

Closed Court Exceptions to the General Rule of Openness

Introduction

The openness of our courts is a fundamental principle of our judicial system.¹ It is generally taken for granted that court proceedings are open to the public and may be freely reported.² However the idea of open justice is not absolute. Exceptions have been developed by courts through the common law where, on rare occasions, limits are placed on publicity. Numerous statutory provisions also recognise that justice requires that the general rule of openness be modified in particular cases

Statutory Exceptions

Crime and Corruption Act 2001 s 332

The *Crime and Misconduct Act 2001* which came into force on 8 November 2001 (and was on 1 July 2014 renamed the *Crime and Corruption Act*) replaced the *Criminal Justice Act 1989*. Section 332 of the *Crime and Corruption Act* applies where a person subject to investigation by the Crime and Corruption Commission makes an application for injunctive relief on the ground that the investigation is being conducted unfairly or the complaint or information on which an investigation is being, or is about to be conducted, does not warrant investigation.³ An application under this section must be held in closed court.⁴ On the Commission's application, the judge may hear submissions from the Commission in relation to the investigation in the absence of the person or their lawyer.⁵

Child Protection Act 1999

In general, public reporting of proceedings in the Childrens Court is prohibited as it is not open to the public, unless approved by the Court. The Childrens Court aims to protect the privacy of children (under 18 years).

The *Child Protection Act 1999* contains numerous provisions which restrict the openness of proceedings before a court (or tribunal).

The identity of a "notifier" is protected under this Act. A notifier is someone who has notified an authorised person that they suspect a child has or is likely to be harmed.⁶ It is an offence for that authorised person to disclose the notifier's identity except in certain circumstances including the giving of evidence in proceedings where leave is granted. If leave is not granted, any witness cannot be asked questions or produce documents which might lead to the identification of the notifier.⁶ In general a court must not grant such leave unless it is satisfied, after considering likely effects on the notifier and their family and the public interest in maintaining their confidentiality, that its disclosure is critical and in the public interest, or the notifier has agreed to the evidence being given.⁷

¹ *Scott v Scott* [1913] AC 417.

² G. Nettheim, "Open Justice versus Justice", *Adelaide Law Review* 9(4) May 1985, 487.

³ s 332(1).

⁴ s 332(8).

⁵ s 332(2).⁶

s

186(1).

⁶ s 186(3).

⁷ s186(3), (4), (5), (6).

Similarly, it is an offence to identify a child who is or has been harmed or is at risk, or is in the guardianship of the Chief Executive, or is the subject of an order⁸ without the written approval of the Chief Executive. The Chief Executive's approval is structured by various statutory criteria.⁹

In court proceedings where there is a notice directed to the Chief Executive or a government entity to produce documents relating to a child or their carer,¹⁰ it is an offence for any court officer to allow the document to be inspected other than by the parties or their legal representatives.¹¹

It is acceptable however for a person who is engaged in the administration of the *Child Protection Act* to refuse to disclose information to a court if its disclosure is likely to adversely affect a person's safety or mental health, if it identifies a source of information which would be prejudicial to the Act's purpose, if it is a counselling record and its disclosure would jeopardize counselling, or if it is purely personal information which is not relevant.¹³

However, a court can, on application by a party, override this refusal if the document is relevant and its disclosure is, on balance, in the public interest.¹⁴ In that situation, the person who holds the information must disclose it to the judge to enable a determination to be made.¹² In such cases the judge must ensure that the information is not disclosed to anyone else.¹³

Evidence given in Childrens Court proceedings or contained in the Court's records or information which identifies a party cannot be published without the Court's approval.¹⁴

Similarly, in offences of a sexual nature where children are involved, whether as a witness, the complainant or the defendant, reports of the proceedings which identify the authorised person/polic officer are prohibited unless the court otherwise authorises it.¹⁵

Childrens Court Act 1992 ss 21A – 21E

Section 21B provides that in a proceeding before the court for a non-youth justice matter in relation to a child or for a youth justice matter in relation to a child who is a first time offender, the court must exclude from the court any person who is not a relevant person for the proceeding or an interested person whom the court permits to be present (s 21B(1)). The terms "relevant person" and "interested person" are defined in s 21A.

For a youth justice matter in relation to a child who is a first-time offender the court may permit the presence of a representative of the media or a person if, in the courts opinion, the person has a proper interest in the proceeding and the person's presence would not be prejudicial to the interests of the child (s 21B(2A)).

⁸ s 189.

⁹ s 10 *Child Protection Regulation 2000*.

¹⁰ s 190(1)(a) and (b) *Child Protection Act 1999*.

¹¹ s 190(5).¹³

s 191(1).¹⁴ s

191(2).

¹² s 191(3).

¹³ s 191(4).

¹⁴ s 192.

¹⁵ s 193(1), (2), (3).

Subsection 21B(1) does not apply to the Childrens Court when constituted by a judge exercising jurisdiction to hear and determine a charge on indictment.

In relation to a youth justice matter involving a child who is not a first time offender, the proceeding must be held in open court unless the court orders the court to be closed or excludes a person under s 21E (s 21C(1)). The court may be closed to the public or to particular persons if the court considers it is necessary and desirable in the interests of justice (s 21C(2)). The court may order the court to be closed for all or part of the proceedings on its own initiative or on an application under s 21D (s 21C(3)).

Despite an order made under s 21C(3), the court may permit to be present an interested person, a representative of the media or a person who, in the courts opinion, has a proper interest in the proceeding and whose presence would not be prejudicial to the interests of the child (s 21(6)).

Section 21C(2) does not apply to the court when constituted by a judge exercising jurisdiction to hear and determine a charge on indictment (s 21C(7)).

