry staff, to ensure the register is up to date.

The register of substitutions can be included as a confidential exhibit if the personal identifiers are required during the course of a trial.

This register must be excluded from copies of transcripts that are purchased or made available to Court libraries and judgments.

ANNEXURE A

Sample anonymised transcript

RSB:SND

D3

Q. And do you remember whereabouts that restaurant was?

A. It was off Smith Street, Downtown.

Q. So you had dinner there at the restaurant?

5 A. Yes.

Q. And what did you do after that?

A. I went back to the car and sent a message to Jane's phone and said, "What's the address as I'll be there in about 10-15 minutes?" Then received a
10 further reply that the address was xx xxxxxxxx xxxx, Downtown.

Q. And did you then, in effect, go to xx xxxxxxxx xxxx, Downtown?

A. Yes.

15 Q. How did you get there?

A. John dropped me off.

Q. In the car with John who else was there?

20 A. My brother.

Q. Do you know about the time that you arrived at xx xxxxxxxx xxxx?

A. Was about two hours after dinner, so about - dinner was at, about
6 o'clock.

25 Q. So about 8pm that evening?

A. Yes.

Q. In relation to that do you remember on that night, on the Saturday, what
shoes you were wearing?

30 A. I wore white trainers.

Q. So you have arrived at xx xxxxxxxx xxxx at about 8pm?

A. Yes.

35 Q. What did you do then upon arrival there?

A. I sent a text message to Jane's phone, that is that I am outside.

Q. What happened then?

A. I then saw a male come out of the premises at xx xxxxxxxx xxxx, Downtown.
40 I got out of the car, thanked them for dropping me off. The male walked down
the stairs. He was in long blue pants, a white T-shirt and sneakers.

Q. Did you know this man before?

45 A. No, I've never seen him before.

Q. Did you come to know who this person was?

A. Yes.

Q. Who was that?

50 A. Jane's boyfriend.

.02/09/09

93

SMTIH XN

ANNEXURE B

Sample register of substitutions

Register of Substitutions

Matter Page#	Doc Page#	Line #	Original Text
77	5	30	67 Smith Road
78	6	19	29 Smith Road
81	9	5	29 Smith Road
81	9	6	67 Smith Road
81	9	23	67 Smith Road
83	11	22	67 Smith Road
84	12	41	Smith Road
84	12	42	29 Smith Road
85	13	18	Smith Road
85	13	21	67 Smith Road
85	13	34	AB-12-CD
85	13	43	1234-5678-910
88	16	1	Smith Road
93	20	10	29 Smith Road
93	20	12	29 Smith Road
93	20	21	29 Smith Road
93	20	32	29 Smith Road
93	20	39	29 Smith Road
111	39	1	29 Smith Road
111	39	34	29 Smith Road
112	40	16	3rd of Feb
112	40	19	3 February 1988
123	51	28	67 Smith Road
127	55	35	Smith Road
135	63	42	84 Jones Street,
140	68	32	29 Smith Road,
140	68	34	Jones Street
160	88	48	3/2/88
160	88	49	1988

APPENDIX B

AUSTRALIAN PRIVACY PRINCIPLES (APPs)

The new APPs are part of the amendments to the Australian *Federal Privacy Act 1988* (Cth)¹¹³⁵ through the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).¹¹³⁶ The APPs commenced operating from March 2014. *The Privacy Amendment Act*¹¹³⁷ introduced the APPs to replace the existing Information Privacy Principle (IPPs) and National Privacy Principles (NPPs) meaning that APPs cover both government agencies and private sector organisations.

APP 1 - Open and Transparent Management of Personal Information

This principle is relevant to this thesis, because of the transparency of dealing with personal information required on the part of the two entities subject to the principle. The objective requires that Australian government agencies and private organisations (entities) manage personal information in a transparent and open way. It requires entities to take reasonable steps to comply with the APPs and to ensure that all enquires and complaints are able to be dealt with. This should be done by the implementation of appropriate practices, procedures and systems. This principle will require that in its privacy policy, if it is practicable, the entity indicate whether the entity is likely to disclose personal information to any entity based overseas, and the countries the recipients are based in.¹¹³⁸

APP2 - Anonymity and Pseudonymity

This is an anonymity principle, which allows the individual the option of not identifying themselves, or unless impracticable, to use a pseudonym, when dealing with an entity.¹¹³⁹

APP3 - Collection of Solicited Personal Information

This principle applies to the collection of solicited personal information. Personal information must not be collected unless it is necessary for, or directly related to, the activities and or functions of the entity. Unless it is impracticable or unreasonable, an entity must not collect information from an individual (there are certain exceptions to this). Sensitive information would maintain its current definitions under the *Privacy Act* as information about health, political and religious beliefs or association. There is also a new addition of biometric information as constituting sensitive information.¹¹⁴⁰ Here an express exemption is created in order to assist "any entity", body or person to locate a person who has been reported as missing.¹¹⁴¹ This exemption has raised some issues in relation to the right to be left alone doctrine.¹¹⁴² The main adverse consequence of such an express exemption is in cases where the missing persons may not wish to be located. For example sometimes missing individuals have not committed an offence, but may wish to be left alone or hide. This may not necessarily be from authority, but may include instances where for example the individual has fled from a damaging relationship, or has

¹¹³⁵ *Privacy Act 1988* (Cth).

¹¹³⁶ *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

¹¹³⁷ Exposure Draft-Australian Privacy Amendment Legislation-Australian Privacy Principles 2010 (Cth).

¹¹³⁸ *Ibid*, s 2, APP1.

¹¹³⁹ *Ibid*, s 3, APP 2.

¹¹⁴⁰ *Ibid*, s 4, APP 3.

¹¹⁴¹ *Ibid*, s 4(3)(g), APP 3(3)(g).

