OPEN JUSTICE AND SUPPRESSING EVIDENCE OF POLICE METHODS: THE POSITION IN CANADA AND AUSTRALIA

PART TWO

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[The purpose of this article is to identify and analyse, from the perspective of the principle of open justice, the response of courts in Canada and Australia when requested by the police to suppress publication in the mass media of evidence given in open court concerning a particular police method that has been used to solve cold cases. Part One discussed the source of the courts' power to make non-publication orders and compared the tests that are used in these two jurisdictions to determine whether such orders should be made. It then identified several practical, procedural and technical issues posed by non-publication orders that were highlighted in these cases, as well as some unresolved issues of statutory interpretation, and considered how these issues impacted on open justice. Part Two will deal with the substance of the decisions of courts and will evaluate them from the perspective of open justice.]

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I Open Justice and Suppressing Evidence of Police Methods and Identities: The Substantive Issue

A *The Position in Canada*

1 *The Ban on Operational Methods*

In *R v Mentuck* ('*Mentuck*'), the Crown claimed that it was not seeking a complete suppression of the hallmarks of the operational methods,[1] only that they should be kept out of the mass media,[2] the assumption being that the types of person selected as targets of the crime boss scenario were more likely to access newspapers and television news programmes than law reports and legal journals. The bans sought in *R v ONE* ('*ONE*') were described as 'effectively identical'.[3] However, in *ONE*, the trial judge worded the ban in such a way that it went beyond publication in the mass media and prohibited outright 'publication in print'.[4] The Supreme Court of Canada did not comment on this apparent discrepancy. The same situation occurred in Victoria in *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* ('*Re Applications 2004*'),[5] and

[1] As explained in Part One of this article, Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia (Part One)' (2007) 31 *Melbourne University Law Review* 171, the hallmarks of the police operational methods sought to be suppressed in *Mentuck* [2001] 3 SCR 442, 446–7 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ) were that Clayton Mentuck:

- was given the opportunity to join a criminal organisation that would provide him with the potential to earn large sums of money so long as he demonstrated his loyalty by confessing any past criminal activity;
- was told that the undercover operator was in trouble with the crime boss because it was believed that he had recruited a liar;
- was asked to pick up a parcel from a bus depot locker and turn the key over to the operator;
- was asked to pick up and deliver a vehicle on the instructions of the operator;
- was asked to stand guard whilst the undercover operator attended a meeting;
- was asked to help count large sums of money;
- was paid substantial sums of money for completing these tasks;
- met with the crime boss in a hotel room;
- was told he needed to provide details of his involvement in the death of the victim so that arrangements could be made for a terminally ill person to confess to the crime; and
- was told he would be assisted in suing the government for wrongful imprisonment and would be allowed to keep a minimum of $85 000 or 10 per cent of the settlement whichever was the larger.

[2] [2001] 3 SCR 442, 467 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). The exact wording of the order sought from Menzies J was not reproduced in the Supreme Court of Canada's decision. The decision recounts the material sought to be suppressed by the Crown's motion, but not the forms of expression subject to it: at 448–9 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

[3] [2001] 3 SCR 478, 484 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

[4] Ibid 482 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

[5] (2004) 9 VR 275.

is discussed below.[6] It demonstrates that the way in which a publication ban is worded has a significant impact on the extent to which open justice is abridged.

Pursuant to the first limb of the modified *Dagenais v Canadian Broadcasting Corporation* ('*Dagenais*') test,[7] the Supreme Court of Canada in *Mentuck* had to ascertain whether a ban prohibiting publication of operational methods was necessary in order to prevent a serious risk to the administration of justice.[8] Despite urging caution in deciding what can be regarded as part of the administration of justice, the Court thought it 'obvious' that the use of police operatives and informers is part of the administration of justice,[9] and was satisfied that the administration of justice was at risk insofar as it accepted that police operations would be compromised if suspects learned that they were targets.[10] However, the stumbling block for the Crown was that it had failed to establish that there was a *serious* risk that the efficacy of present and future police operations would be reduced by the publication of the hallmarks of the technique. The Court took the view that there are a limited number of ways that undercover operations can be run, and that criminals who might extrapolate from a newspaper story that their own situation could be a police construct might arrive at the same conclusion using their common sense or by reference to similar situations depicted in popular books or films.[11] Since suspects could learn of the types of undercover operation employed by police from other sources, the risk that media reports alone would tip them off and jeopardise police operations was not regarded as a serious one. Thus, publication of the methods in the mass media would not 'seriously increase the rate of compromise'.[12] The police had only been able to point to one instance in which media reports had arguably resulted in the compromise of an operation.[13] The same reasoning was adopted in *ONE*, where the Court reiterated that neither the efficacy of ongoing police investigations nor the safety of officers in the field would be significantly compromised by the publication of information about undercover investigative techniques.[14]

Having concluded that the Crown had not demonstrated that a ban on the publication of the operational methods was necessary in order to prevent a serious risk to the administration of justice, there was no real need for the Court to consider the second limb of the test. Nevertheless, the Court bolstered its conclusion by stating that, in any event, the salutary effects of a publication ban would be outweighed by its deleterious effects. The problem was that the salutary effects — namely, protecting officers in the field and ensuring that the

6 See below nn 81–4 and accompanying text.

7 [1994] 3 SCR 835. See Rodrick, above n 1, 178–83.