Section 21D provides for an application to close the court for all or part of a proceeding to be made by a relevant person for the proceeding or the chief executive (child protection) or the child guardian.

Section 21E provides for the exclusion of the public in relation to a proceeding in relation to a child who is charged with a sexual offence when the complainant is giving evidence in any committal or trial.

Youth Justice Act 1992

Section 301 prohibits publication of identifying information about a first-time offender (s 301(1)). "First-time offender" is defined in schedule 4 (Dictionary).

Section 301(1) does not apply to a publication in a way permitted by a court order or publication under written authority given by the chief executive if satisfied the publication is necessary to ensure a person's safety (s 301(2),(3)).

Section 234 provides that a court may order that identifying information about a child who is a first-time offender may be published if the court considers it would be in the interests of justice to allow publication. The court needs to have regard to the need to protect the community, the safety or wellbeing of a person other than the child or the child's rehabilitation and any other relevant matter (s 234(2)). This order can only be made concerning a child who has been dealt with pursuant to s 176(3)(b).

In relation to a child who is not a first-time offender, the court may, at any time during a proceeding, make an order it considers in the interests of justice prohibiting the publication of identifying information about the child (s 299A). The court may make a publication prohibition order on its own initiative or an application by a relevant party (s 299A(3)). "Relevant party" is defined in that section. The section also sets out the matters the court must consider in such an order.

Penalties and Sentences Act 1992

Under s 13A, an offender who has cooperated with authorities (ie an informer) has his undertaking placed in an unsealed envelope; oral submissions as to an informer's cooperation occur in a closed court. The imposition of the penalty is in an open court but afterwards the reasons for the reduced sentence are stated in closed court. The envelope containing the material relevant to the formation provided is then sealed. The judge/magistrate can prohibit publication of all or part of the proceeding or the name and address of any witness either on

his/her own initiative or on application.¹⁶ In deciding whether or not to make an order the judge/magistrate may have regard to the safety of any person; and the extent to which the detection of offences of a similar nature may be affected; and the need to guarantee the confidentiality of information given by an informer.¹⁷¹⁸¹⁹²⁰

A similar procedure exists under s 13B for significant cooperation with the authorities except that the court is not required to be closed when the Judge delivers sentence.

Evidence Act 1977

This act makes special provision for the giving of evidence by children or people with mental, intellectual or physical impairment such as to make them likely to be disadvantaged as witnesses or those likely to suffer severe emotional trauma or those likely to be so intimidated as to be disadvantaged as witnesses. It allows the court in certain circumstances to close the court²¹ or to hear evidence by videotape.²²

Where there is a danger to a witness or undercover, law enforcement agencies can issue a certificate of anonymity.²³

Criminal Law (Sexual Offences) Act 1978

Exclusion of public

Complainants in sexual cases are able to give evidence in closed court. A support person may be present.²¹

Publication of complainant's identity prohibited Publication prematurely of defendant's identity prohibited

Publication of the complainant's identity – name, address, school, employment etc or details of examination of witnesses at committal proceedings which might lead to the identification of a defendant are prohibited unless the court (in the first instance) or justice (in the second instance) for good and sufficient reasons order to the contrary.²²

Justices Act 1886

Open / Closed Court

There is a general presumption that courts should be open and public but justices can, in the interests of public morality, require some or all persons to be excluded (but not the legal representatives of the defendant).²³ It is open to justices to exclude strangers if it appears that

¹⁶ s 13A(8).

¹⁷ s 13A(9).

¹⁸ s 21A(2)(b).

¹⁹ s 21A(2)(e).

²⁰ s 21B.

²¹ s 5.

²² ss 6 and 7.

²³ s 70.

the ends of justice require it.²⁴ The taking of photographs either in the court or a passageway / entrance leading to it are prohibited.²⁵

Bail Act 1980

Restrictions on publication

Where the complainant or prosecutor opposes the defendant's release (under Part 2 – Grant and Enlargement of Bail and Other Release), a court can order that the evidence, information, representations of either party or the reasons for the court's refusal of bail shall not be published – in the case where the examination relates to a witness to an indictable offence which examination is held before the defendant's discharge, or where the defendant is tried or committed for trial but before the trial is ended.²⁶

Coroners Act 2003

Inquests

An inquest shall be open unless the coroner orders that the court be closed while particular evidence is given.²⁷ The Coroners Court may exclude a person if the court considers that it is in the interest of justice, the public or a particular person to do so.²⁸ The coroner can make an order prohibiting publication of evidence.²⁹

Adoption Act 2009

Restrictions on publication of identity of parties

The *Adoption Act 2009* replaced the *Adoption of Children Act 1964* on 26 August 2009. Pursuant to s 315(2), the publication of identifying material is prohibited without written approval by the chief executive or written consent by the identified person (if an adult), the parent of an identified person who is a child other than a proposed adoptee, the person with custody of an identified person who is a proposed adoptee in the custody of a person under an interim order, or the chief executive in relation to other proposed adoptees. Identifying material is defined as material that identifies, or is likely to lead to the identification of a party, or relative of a party, to an adoption or a court proceeding relating to an adoption, or a person whose consent to an adoption is or was required.³⁰

Criminal Code 1899

Power to protect victim of violence by prohibiting publication of information about proceedings

Where a person has been committed for trial or sentence for an indictable offence involving personal violence, or where there is a summary hearing of an indictable offence involving personal violence³¹ the Court can prohibit the publication of the victim's address (residential,

²⁴ s 71.

²⁵ s 71B.

²⁶ s 12.

²⁷ s 31(1).

²⁸ s 43(1).

²⁹ s 41.

³⁰ s 315(1).

³¹ s 695A(1)(a) and (b).

school, employment etc). The order can only be made if the information is not relevant to the defendant's guilt or innocence.