¹¹⁴² S. Warren; L. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

witnessed a violent crime and fears revenge attacks.¹¹⁴³ To create a general exemption in respect of all missing persons is likely to interfere with the privacy of the individual.¹¹⁴⁴

APP4 - Receiving Unsolicited Personal Information

In the event that an entity receives personal information, it must, within a reasonable period, determine whether the information could have been collected without breaching APP 3. If there is a breach, then it must treat that information in accordance with APP 5 to APP 13. If that is not possible then the entity must effectively destroy or anonymise that information so as to prevent it containing personal information.¹¹⁴⁵

APP 5 - Notification of the Collection of Personal Information

At the time, or prior to, or as soon as practicable, entities are to provide privacy notification statements after collecting personal information. The entity must also provide a notice about matters relating to the purpose of collection and to whom the information is to be disclosed pursuant to NPP1.¹¹⁴⁶ The circumstances of the collection, if the information was not collected directly from the individual, must be provided and if it is practicable, whether the entity is likely to disclose personal information to entities based overseas.¹¹⁴⁷

APP 6 - Use or Disclosure of Personal Information

This principle is designed to deal with social networking websites, and the way in which those organisations deal with personal information. The general rule is that personal information can be used or disclosed for the purpose it was collected, or for the purpose that the affected individual would expect to be a related purpose. Here, as in its previous interpretation under the *Privacy Act*,¹¹⁴⁸ sensitive information would be deemed as directly related. There are of course exceptions to this rule, if for example, the individual had consented to use or disclosure for another purpose, or in circumstances where it is reasonably necessary for the commencement, exercise or defence of a legal or equitable claim, or a confidential alternative dispute resolution.¹¹⁴⁹

APP 7 - Direct Marketing

This principle is directed towards targeted advertising, special rules for direct marketing, and not those covered by the *Spam Act 2003* (Cth)¹¹⁵⁰, or the *Do Not Call Register Act 2006* (Cth).¹¹⁵¹ These rules are designed to prevent the use of personal information for marketing purposes without the consent of the individual, unless this is reasonably expected by the individual. If the personal information was collected from a third party, or beyond the reasonable expectation of the individual to use for marketing, then it is

¹¹⁴³ Submission from Rosalind Croucher to Christine McDonald, Senate Standing Committee on Finance and Public Administration, 23 July 2010, in *Inquiry into exposure draft of Australian privacy amendment legislation*, at 2.

¹¹⁴⁴ *Ibid*.

¹¹⁴⁵ Exposure Draft-Australian Privacy Amendment Legislation-Australian Privacy Principles 2010 (Cth) s5, APP4.

¹¹⁴⁶ *Privacy Act 1988* (Cth) see Sch.3, NPP1.

¹¹⁴⁷ Exposure Draft-Australian Privacy Amendment Legislation-Australian Privacy Principles 2010 (Cth), s6, APP 5.

¹¹⁴⁸ *Privacy Act 1988* (Cth).

¹¹⁴⁹ Exposure Draft-Australian Privacy Amendment Legislation-Australian Privacy Principles 2010 (Cth), s7, APP 6.

¹¹⁵⁰ *Spam Act 2003* (Cth).

¹¹⁵¹ *Do Not Call Register Act 2006* (Cth).

permissible to use for marketing only with the consent of the individual or if it is not practical to obtain the consent. Regardless, in all circumstances opt-out from marketing must be provided.¹¹⁵²

APP 8 - Cross-border Disclosure of Personal Information

Generally reasonable steps must be taken by an entity to ensure that the intended recipient of any personal information does not breach any of the APPs. Any breaches of the APPs by the overseas entity will be taken to have been committed by the Australian entity, if the overseas entity is not bound by the APPs. Exceptions do exist, such as if the overseas entity has access to substantially similar or higher levels of protection than the APPs and the individual or entity overseas has the necessary access to those mechanisms that enforce those protections. Another important exception is if the individual consents to the overseas disclosure after being informed that the disclosure will not require the overseas individual or entity to comply with the APPs.¹¹⁵³

APP 9 - Adoption, Use or Disclosure of Government Related Identifiers

Organisations must not adopt government related identifiers.¹¹⁵⁴ Government related identifiers are described as the identification of an individual by using an assigned number, letter or symbol, or a combination of any or all of those, that is used to identify the individual or to verify the identity of the individual¹¹⁵⁵. These identifiers are assigned by a government agency, State or Territory authority, or an agent of an agency or a State or Territory authority, acting in its capacity as agent; or a contracted service provider for a Commonwealth contract or a State contract, acting in its capacity as contracted service provider for that contract.¹¹⁵⁶

APP10 - Quality of Personal Information

Entities must take reasonable steps to ensure that when they collect, use or disclose personal information that it is accurate, up to date, complete and when in relation to disclosure, that it is relevant.¹¹⁵⁷

APP 11 - Security of Personal Information

Entities must take reasonable steps to protect personal information from misuse, loss, unauthorised access, interference, modification and disclosure. If the personal information is no longer needed for the purpose for which it was collected, then it must be destroyed or anonymised, unless required to be retained on legal grounds.¹¹⁵⁸

APP 12 - Access to Personal Information

Pursuant to the many exceptions to access rights in NPP 6¹¹⁵⁹ which have been replicated under this principle, the principle provides for individuals' rights to access their information.¹¹⁶⁰

¹¹⁵² Exposure Draft-Australian Privacy Amendment Legislation-Australian Privacy Principles 2010 (Cth), s 8, APP7.

¹¹⁵³ Ibid, s 9, APP 8.

¹¹⁵⁴ Ibid, s 10, APP 9.

¹¹⁵⁵ Ibid, s 10(5), APP 9(5).

¹¹⁵⁶ Ibid; s 10(4), (5), APP 9(4), (5).

¹¹⁵⁷ Ibid, s 11, APP 10.