8 [2001] 3 SCR 442, 466 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

9 Ibid 463 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

10 Ibid 468 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

11 Ibid.

12 Ibid.

13 Ibid.

14 [2001] 3 SCR 478, 484–5 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

targets of the operation continued to provide useful information — were not substantial. Given that in this type of operation the one suspect is surrounded by many police officers, the risk to officer safety was regarded as speculative and not compelling. The Court also thought it unlikely that a ban would have a significant effect on the likelihood that suspects would realise that they were being targeted in undercover operations. At most, the ban would produce speculative and marginal improvements in the efficacy of undercover operations.[15]

By contrast, the deleterious effects were regarded as substantial. First, the freedom of the press would be seriously curtailed in respect of an issue that lies at the core of freedom of expression, namely, discussions of the proper role and acceptable activities of the police. In the words of the Court:

> A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state. The tactics used by police, along with other aspects of their operations, is [sic] a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourage the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed critics of what may be controversial police actions.[16]

The Court proceeded to state that if publication bans were improperly used to insulate police conduct from public scrutiny, the Canadian public would be seriously deprived of its ability to become appraised of and respond to police practices that, left unchecked, 'could erode the fabric of Canadian society and democracy'.[17] The case for public exposure of police methods is even stronger now that the reliability of the confessions extracted via these methods is being increasingly questioned in Canada.[18]

Secondly, the *Canadian Charter of Rights and Freedoms* right of the accused to a 'fair and public hearing' would be deleteriously affected by the ban.[19] The Court emphasised that in cases where the accused is known to have made admissions yet is acquitted, the public might not appreciate why the accused had been acquitted. In this case, the public are reliant on the advantage of a full explanation. If the facts surrounding the police operation were made available to the public, they could make an informed judgement about the reasonableness of the acquittal, and the accused could feel vindicated to some extent. By contrast, where a publication ban prevents the public from being made aware of the facts leading to an acquittal, a public perception may emerge that the acquittal was

[15] *Mentuck* [2001] 3 SCR 442, 471 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

[16] Ibid.

[17] Ibid 472 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

[18] See below n 101 and accompanying text.

[19] *Mentuck* [2001] 3 SCR 442, 472 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

gained on a technicality rather than because there were serious doubts about the authenticity of the confession. Identical reasoning was adopted in *ONE*.[20]

2 *The Ban on Police Identities*

Although the Supreme Court of Canada refused to impose a publication ban on the police methods, in both *Mentuck* and *ONE*, the Court upheld a ban in respect of the officers' names and identities for a one-year period. Applying the 'necessity test',[21] the Court held in both cases that publishing the identities of the undercover police would involve a serious risk to the efficacy of current, similar operations.[22] The officers concerned were using their real names in the course of their undercover work, so publishing their names could very easily alert targets that their apparent criminal associates were in fact police officers. This would almost certainly compromise the operation. Moreover, the Court found that there were no reasonable alternatives to a publication ban.[23] In both cases, the ban was restricted to one year, when current operations would be expected to have concluded.[24] In respect of operations not yet commenced, the Court indicated that since reasonable alternative measures such as the use of pseudonyms and the use of different officers and scenarios would be available to the police, future non-publication orders may not be necessary.

Regarding the proportionality component of the test, the Court in each case regarded the salutary effects of the ban as significant.[25] Preventing the names and descriptions of officers in the field from reaching the attention of current targets would avoid potential harm to those officers and would assist in ensuring the efficacy of those ongoing operations. The deleterious effects were not as substantial and were outweighed by the salutary effects.[26] Public debate about police tactics and the manner in which police powers are exercised can proceed unhindered without the public knowing the identity of the particular officers involved in their employment. Moreover, public knowledge of the identity of the officers is largely irrelevant to an accused person's desire for public vindication.

20 [2001] 3 SCR 478, 485 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ), also noting that this public perception was in fact found to have been created by media reports of the acquittal.

21 See Rodrick, above n 1, 180–1.

22 *Mentuck* [2001] 3 SCR 442, 470 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ); *ONE* [2001] 3 SCR 478, 485–6 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

23 *Mentuck* [2001] 3 SCR 442, 470 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

24 Ibid 476 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). The Court explained that it did not want to be perceived as creating a bright line rule as to a year; different cases will involve different considerations.

25 Ibid 474 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ); *ONE* [2001] 3 SCR 478, 486 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

26 *Mentuck* [2001] 3 SCR 442, 475 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ); *ONE* [2001] 3 SCR 478, 486 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

However, the Court refused to impose an indefinite ban on police identities, stating that a court should never permanently conceal information from the public without a very compelling reason.[27] Police safety was not such a compelling reason as would justify indefinite concealment.[28] In any event, the Court did not regard the officers involved in employing the techniques in the *Mentuck* and *ONE* cases as being at a substantially greater risk than other police officers:

> All police officers are subject to the possibility of retributive violence from criminals they have apprehended and other persons who bear them grudges or ill-will … a free and democratic society does not react by creating a force of anonymous and unaccountable police.[29]

B *The Position in Australia*

When the leading Australian case, *Re Applications 2004*, was before the Victorian Court of Appeal, the Chief Commissioner of Victoria Police relied on three considerations to support her claim that the non-publication orders should operate indefinitely.[30] First, she submitted that the technique provides the police with a very powerful tool that is designed to enable them to elicit confessions or admissions in cases that could not otherwise be solved. Moreover, the technique may furnish the police with information that might open up avenues for the investigation and obtaining of other evidence. Because the efficacy of the technique is dependent upon the suspect accepting the genuineness of the scenarios with which they are presented, its usefulness could be reasonably expected to reduce dramatically if it became generally known that the police were engaging in such operations. Secondly, the Chief Commissioner informed the Court that ongoing operations of this kind currently being conducted in Victoria and in other states might be compromised if publicity were given to what had already happened. Thirdly, she submitted that the persons selected as the subjects of these operations were suspected murderers, and public disclosure of the police procedures involved could put undercover operatives in personal jeopardy.

Whilst conceding that these considerations had merit, the Court ultimately held that indefinite non-publication orders should not be made. It based its decision on three main considerations: the lack of connection between the orders sought and the statutory powers contained in ss 18–19 of the *Supreme Court Act 1986*

[27] *Mentuck* [2001] 3 SCR 442, 475 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ); *ONE* [2001] 3 SCR 478, 486 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

[28] *Mentuck* [2001] 3 SCR 442, 475 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ); *ONE* [2001] 3 SCR 478, 485 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

[29] *Mentuck* [2001] 3 SCR 442, 475 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). In fact, in *ONE* [2001] 3 SCR 478, 486 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ), it was stated that a force of anonymous undercover police was not the sort of institution a court could legitimately create.

[30] (2004) 9 VR 275, 289 (Winneke P, Ormiston and Vincent JJA).

(Vic); the undesirability of impinging on the principle of open justice in respect of evidence adduced in criminal trials; and the practical ineffectiveness of non-publication orders to secure the concealment of the technique.

1 *The Connection between the Orders and the Statutory Powers in Sections 18 and 19*

In Part One,[31] it was explained that at common law an order prohibiting the publication of evidence, if it can be made at all, can be made only when necessary to secure the proper administration of justice in the proceeding in which it is sought. Although the Court of Appeal was not being asked to make the non-publication order in reliance on its inherent common law powers, it made some comments about these powers. Apart from the vexed question of whether a superior court has inherent power to make a non-publication order, binding on the world, suppressing the publication of anything said in open court,[32] there was the question of whether, assuming such power did exist, this was a circumstance in which it could be properly exercised. The problem was that the orders were not being sought to protect the proceedings then before the court. The accused persons in these cases had already fallen victim to the methods and made their confessions, thus it was not necessary for the administration of justice *in those proceedings* to ensure that they did not become aware of the technique. Rather, the purpose of the orders was to protect the use of the technique in other current and future operations.[33] It should be noted that whilst the orders were not necessary to *secure* the administration of justice in *R v Favata* ('*Favata*')[34] and *R v Tofilau* ('*Tofilau*'),[35] the making of the orders did have some significance for the administration of justice in those proceedings. Had the accused been acquitted as a result of a challenge to the admissibility of their respective confessions, the orders would have precluded the media from describing to the public the nature of the evidence and from informing the public of the basis for the acquittals. This could have operated to prevent the accused from being properly vindicated in the eyes of the community.

For these reasons, the Court considered that the orders sought by the Chief Commissioner were dependent on ss 18(1)(c) and 19(b)–(c) of the *Supreme Court Act 1986* (Vic) for their validity. A number of questions about the meaning of these provisions were raised by both the Victorian Court of Appeal and the High Court, but as they had not been considered in argument they were left unresolved. First, the High Court noted that the wording of s 18(1)(c) has a bearing on how a non-publication order can be framed, which, in turn, impacts on the extent to which the Supreme Court of Victoria can abridge open justice. In their joint judgment, Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ

31 Rodrick, above n 1, 183–9.

32 See *Re Applications 2004* (2004) 9 VR 275, 288 (Winneke P, Ormiston and Vincent JJA) where the Court also doubted, but refused to determine, whether it had an inherent power to make a non-publication order suppressing the publication of anything said in open court.