¹¹⁵⁸ Ibid, s 12, APP 11.

¹¹⁵⁹ *Privacy Act 1988* (Cth). See sch. 3, NPP 6.

¹¹⁶⁰ Exposure Draft-Australian Privacy Amendment Legislation-Australian Privacy Principles 2010 (Cth), APP 12.

APP 13 - Correction of Personal Information

Individuals have the right to correct their personal information if it is inaccurate, out of date, irrelevant or incomplete. If an individual is in disagreement about this, he/she can request that reasonable steps be taken by the entity to update their information.¹¹⁶¹

¹¹⁶¹ Ibid, APP 13.

APPENDIX C

PRIVACY: ICCPR AND OECD

Article 17 of the ICCPR specifically recognises the right to privacy.¹¹⁶²

Article 17 States:

- (1) No one shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, nor to unlawful attacks on his/her honour and reputation¹¹⁶³.
- (2) Everyone has the right to protection of the law against such interference or attacks.¹¹⁶⁴

The concept of privacy, and the very meaning of the word, is applicable to publication of court materials and decisions on the internet, in that it goes beyond the physical zone of protection discussed previously.¹¹⁶⁵ It includes all informational correspondence and publication made available from the private to the public spheres. As such, it's applicable to the internet which is a public space.¹¹⁶⁶ However, it should be noted that over reliance to assert a privacy right might lead to disappointing results, since the article does not establish any true right or freedom. A right to freedom of liberty of privacy, which is comparable to the rights of liberty of the person, is lacking. This is unlike the wording of Article 8 of the ECHR¹¹⁶⁷ which does not place such limitations on the right to privacy, unless authorised by law.¹¹⁶⁸

Where the law is concerned, it seems that the state is able to breach the kinds of freedoms stated in Article 8. For example in *Malone v United Kingdom*,¹¹⁶⁹ the European Court of Human Rights held that the United Kingdom was in breach of Article 8. The Court stated the interception of dialled telephone numbers, and the duration of those conversations to the police, was not authorised by law and therefore not allowed under the exceptions in Article 8(2). However, in *Kracke v Mental Health Review Board & Ors (General)*¹¹⁷⁰ the court considered interference of a medical nature to be justified pursuant to the exceptions under Article 8(2), and as such authorised by law. The Tribunal, in coming to its decision, considered the statement made by Lord Bingham in the House of Lords decision in *Huang v Secretary of*

¹¹⁶² 'International Covenant on Civil and Political Rights (ICCPR) entry into force 23 March 1976, in accordance with Article 49', (16 December 1966) UN, see Article 17 <<http://www2.ohchr.org/english/law/ccpr.htm>>.

¹¹⁶³ *Ibid.*

¹¹⁶⁴ *Ibid.*

¹¹⁶⁵ S. Warren; L. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

¹¹⁶⁶ Julie E. Cohen, 'Privacy, Visibility, Transparency, and Exposure' (2008) 75 *University Chicago Law Review* 181.

¹¹⁶⁷ 'European Convention on Human Rights as amended by Protocol No.14', (2010) Art. 8, Article 8 (2) <<http://www.echr.coe.int/echr/en/header/the+court/events+at+the+court/60+years+of+the+convention>>.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹¹⁶⁸ *Toonen v Australia* [1994] UNHRC 9 (24 March 1994). For further details, see pp 333-359, Sarah Joseph and David Harris, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford University Press, 1995).

¹¹⁶⁹ *Malone v United Kingdom* [1984] ECHR 10; (1985) 7 EHRR 14.

¹¹⁷⁰ *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009)

State for the Home Department,¹¹⁷¹ which stated that such privacy rights in favour of the individual or group would need to be balanced against the interests of society.¹¹⁷² Lord Bingham considered proportionality in bringing the balance to an important aspect, which was outlined in the judgment of Dickson CJ in the Supreme Court of Canada decision in *R v Oakes*,¹¹⁷³ which was also considered in *Momcilovic v R*.¹¹⁷⁴

Accordingly, any limitations on rights and freedoms would have to be reasonable and in accordance with Article 8(2), if it is legally justifiable in a free and democratic society. What this analysis shows is that the right to individual privacy can be maintained if it can be balanced against the rights of the public or societal well-being. It seems to that end at least, that societal well-being is considered the same as the public's right to know, pursuant to the principle of open justice as interpreted in *Scott v Scott*¹¹⁷⁵ and *Russell v Russell*.¹¹⁷⁶ Nevertheless, the court should take into account instances where the public may not be entitled to know, where such instances are breaching explicit rights provided under articles 17 and 8(1). Recent statutory measures, such as the *Suppression Act*,¹¹⁷⁷ seem to suggest that the legislature is recognising the importance of privacy and moving to that end, while the courts, although granting recent applications for suppression¹¹⁷⁸ have shown continued reservation and resistance in granting suppression or non-publication of personal information in published court decisions.¹¹⁷⁹

Another interesting provision in the ICCPR is Article 14(7):¹¹⁸⁰ which is directly related to such cases as breaches of spent convictions, particularly in the context of electronic publication, where long after the expiry of a spent conviction the personal information of individuals remains on the internet, and is likely to bring prejudice and hardship to the individual/s concerned. The action of breaching a spent conviction goes against the spirit of a spent conviction.

Article 14(7)

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.¹¹⁸¹

An identically worded declaration is found in Article 12 of the Universal Declaration of Human Rights:¹¹⁸²

¹¹⁷¹ *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167.

¹¹⁷² *Ibid*, at 19.

¹¹⁷³ *R v Oakes* [1986] SCR 103, at 70, the question of justified limits is to be kept “analytically distinct” from the initial analysis of the human right in question.

¹¹⁷⁴ *Momcilovic v R* [2011] HCA 34 (8 September 2011), at 26.