33 Ibid 287 (Winneke P, Ormiston and Vincent JJA).

34 [2004] VSC 7 (Unreported, Teague J, 23 January 2004); revd [2006] VSCA 44 (Unreported, Callaway, Buchanan and Vincent JJA, 21 April 2006).

35 (2003) 13 VR 1; affd [2007] HCA 39 (Unreported, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 30 August 2007).

queried whether the phrase 'information derived from a proceeding' means only that the subject matter of the prohibited publication must be a subject that was dealt with in evidence or argument in the proceeding, or whether it means that the information contained in the prohibited report 'must have come to the attention of the publisher (first, only, chiefly) from what was said and done in the proceeding'.[36] There was also a suggestion that those aspects of the non-publication order made by Osborn J in *Tofilau*, which were not limited to the evidence that had been given in that case, were wider than s 18(1)(c) would permit.[37] Some judges opined that, in light of the fact that orders made under s 18 bind the world and attract criminal sanctions if breached, the phrase 'publication of a report of … any information derived from a proceeding' should be construed narrowly.[38] This is bolstered by the fact that the only obligation to notify the world about an order is to place a copy of the order on the courthouse door. Finally, Kirby J expressed the view that the provision is subject to constitutional implications of openness.[39]

Regarding s 19 of the *Supreme Court Act 1986* (Vic), which outlines the circumstances in which non-publication orders can be made, the Victorian Court of Appeal held that the two paragraphs that were being invoked by the Chief Commissioner could not support an indefinite suppression of police methods and identities. The first is s 19(b), which permits non-publication orders to be made if they are necessary in order not to prejudice the administration of justice. The second is s 19(c), which contemplates that an order might be necessary in order not to endanger the physical safety of any person.

Regarding the police methods, the Court found that the connection between the non-publication orders sought by the Chief Commissioner and s 19(b) was too remote. This was because the orders were not directed to ensuring the fair trial of any individual but to circumstances going beyond the administration of justice, namely, to ongoing investigations and possible future trials.[40] However, s 19(b) does not refer to a fair trial, nor is it confined, in its terms, to the administration of justice in the case at hand. It refers to the administration of justice per se, which is arguably a wider concept. Indeed, it was an appreciation of the distinction between a fair trial and the administration of justice that prompted the modifications made in *Mentuck* to the Canadian test.[41] The more significant issue is the characterisation of police investigative techniques. Since the purpose of the orders pertaining to police investigative techniques was to preserve the

[36] *Re Application by the Chief Commissioner of Police (Vic)* (2005) 214 ALR 422, 425 ('*Re Application 2005*').

[37] *Re Application 2005* [2004] HCATrans 286 (Hayne J and D R F Beach SC, 10 August 2004). They were those aspects of the order which prohibited the publication of 'details of the sixteen scenarios comprising such methodology' and of 'the fact of the use of any of the sixteen scenarios as an investigative tool used by the Victoria Police': *Re Applications 2004* (2004) 9 VR 275, 278–9 (Winneke P, Ormiston and Vincent JJA).

[38] *Re Application 2005* [2004] HCATrans 286 (Gummow, Hayne and McHugh JJ, 10 August 2004).

[39] Ibid. See the earlier discussion in Rodrick, above n 1, 183–9.

[40] *Re Application 2005* (2005) 214 ALR 422, 424 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

[41] [2001] 3 SCR 442, 462–3 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

utility of those techniques into the future, could it be said that such orders were necessary in order not to prejudice the administration of justice?

In Part One,[42] it was explained that in *Mentuck*, the Supreme Court of Canada was prepared to regard the use of police operatives and informers as part of the administration of justice.[43] The position in Australia appears to be different. In *R v Rogerson* ('*Rogerson*'),[44] the High Court held that police and investigative agencies do not administer justice in any relevant sense, even though their enquiries may ultimately lead to prosecutions in the courts.[45] Rather, the course of justice 'consists in the due exercise by a court … of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case'.[46] The Court's finding that police and investigative agencies do not administer justice represented a departure from authority.[47]

In the context of non-publication orders made pursuant to s 19(b) of the *Supreme Court Act 1986* (Vic), it would seem that *Rogerson* would preclude an argument that police investigation of criminal offences is necessarily part of the administration of justice. As a corollary, it would preclude an argument that details of an investigative method should not be revealed if this would prejudice the success of an investigation. By analogy with *Rogerson*, it would be necessary to show a connection with the administration of justice by the courts. The matter was alluded to in a brief exchange between counsel for the Chief Commissioner and McHugh J in argument before the High Court.[48] McHugh J understood *Rogerson* to mean that a person seeking continuing orders of the nature being sought would have to point to something in an individual case that might prejudice the administration of justice by the courts.[49] Whilst there was a connection with judicial proceedings insofar as the non-publication order was being sought in respect of evidence that had been given in open court, it is the purpose of the order that is the relevant focal point.[50] Section 19(b) requires that non-publication be necessary in order not to prejudice the administration of justice.[51] Counsel for the Chief Commissioner argued that the administration of justice would be prejudiced if the successful prosecution of criminals was in

42 Rodrick, above n 1, 190–2.

43 [2001] 3 SCR 442, 463 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

44 (1991) 174 CLR 268.