¹¹⁷⁵ *Scott v Scott* [1913] AC 417.

¹¹⁷⁶ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520.

¹¹⁷⁷ *Court Suppression and Non-Publication Orders Act 2010* (NSW).

¹¹⁷⁸ See the comments of Tobias JA, *Hogan v Hinch* [2011] HCA 4; *Welker & Ors v Rinehart* [2011] NSWSC 1094 (13 September 2011); *Rinehart v Welker and Ors* [2011] NSWCA 345 (31 October 2011).

¹¹⁷⁹ See *Rinehart v Welker* [2012] NSWCA 1 (13 January 2012), see previous detailed discussion and analysis of the applicant's at the Supreme Court of NSW, Court of Appeal and the High Court of Australia.

¹¹⁸⁰ 'International Covenant on Civil and Political Rights (ICCPR) entry into force 23 March 1976, in accordance with Article 49', (16 December 1966) UN, see Article 14(7) <<http://www2.ohchr.org/english/law/ccpr.htm>>.

¹¹⁸¹ *Ibid*.

¹¹⁸² 'The Universal Declaration of Human Rights (UDHR) Article 12.' (1948) (UN) <<http://www.un.org/en/documents/udhr/index.shtml>>.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.¹¹⁸³

The most important piece of international legislation directly relevant to the development of the modern Australian privacy laws, and indeed this research, is the Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data – developed by the Organisation of Economic Cooperation and Development (OECD guidelines)¹¹⁸⁴ which were adopted in Australia in 1980.¹¹⁸⁵ The eight (8) guidelines, found in guidelines 7–14, are basic principles of national application, and which must be followed by OECD member States.¹¹⁸⁶ These guidelines set out the way personal information about individuals should be collected, stored, used and disclosed pursuant to ICCPR and the United Nations Human Rights Charter.¹¹⁸⁷ In particular, the OECD guidelines provide the basis for the IPPs and the NPPs in the Australian *Privacy Act*.¹¹⁸⁸

THE OECD GUIDELINES IN THE CONTEXT OF PRIVACY AND LAW REPORTING

The privacy principles in the OECD Guidelines, which apply to personal data in both the public and private sectors, are the foundation for the two sets of privacy principles in the *Privacy Act*, the Information Privacy Principles (IPPs) and the National Privacy Principles (NPPs).¹¹⁸⁹ The IPPs and the NPPs contained in the Commonwealth Privacy Act will soon be incorporated into one Australian Privacy Principles (APPs), which will be dealt with in more detail in this chapter.

As already mentioned, the preamble to the *Privacy Act* States that since Australia is a member of the OECD, the council of the OECD recommended that all member States take into account, or integrate in some way into their domestic legislation, the privacy principles set out in the OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data (1980).¹¹⁹⁰ The preamble also States that Australia has expressed its intention to participate in the recommendation.

The OECD Guidelines, which are made up of privacy principles, apply to personal data in both the private and public sectors and as already mentioned, form the basis for the two sets of privacy principles in the *Privacy Act*: the IPPs and the NPPs which have now been absorbed by the Australian Privacy Principles (APPs).

The OECD Guidelines were designed to promote transparency in the European Union block, by making it unnecessary for each member State to develop their own conflicting and or convoluted privacy principles in trying to deal with established data bases and interlined technologies.¹¹⁹¹ These guidelines try to bring

¹¹⁸³ 'The Universal Declaration of Human Rights (UDHR) Article 12.', (1948) (UN)

<<http://www.un.org/en/documents/udhr/index.shtml>>.

¹¹⁸⁴ 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980)

<http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>.

¹¹⁸⁵ *Ibid.*

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ *Ibid.*, UDHR.

<<http://www.un.org/en/documents/udhr/index.shtml>>.

¹¹⁸⁸ *Privacy Act 1988* (Cth).

¹¹⁸⁹ See Annexure B.

¹¹⁹⁰ 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980)

<http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>.

¹¹⁹¹ Michael Kirby, 'Privacy Protection, a New Beginning: OECD Principles 20 years on ' (1999) 6(25) *Privacy Law & Policy Reporter* 25.

together, rather than segregate, the attempt to balance the protection of individual privacy and liberties with the advance of free flow of personal information.¹¹⁹² They were designed chiefly to protect and remove any impediments in the cross-border flow of information, while attempting to co-ordinate and bring together national privacy legislative regimes and protect human rights under the charters mentioned.¹¹⁹³

The OECD Guidelines apply to personal information. These guidelines apply both to the public and private sectors and apply in order to protect against dangers to individual privacy and liberties.¹¹⁹⁴ These guidelines are designed as the basic or minimum standards of requirement, and are able to be supported with additional measures in order to strengthen them.¹¹⁹⁵ Of relevance also is the fact that the guidelines are designed to discourage member States from drafting unnecessary and convoluted legislation, which might stand in the way of free cross-border flows of personal information when those States attempt to protect individual privacy.¹¹⁹⁶

As previously mentioned, the eight basic Information Privacy Principles or IPPs in the Guidelines cover: collection limitation, data quality, purpose specification, use limitation, security safeguards, openness; individual participation; and accountability.¹¹⁹⁷

These principles can be found in the Australian IPPs and NPPs, and although not all the headings bear the same names as those found in the Guidelines mentioned above, their overriding principles are nevertheless incorporated in the provisions of the *Privacy Act*.¹¹⁹⁸ The explanatory memorandum to the IECG Guidelines¹¹⁹⁹ does try to explain the difficulty in the implementation and the appropriate level of that implementation. That difficulty also extends to the questions of time limits for the retention, and requirements for the erasure of personal information. In addition, the relevance of the data, that it be relevant for a specific purpose, are all details which as the OECD memorandum explains, should ultimately be better left to domestic implementation.¹²⁰⁰

Indeed, it is noteworthy to give a brief explanation as to how instrumental Australia was, through the efforts and involvements of His Honour Justice Kirby, in the development of the very Guidelines that underpin the privacy regimes of all OECD member States. The Explanatory Memorandum to the OECD Guidelines¹²⁰¹ States that a group of experts was formed back in 1978 for the specific purpose of Trans-border Data Barriers and Privacy Protection. The group was instructed (by the OECD) to develop guidelines on basic rules governing the trans-border flow and the protection of personal data and privacy, for the harmonization of national legislations, without this precluding at a later date the establishment of

¹¹⁹² 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980) <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>, Explanatory Memorandum 25.