45 Ibid 276 (Mason CJ), 283 (Brennan and Toohey JJ), 293 (Deane J), 302 (McHugh J). It should be noted that the High Court was not dealing with a non-publication order, but with whether an alleged agreement to fabricate evidence, which had as its object the frustration or diversion of a police investigation into the possible commission of a crime, could amount to a conspiracy to pervert the course of justice: at 275 (Mason CJ), 296–7 (McHugh J).

46 Ibid 280 (Brennan and Toohey JJ).

47 See *R v Bailey* [1956] NI 15, 26 (Lord MacDermott LCJ); *R v Kane* [1967] NZLR 60, 64 (McCarthy J for North P, Turner and McCarthy JJ); *R v Sharpe* [1938] 1 All ER 48, 51 (Du Parcq J for Lord Hewart LCJ, Humphreys and Du Parcq JJ).

48 *Re Application 2005* [2004] HCATrans 286 (McHugh J and F X Costigan QC, 10 August 2004).

49 Ibid.

50 Ibid (McHugh J).

51 Ibid.

some way impacted.[52] However, McHugh J said that this was using the term 'administration of justice' too loosely.[53] It is suggested that the High Court's characterisation in *Rogerson* of the nature of police activity is correct, as it is consistent with the approach taken in the context of contempt law.[54]

Regarding the ongoing suppression of police identities, the Victorian Court of Appeal conceded that non-publication orders can be made to protect the safety of individuals pursuant to s 19(c) of the *Supreme Court Act 1986* (Vic), but only for the period during which their safety is at risk.[55] Even then, that protection must give way if the fairness of the trial would be compromised.[56] Thus, it was appropriate for the trial judges in *Tofilau*[57] and *Favata*[58] to make these orders for a limited period in order to give the police officers who, at the time, were involved in this undercover work, time to remove themselves from danger. Moreover, if such persons are potential witnesses, the order can be justified on the basis of protecting the administration of justice. However, this is not the position when an order is sought for the protection of individuals in respect of ongoing investigations and possible future trials, particularly if different undercover officers are likely to be used.

Arguments based on the safety of undercover officers took on a more sophisticated form before the High Court. A distinction was drawn between the danger to undercover officers that might result from revelation of the technique and the danger that might result from the revelation of their identities.[59] Counsel for The Age Co Ltd submitted that there was no compelling evidence that there was a danger to the undercover operatives if the *technique* was revealed, as opposed to the prospect of danger if their *identities* were revealed.[60] In fact, counsel for The Age Co Ltd surmised that, because the crime boss scenario involves many police officers but only one target, if the target did find out about the method it was unlikely that the police would be in danger and far more likely that the target would manipulate the method and be exonerated by not falling for it.[61] In *Mentuck*, the Supreme Court of Canada also found that the risk to the safety of officers from the publication of the technique was speculative and not compelling.[62] There was very little argument before the High Court about the danger of

52 Ibid (F X Costigan QC).

53 Ibid.

54 Proceedings must be 'pending' before a publication can amount to a sub judice contempt of court. See generally *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368, 375 (Gleeson CJ, Kirby P and Priestley JA). Proceedings are 'pending' if curial procedures have been commenced and are not completed: at 377–8 (Gleeson CJ, Kirby P and Priestley JA). The fact that there is police activity in relation to a case is not sufficient to trigger the sub judice period: at 374 (Gleeson CJ, Kirby P and Priestley JA).

55 *Re Applications 2004* (2004) 9 VR 275, 293 (Winneke P, Ormiston and Vincent JJA).

56 Ibid 287–8 (Winneke P, Ormiston and Vincent JJA). See also *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 89 (Brooking J).

57 (2003) 13 VR 1.

58 [2004] VSC 7 (Unreported, Teague J, 23 January 2004).

59 *Re Application 2005* [2004] HCATrans 286 (D F R Beach SC, McHugh J, 10 August 2004).

60 Ibid (D F R Beach SC).

61 Ibid.

62 [2001] 3 SCR 442, 471 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

revealing police identities because counsel for The Age Co Ltd indicated that the newspaper was not seeking to publish this information.[63] In their joint judgment, Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ readily conceded that an order preventing the revelation of the identity of a police officer who, *at the time*, was engaged in an undercover operation was directed at the circumstance outlined in s 19(c) of the *Supreme Court Act 1986* (Vic).[64]

2 *The Principle of Open Justice*

In Part One,[65] it was explained that the weight to be given to the principle of open justice varies according to the source and nature of a court's power to make non-publication orders. If Parliament has invested a court with a discretionary power to make non-publication orders only when necessary to avoid prejudice to the administration of justice, a prohibition on publication will be made if the court is satisfied on the evidence that publicity will have this prejudicial effect. Courts are adamant that such a conclusion is exceptional, since the general tenet is that open justice advances the administration of justice. However, in the unlikely event that the two are shown to be incompatible, the justification for overriding open justice is patently demonstrable and the administration of justice must prevail. The position is different when a statute empowers a court to make non-publication orders in pursuance of public interest considerations other than the need to avoid prejudice to the administration of justice. Here, the applicant for such an order is really asking the court to displace open justice in circumstances where the publicity might be compatible with the administration of justice. Whilst it is clearly open to Parliament to empower a court to do this, the Victorian Court of Appeal has indicated that such power should be exercised with great caution and considerable deference to the principle of open justice. In *Re Applications 2004*, the Victorian Court of Appeal having decided that the non-publication orders sought were not directed to securing the administration of justice in the *particular* case, it was incumbent on the Chief Commissioner of Victoria Police to convince the Court that the orders should be made notwithstanding their effect on open justice. This she was unable to do. Ultimately, the Court decided that society's interest in the principle of open justice and in retaining supervisory control over the behaviour of police and their methods should be accorded priority over the public interest in effective policing.

The Court began by emphasising that the principle of open justice applies with particular force to the conduct of criminal trials and to the evidence upon which convictions are based.[66] Notwithstanding the centrality of the principle, the Court conceded that the law recognises that there may be exceptional circumstances in which the presence of a highly important and powerful public policy consideration creates a need to suppress the publication of part of the evidence given in what would otherwise be a publicly conducted criminal trial.[67] The task

63 *Re Application 2005* [2004] HCATrans 286 (D F R Beach SC, 10 August 2004).
64 *Re Application 2005* (2005) 214 ALR 422, 424.
65 Rodrick, above n 1, 183–9.
66 *Re Applications 2004* (2004) 9 VR 275, 287–8 (Winneke P, Ormiston and Vincent JJA).
67 Ibid 286 (Winneke P, Ormiston and Vincent JJA), citing *Mentuck* [2001] 3 SCR 442.

for the Court was to determine whether the police investigative techniques in question and the identities of the officers using them were of such an exceptional nature as to warrant the making of indefinite non-publication orders. The Court decided that they were not.

The Court identified a number of considerations that weighed in favour of open justice. First, the Court adopted with approval statements made by the Supreme Court of Canada in *Mentuck* that the police should remain under civilian control and supervision by democratically elected officials, and that their tactics are presumptively a matter of public concern, particularly where they utilise controversial methods such as deception and inducements to confess.[68]

Secondly, the Court emphasised that where the investigative techniques used by police are relevant to a case, these techniques have always been open to a publicly conducted challenge by the accused. Indeed, the Court noted that in every trial where the prosecution seeks to admit a confessional statement made as a result of employing this technique, it is virtually inevitable that the defence will challenge the admissibility of the confession.[69] The Court anticipated that the defence might argue that the accused made confessional statements only because they perceived it to be in their interests to do so, for example, to gain entry into the gang and thereby share in the anticipated rewards of membership.[70]

Thirdly, the Court described an order of the unlimited nature sought by the Chief Commissioner as 'breathtaking'[71] in its breadth. If made, the order would, for an indefinite period into the future, conceal from the public 'the evidentiary foundation upon which the prosecution has sought the conviction of persons for murder'.[72] The Court did not regard this outcome as serving the interests of the accused or the general public.[73] In circumstances where the use of the technique had resulted in a conviction, the convicted person serving a lengthy sentence would have no interest in protecting the secrecy of the police procedures that led to the conviction, especially if that person maintained their innocence and wished to challenge the technique and any resultant evidence on an appeal. Conversely, where the technique had produced a confession that did not result in a conviction at trial and a non-publication order was in force in relation to the technique, the public would be left to ponder why the confession had been excluded. An accused person who disclosed the real basis for the acquittal might be in contempt of court for disobeying the order. The Court agreed with the Supreme Court of Canada that the vindication associated with public awareness

68 Ibid 285 (Winneke P, Ormiston and Vincent JJA).

69 The challenges were duly made in each Victorian prosecution for murder arising out of a confession procured by the use of the technique, both at first instance before the trial judge and also on appeal, as discussed in Part One of this article: see Rodrick, above n 1, 174–7. Challenges to several of the cases were recently taken to the High Court: see, eg, *Tofilau v The Queen* [2007] HCA 39 (Unreported, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 30 August 2007). The cases are discussed in Rodrick, above n 1, 175.

70 *Re Applications 2004* (2004) 9 VR 275, 289 (Winneke P, Ormiston and Vincent JJA).

71 Ibid 290 (Winneke P, Ormiston and Vincent JJA).

72 Ibid. Presumably, even if orders had been made indefinitely, they would always be subject to an application for change.