¹¹⁹³ Ibid.

¹¹⁹⁴ Ibid, see Guideline 2.

¹¹⁹⁵ Ibid, see Guideline 6.

¹¹⁹⁶ Ibid, see Guideline 18.

¹¹⁹⁷ Ibid, see Guidelines 7-14.

¹¹⁹⁸ *Privacy Act 1988* (Cth). See aspects of the accountability principle from the OECD Guidelines as they are incorporated including other provisions in the Privacy Act, such as those dealing with investigations of complaints regarding privacy breaches.

¹¹⁹⁹ 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980) <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html> Explanatory Memorandum to the OECD Guidelines.

¹²⁰⁰ Ibid.

¹²⁰¹ Ibid, clause 17.

an international convention. The group co-ordinated its efforts closely with the Council of Europe and the European Community, and spent one year in order to complete that task by mid 1979.¹²⁰²

That Expert Group was chaired by His Honour Justice Kirby. Accordingly, His Honour was able to ascertain within a short period of time the main issues of concern, and to have the group produce several drafts and discussions on a number of relevant and important topics, including comparative analysis of different approaches to privacy legislation and other legislative regimes in this field.¹²⁰³ The Group of experts analysed and studied differing aspects of privacy issues [and much more relevant to our understanding and the way in which privacy issues are dealt with by the various nation State legislative regimes today] such as those relating to digital information; public administration; trans-border data flows; and policy implications in general.¹²⁰⁴ These tasks were undertaken by the Group in order to gather evidence on the types of problems prevalent and which of those would need addressing. As early as 1977, the Data Bank Panel, aided the Group of Experts, organised a Symposium in Vienna, which provided opinions and experience from a diversity of interests, including government, industry users of international data communications networks, processing services, and interested inter-governmental organisations.¹²⁰⁵

The guiding principles considered were as follows:¹²⁰⁶ (i) the continuous and uninterrupted flow of information between countries; (ii) legitimate interests of countries in preventing the transfer of dangerous data (considered subjectively in the State's self interest and security)¹²⁰⁷ which would contravene the State's national security laws, and or such data which might promote public disorder and indecency, and or data which would violate the average citizen's rights; (iii) the economic value of information and the importance of protecting "data trade" by accepted rules of fair competition; (iv) security safeguards to minimise violations of proprietary data and misuse of personal information [relevant particularly to this thesis]; and (v) the importance of committed countries setting a core of principles for the protection of personal information.¹²⁰⁸

Specifically, the key issues and different approaches to legislation in this field which were considered by the expert group involved the following:¹²⁰⁹

- (i) Whether the guidelines should be of a general nature, or whether they had to be developed to address different issues, such as dealing with credit reporting. This was problematic, since it was deemed impossible to identify and categorise a set of data which would universally be deemed and regarded as sensitive;¹²¹⁰
- (ii) In relation to automatic data processing, the issue was not considered to be of major concern, and in fact any such allegations of concern are contested;¹²¹¹
- (iii) In relation to the legal person's issue. Most national laws were deemed laws which were able to protect data relating to legal persons in a similar manner to data related to physical persons;¹²¹²

¹²⁰² Ibid, clause 18.

¹²⁰³ Ibid.

¹²⁰⁴ Ibid.

¹²⁰⁵ Ibid.

¹²⁰⁶ Ibid, clause 17.

¹²⁰⁷ See, John Gaudin, 'The OECD Privacy Principles -- can they survive technological change?' (Pt II) (1997) 3 *Privacy Law & Policy Reporter* 196.

¹²⁰⁸ 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980) <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>.

¹²⁰⁹ Ibid, clause 19.

¹²¹⁰ Ibid, clause 19(a).

¹²¹¹ Ibid, clause 19(b).

- (iv) In relation to remedies and sanctions, the approaches differ considerably in that the schemes involving supervision and licensing by specially constituted authorities might be compared to schemes involving voluntary compliance by record-keepers and reliance on traditional judicial remedies in the Courts;¹²¹³
- (v) In relation to basic machinery or implementation. The extent to which data security questions (protection of data against unauthorised interference, fire, and similar occurrences) should be regarded as part of the greater protection of privacy issues. Although opinions may differ with regard to time limits for the storage and the requirements for erasure of data, and that the data should be relevant to the specific purpose for which it was gathered, they are both considered as part of the protection of privacy issue. The other sticking point was the extent to which the data protection regimes, or enforcement of such regimes, should be left to domestic implementation;¹²¹⁴
- (vi) in relation to the choice of law, with several problems arising out of the particular jurisdiction, the choice of applicable law, and the extent to which foreign judgment would be binding, have proved complex in the context of trans-border data flows;¹²¹⁵
- (vii) in relation to the exception issue, various options were considered as to whether particular categories of exceptions should be provided at all, or should general limits to exceptions be formulated;¹²¹⁶ and
- (viii) in relation to the issue of bias, in order to avoid the inherent conflict between the protection and the free trans-border flow of personal data, emphasis should be placed on one or the other. That privacy interests may be difficult to differentiate from other interests relating to trade, culture, national sovereignty, and so on.¹²¹⁷