73 Ibid 291–2 (Winneke P, Ormiston and Vincent JJA).

of the nature of the evidence on which the accused is acquitted would be seriously compromised by a ban on its publication. For this reason, the Court held that, ordinarily, there should be full disclosure of the circumstances under which confessional evidence comes into existence.[74]

Fourthly, the Court was perturbed by the effect that a non-publication order would have if a conviction was subjected to an appeal and the appellate court found that the accused's confession, obtained through the use of the suppressed technique, should be excluded on the basis that it was involuntary or that its admission would be unfair or contrary to public policy.[75] If the appellate court was forced to release its decision in general terms without reference to the factual background or a description of the police techniques employed to obtain the confession, the general community would perceive the court's decision as 'unsatisfactorily imprecise'.[76] It is generally agreed that the principle of open justice requires that the terms of a judgment are not restricted. To those involved in the case it would seem as though the court had substituted a verdict based on evidence for one based on general statements of principle. This would constitute a serious disservice to the law, the community, those personally affected by the decision, and to the court itself.[77] A decision to set aside a conviction for murder is a momentous one and, save in the most exceptional circumstances, the factual and legal foundations underlying such a decision should be revealed.

Fifthly, the Court pointed to the fact that other sting operations and police tactics that have been employed in hundreds of cases and been the subject of evidence in open court are still successfully employed despite being well-known and accepted by the community.[78] Common scenarios include police officers who pose as drug dealers or contract killers, operations mounted to identify paedophiles using the internet, and police infiltration of car stealing gangs. No compelling reason had been advanced by the Chief Commissioner that would justify the Court in taking a different approach in relation to this particular technique. Even if publicity did have a spoiling effect on the technique, this is probably something that courts would have been willing to wear in the interests of open justice. Before the High Court, counsel for The Age Co Ltd argued that knowledge of a technique cannot be suppressed for all time simply because

74 Ibid 290–1 (Winneke P, Ormiston and Vincent JJA). The Court did countenance that there may be circumstances in which a non-publication order in relation to evidence might be made. For example, when accused persons give assistance to the police, it is common for the nature of that assistance to be made the subject of a non-publication order for an indefinite period: at 290–1. The reward for the accused is a lesser sentence. However, the Court regarded a limited ban of this nature as being in the interests of the administration of justice in the particular criminal proceeding and as 'not directed to some future and indefinite purpose': at 291 (Winneke P, Ormiston and Vincent JJA).

75 Ibid 291. For example, an appellate court might find that the nature of the inducements offered or the process of manipulation involved in the technique may have affected the evidentiary value and fairness of the resulting confession or admission, perhaps on the basis that the will of the individual had been overborne as a consequence of the psychological pressure exerted upon them.

76 Ibid 291–2 (Winneke P, Ormiston and Vincent JJA).

77 Ibid 292 (Winneke P, Ormiston and Vincent JJA).

78 Ibid.

suppression will solve a greater percentage of crimes.[79] It has to be accepted that if a certain crime solving technique comes to the attention of criminals, they will take steps to thwart it.[80] Whilst this may make it more difficult to solve crimes, it has never been suggested that this information should have been suppressed in the interests of catching more criminals.

Finally, had the case come back before the Victorian Court of Appeal for further argument, the Chief Commissioner maintained that she would have pressed upon the Court that the derogation from open justice was minimal.[81] First, the techniques had been discussed and analysed in open court in the presence of the accused, their counsel and the jury and were subject to the control and direction of the trial judge and to appeal thereafter. Secondly, the orders were being sought only in relation to publication in the mass media. At all times, the methods could be freely discussed in law reports and legal journals, among lawyers, or by word of mouth by persons 'in the know'. The explanation for this lies in the types of person selected as targets for such operations. Such targets are not underworld criminals with a network of communication, but rather are ordinary, isolated, impressionable people who read newspapers and watch television but who do not trawl through legal journals or law reports. However, as noted earlier in this article, the orders made by Osborn J[82] and Teague J[83] were not restricted in their terms to the mass media, either in their initial temporary form, or as extended pending the outcome of the appeals. Instead, they prohibited publication in print of any kind and publication by any kind of electronic means.

The same imprecision appears to have been present in the order made by the trial judge in *ONE*.[84] This had an impact on open justice beyond what was being sought by the Chief Commissioner, and perhaps even beyond what was contemplated by the judges themselves! It meant that the judgment of the Victorian Court of Appeal, although initially uploaded onto the internet, was removed after a few days because it described the methodology and would have infringed the orders.[85] The orders may have been responsible for the postponement of the publication of a journal article until they were lifted some months later.[86] Moreover, documents pertaining to the case that were on file in the High Court

79 *Re Application 2005* [2004] HCATrans 286 (D F R Beach SC, 10 August 2004).