During that period of development, the Expert Group of the OECD maintained close contacts with the relevant organs of the Council of Europe. Great effort was made by the Group to avoid any unnecessary differences between the texts produced between the two organs. As a result, the set of basic principles of protection are very similar. However, some differences were apparent. Most importantly, the OECD guidelines are not legally binding, whereas the Council of Europe produced a convention which, when ratified by countries, will make it binding.¹²¹⁸

The Council of Europe¹²¹⁹ dealt with the questions of exceptions and the areas of application in greater detail, and it should be noted that the COE dealings were different from that of the OECD. The COE Convention dealt primarily with the automatic processing of personal data, whereas the OECD Guidelines applied to personal data which revolved around the areas of privacy and individual liberties, irrespective of the way in which they were handled. Whilst the principles of protection proposed by the two organisations were not identical, and the terminology employed differs in some respects, the institutional framework for continued co-operation is treated in greater detail in the Convention of the COE than in the

¹²¹² Ibid, clause 19(c).

¹²¹³ Ibid, clause 19(d).

¹²¹⁴ Ibid, clause 19(e).

¹²¹⁵ Ibid, clause 19(f).

¹²¹⁶ Ibid, clause 19(g).

¹²¹⁷ Ibid, clause 19(h).

¹²¹⁸ Ibid, clause 20.

¹²¹⁹ *Council of Europe (COE)*, <<http://www.coe.int/>>.

OECD Guidelines.¹²²⁰ Finally, the Expert Group also maintained co-operation with the Commission of the European Communities as required by its mandate.¹²²¹

Although the Guidelines were progressive in their nature and designed to deal with the privacy challenges presented by the technology of the day, it soon became apparent that the OECD principles were failing to keep pace with the rapid changes presented by technology in the modern era.¹²²² Furthermore, it was argued that although the principles were relevant, they were seen to be placing a limitation on the extent to which they were effective.¹²²³ These limitations were hard to ignore, since they were developed around and grounded in the society, technology and culture of the 1970's. In addition, certain assumptions were clearly made about the future development of information technology, which have rapidly become more advanced and have placed further limitations on the guidelines.¹²²⁴

Indeed, the above sentiment had been reflected by Justice Michael Kirby who, as previously mentioned, chaired the OECD expert group on privacy and who was responsible for the development of the principles. By the late 1990's, His Honour stated that in relation to their effectiveness, the 1980 OECD Guidelines needed to be reviewed, as they were already showing signs of ageing.¹²²⁵ His Honour highlighted the 'openness principle' of the guidelines as being the weakest, and clearly out of depth with contemporary technology, in particular since it was developed prior to the advent of the internet, and therefore strengthening the argument that it be further developed in light of the internet.¹²²⁶ Ultimately, the guidelines led to the development in 1992 of the adoption of the *Guidelines for the security of Information Systems*, by the Council of the OECD.¹²²⁷

These further Guidelines were designed to highlight the risk factors involved in information systems, and the available measures at hand [at the time] to meet the challenges posed by those risks. Furthermore, they were brought about for the creation of a framework to assist those responsible, in the public and private sectors, to implement a set of practices and procedures in order to bring further security to information systems.¹²²⁸

However, since 1992, there has been a dramatic transformation in the information technology sector, and the technological environment governing most nation-States. Consequently, those Guidelines¹²²⁹ have since been replaced by the 'OECD Guidelines for the 'Security of Information Systems and Networks: Towards a Culture of Security'.¹²³⁰

These Guidelines¹²³¹ in-turn contain nine (9) information systems security principles similar to the 1980 Guidelines. These are as follows: awareness; responsibility; ethics; democracy; risk assessment; security design and implementation; security management; and reassessment. The two most important principles

¹²²⁰ 'OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', (1980), clause 20 <http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html>.

¹²²¹ Ibid, clause 21.

¹²²² John Gaudin, 'The OECD Privacy Principles -- can they survive technological change?' (Pt I) (1996) 3 *Privacy Law and Policy Reporter* 143, at 144.

¹²²³ Ibid, Gaudin, at 199.

¹²²⁴ Ibid, at 144.

¹²²⁵ Michael Kirby, 'Privacy Protection, a New Beginning: OECD Principles 20 years on' (1999) 6(25) *Privacy Law & Policy Reporter* 25, at 53.

¹²²⁶ Ibid.

¹²²⁷ *OECD Guidelines for the Security of Information Systems*, 1992, OECD <http://www.oecd.org/document/19/0,2340,en_2649_34255_1815059_119820_1_1_1,00.html>.

¹²²⁸ Ibid.

¹²²⁹ Ibid.

¹²³⁰ 'OECD Guidelines for the Security of Information Systems and Networks: Towards a Culture of Security (2002)' <http://www.oecd.org/document/42/0,3746,en_21571361_36139259_15582250_1_1_1_1,00.html>.

¹²³¹ Ibid.

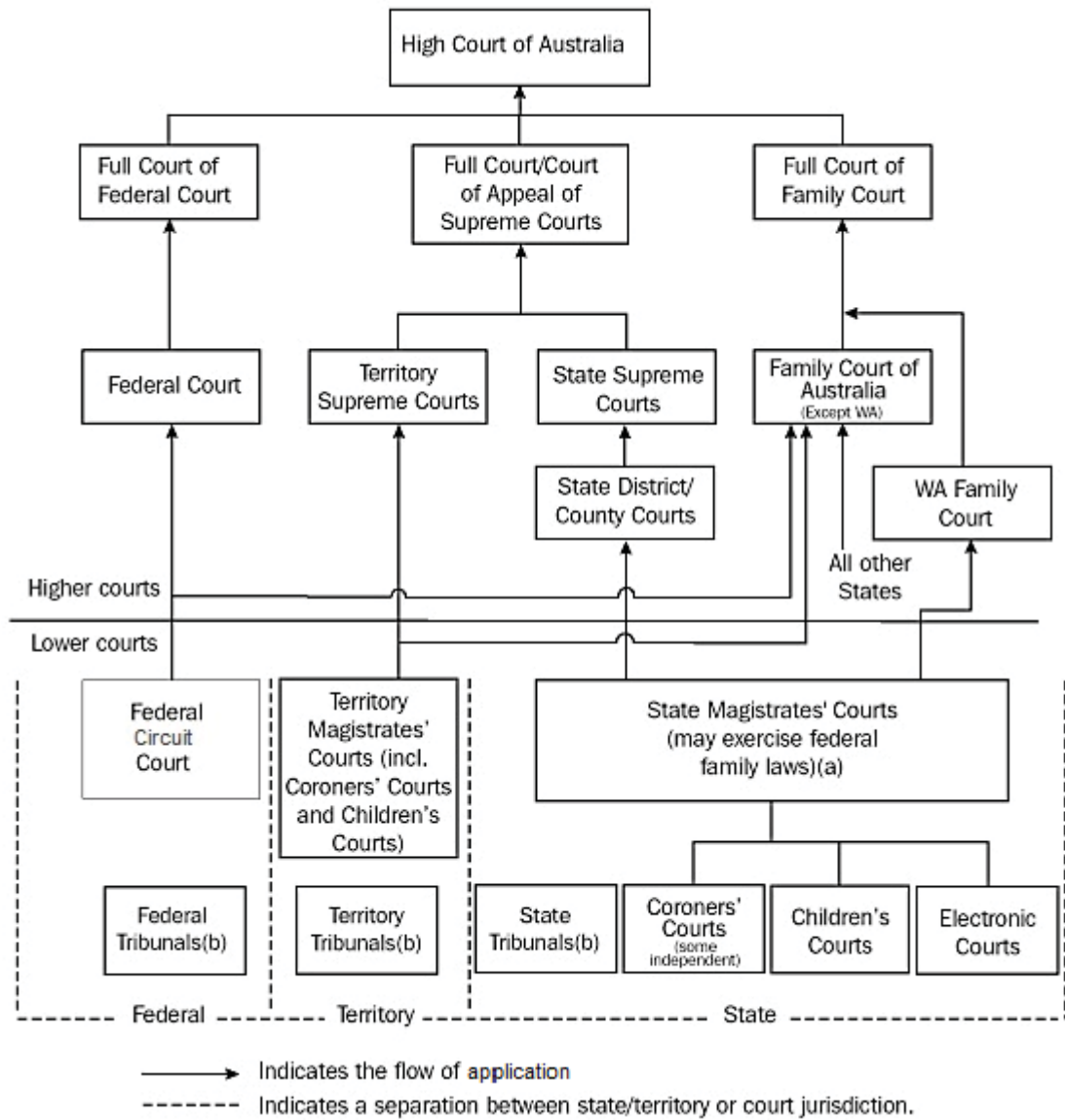
being the awareness principle, which provides that participants should be aware of the need for security of information systems and networks and what they can do to enhance that security;¹²³² and the responsibility principle, which provides that participants should act in a timely and co-operative manner to prevent, detect and respond to security incidents.¹²³³

¹²³² Ibid, see Principle 1.

¹²³³ Ibid, see Principle 3.

APPENDIX D

HIERARCHY OF AUSTRALIAN COURTS¹²³⁴



¹²³⁴ Included for ease of reference for international readers.

APPENDIX E

TERMS OF REFERENCE

SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA¹²³⁵

- the extent and application of existing privacy statutes
- the rapid growth in capabilities and use of information, surveillance and communication technologies
- community perceptions of privacy
- relevant international standards and the desirability of consistency in laws affecting national and trans-national data-flows.

REFER to the Australian Law Reform Commission for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996*, the issue of prevention of and remedies for serious invasions of privacy in the digital era.

Scope of the reference

The ALRC should make recommendations regarding:

1. Innovative ways in which law may reduce serious invasions of privacy in the digital era.
2. **The necessity of balancing the value of privacy with other fundamental values including freedom of expression and open justice.**
3. The detailed legal design of a statutory cause of action for serious invasions of privacy, including but not limited to:
 - (i) legal thresholds
 - (ii) the effect of the implied freedom of political communication
 - (iii) jurisdiction
 - (iv) fault elements
 - (v) proof of damages
 - (vi) defences
 - (vii) exemptions
 - (viii) whether there should be a maximum award of damages
 - (ix) whether there should be a limitation period
 - (x) whether the cause of action should be restricted to natural and living persons
 - (xi) whether any common law causes of action should be abolished
 - (xii) access to justice
 - (xiii) the availability of other court ordered remedies.
4. The nature and appropriateness of any other legal remedies for redress for serious invasions of privacy

¹²³⁵ New Commissioner appointed to the ALRC for the Serious Invasions of Privacy Inquiry found at: *Australian Law Reform Commission (ALRC)*, 'Terms of Reference' <<http://www.alrc.gov.au/>>.

APPENDIX F

DECLARATION ON FREE ACCESS TO LAW¹²³⁶

Legal information institutes of the world, meeting in Montreal, declare that:

- Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;
- Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;
- Organisations such as legal information institutes have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published by other parties.

Public legal information means legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.

Publicly funded secondary (interpretative) legal materials should be accessible for free but permission to republish is not always appropriate or possible. In particular free access to legal scholarship may be provided by legal scholarship repositories, legal information institutes or other means.

Legal information institutes:

- Publish via the internet public legal information originating from more than one public body;
- Provide free and anonymous public access to that information;
- Do not impede others from obtaining public legal information from its sources and publishing it; and
- Support the objectives set out in this Declaration.

All legal information institutes are encouraged to participate in regional or global free access to law networks.

Therefore, the legal information institutes agree:

- To promote and support free access to public legal information throughout the world, principally via the Internet;
- To recognise the primary role of local initiatives in free access publishing of their own national legal information;

¹²³⁶ Declaration on Free Access to Law, made by legal information institutes meeting in Montreal in 2002, as amended at meetings in Sydney (2003), Paris (2004) and Montreal (2007) *Declaration on Free Access to Law* <<http://www.fatlm.org/declaration/>>.

- To co-operate in order to achieve these goals and, in particular, to assist organisations in developing countries to achieve these goals, recognising the reciprocal advantages that all obtain from access to each other's law;
- To help each other and to support, within their means, other organisations that share these goals with respect to:
 - Promotion, to governments and other organisations, of public policy conducive to the accessibility of public legal information;
 - Technical assistance, advice and training;
 - Development of open technical standards;
 - Academic exchange of research results.
- To meet at least annually, and to invite other organisations who are legal information institutes to subscribe to this declaration and join those meetings, according to procedures to be established by the parties to this Declaration;
- To provide to the end users of public legal information clear information concerning any conditions of re-use of that information, where this is feasible.

The parties to this Declaration also support the principles stated in the 'Guiding Principles' on State obligations concerning free access to legal information developed by an expert group convened by the Hague Conference on Private International Law in October 2008, and the 'Law.Gov principles' for 'the dissemination of primary legal materials in the United States' developed in 2010 by Public Resources.org.

APPENDIX G

HAGUE CONFERENCE GUIDING PRINCIPLES¹²³⁷

Below are listed the Guiding Principles to be Considered in Developing a Future Instrument, developed by the Expert Meeting of October 2008. These Guiding Principles are a rough draft of the main consensus concepts agreed upon by the experts present at the meeting, but does not reflect full consensus on all wording of the principles. The Principles, which remain subject to further development, refinement and discussion, provide an indication for one possible direction of work by the Hague Conference.

Free access

1. State Parties shall ensure that their legal materials, in particular legislation, court and administrative tribunal decisions and international agreements, are available for free access in an electronic form by any persons, including those in foreign jurisdictions.
2. State Parties are also encouraged to make available for free access relevant historical materials, including preparatory work and legislation that has been amended or repealed, as well as relevant explanatory materials.

Reproducing and re-use

3. State Parties are encouraged to permit and facilitate the reproduction and re-use of legal materials, as referred to in paragraphs 1 and 2, by other bodies, in particular for the purpose of securing free public access to the materials, and to remove any impediments to such reproduction and re-use.

Integrity and authoritativeness

4. State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form.
5. State Parties are encouraged to take all reasonable measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness).
6. State Parties are encouraged to remove obstacles to the admissibility of these materials in their courts.

Preservation

7. State Parties are encouraged to ensure long-term preservation and accessibility of their legal materials referred to in paragraphs 1 and 2 above.

Open formats, metadata and knowledge-based systems

8. State Parties are encouraged to make their legal materials available in open and re-usable formats and with such metadata as is available.

¹²³⁷ 'Prel. Doc. No 11 B of March 2009 'Accessing the Content of Foreign Law – Report of the Meeting of Experts on Global Co-operation on the Provision of Online Legal Information on National Laws' <<http://109.168.120.21/siti/Unidroit/index/pdf/XIV-1-2-0264.pdf>>.

9. State Parties are encouraged to co-operate in the development of common standards for metadata applicable to legal materials, particularly those intended to enable and encourage interchange.
10. Where State Parties provide knowledge-based systems assisting in the application or interpretation of their legal materials, they are encouraged to make such systems available for free public access, reproducing and re-use.

Protection of personal data

11. Online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymised in order to make them available for free access.

Citations

12. State Parties are encouraged to adopt neutral methods of citation of their legal materials, including methods that are medium-neutral, provider-neutral and internationally consistent.

Translations

13. State Parties are encouraged, where possible, to provide translations of their legislation and other materials, in other languages.
14. Where State Parties do provide such translations, they are encouraged to allow them to be reproduced or re-used by other parties, particularly for free public access.
15. State Parties are encouraged to develop multi-lingual access capacities and to co-operate in the development of such capacities.

Support and co-operation

16. State Parties and re-publishers of their legal materials are encouraged to make those legal materials more accessible through various means of inter-operability and networking.
17. State Parties are encouraged to assist in sustaining those organisations that fulfil the above objectives and to assist other State Parties in fulfilling their obligations.
18. State Parties are encouraged to co-operate in fulfilling these obligations.

APPENDIX H

AUSTRALASIAN LEGAL INFORMATION INSTITUTE

FREE ACCESS TO LAW PRINCIPLES¹²³⁸

1. Provision in a completed form, including additional information best provided at source, such as the consolidation of legislation, and the addition of catchwords (index terms) or even summaries to cases.
2. Provision in an authoritative form, such as use of court-designated citations for cases and (eventually) use of digital signatures to authenticate the versions distributed.
3. Provision in the form best facilitating dissemination, which should always now mean in electronic form, which should in most cases be possible by email or more sophisticated forms of data delivery, and should be possible in a form facilitating conversion.
4. Provision on a marginal-cost-recovery basis to anyone, so that governments do not attempt to profit from the sale of public legal information, thereby creating artificial barriers to access to law.
5. Provision with no re-use restrictions or licence fees, subject only to such minimal restrictions as are necessary to preserve the integrity of published data.
6. Preservation of a copy in the care of the public authority, so that an archive of the data is preserved to enable greater competition whenever a new entrant wishes to publish the data, whether or not the public authority publishes the data itself.
7. Non-discriminatory recognition of citations, so that Court-designated citations are not removed from 'reported' cases, so that the privileged status of citations of 'official' reports is reduced or eliminated.

¹²³⁸ See *Australasian Legal Information Institute (AustLII)* University of Technology, Sydney, Faculty of Law <<http://www.austlii.edu.au/>>.

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