80 A case in point is forensic evidence. For example, the discovery that each person's fingerprints and DNA are unique has resulted in criminals wearing gloves in order to avoid detection.

81 *Re Application 2005* [2004] HCATrans 286 (F X Costigan QC, 10 August 2004).

82 *Tofilau* (2003) 13 VR 1.

83 *Favata* [2004] VSC 7 (Unreported, Teague J, 23 January 2004).

84 [2001] 3 SCR 478.

85 The judgment of the Victorian Court of Appeal was unavailable to the public when the matter was argued before the High Court in August 2004. This greatly perturbed Kirby J, who asserted that not even in wartime had the High Court been asked to deal with a case on appeal from a judgment that was not available to the general public: *Re Application 2005* [2004] HCATrans 286 (10 August 2004). His Honour organised for the judgment to be made available immediately, except for those paragraphs in which the methods under consideration were described: *Re Application 2005* [2004] HCATrans 286 (10 August 2004).

86 Andrew Palmer, 'Applying *Swaffield* Part II: Fake Gangs and Induced Confessions' (2005) 29 *Criminal Law Journal* 111.

registry had to be altered to black out the identity of the police — again, going beyond a mass media ban.[87] These cases demonstrate the importance of wording non-publication orders with care and precision. Given the importance attached to open justice and the insistence by courts that non-publication orders should be restricted as far as possible without sacrificing the prevention of the risk,[88] the loose wording is somewhat surprising. However, it must be conceded that even if the orders had been confined in their terms to the mass media, it is unlikely that the Victorian Court of Appeal would have been moved by the Chief Commissioner's argument, given the Court's emphasis on the public's right to be appraised of the evidentiary basis of convictions and acquittals. The Court shared the disquiet expressed by the Supreme Court of Canada at the prospect of lawyers, legal academics and law students being aware of police practices but not the general public.[89]

3 *The Practical Utility of the Orders*

The Victorian Court of Appeal also held that even if, as a matter of principle, an order prohibiting indefinitely the publication of police techniques and identities should be made, such an order would be practically ineffective on at least two counts. First, the Court did not believe that a non-publication order would be effective to stop information about police methodologies and identities from being passed on by those accused persons upon whom it had been used. The threat of punishment for contempt of court is hardly likely to have a deterrent effect on persons already serving an extensive term of imprisonment for murder.[90] In making these remarks, the Court seemed to have in mind channels of communication between persons who move in the underworld. The Chief Commissioner took issue with this assumption. She had hoped to be able to explain to the Court that the bulk of the targets upon whom these methods are practised are those suspected of 'domestic, private murders',[91] not underworld murderers with networks of information and communication with members of the prison population. She therefore did not concede that the technique would become known informally amongst the kind of persons likely to be affected, even where an order prohibiting disclosure had been made.[92]

Secondly, the Court believed that an order was ultimately powerless to quarantine Victoria against the intrusion of knowledge from overseas jurisdictions such as Canada, where the technique had been the subject of reported decisions (for example, *Mentuck* and *ONE*). The Court was prepared to assume that a non-publication order made by a Victorian court would be effective to preclude the media in Victoria from publishing, in an article or programme dealing with police investigative techniques generally, material extracted from the reported Canadian cases to the extent that the details of those tactics were similar to those

87 See Rodrick, above n 1, 197 fn 175.
88 *Mentuck* [2001] 3 SCR 442, 464 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).
89 *Re Applications 2004* (2004) 9 VR 275, 292–3 (Winneke P, Ormiston and Vincent JJA).
90 Ibid 292 (Winneke P, Ormiston and Vincent JJA).
91 *Re Application 2005* [2004] HCATrans 286 (F X Costigan QC, 10 August 2004).
92 *Re Applications 2004* (2004) 9 VR 275, 289 (Winneke P, Ormiston and Vincent JJA).

being used in Victoria.[93] However, the Court posited some other scenarios in which the dissemination of information about a police technique might not infringe a non-publication order made by a Victorian court.[94] One scenario was the broadcast of an overseas television programme — whether fictional or not — based upon what had occurred in Canada, in circumstances where its screening might alert targets in Victoria. The advent of technologies such as the internet that have no jurisdictional boundaries has also diminished the practical effect of non-publication orders. The Court regarded these scenarios as demonstrating the immense practical difficulties of making such orders in terms of their duration, scope and effectiveness.[95] A similar acknowledgement of the powerlessness of courts to quarantine their respective jurisdictions from information originating interstate and overseas was made in *Dagenais*.[96] Given the courts' insistence that they will not make non-publication orders that are futile or fatuous, this will undoubtedly have implications for the making of such orders into the future.

It is interesting to speculate on whether a non-publication order prohibiting the publication of evidence concerning police techniques would prevent the same information from being reported by a media organisation that was prepared to invest time and resources to discover these methods independently, that is, by means other than being present in the courtroom when they were presented in evidence or through a search of documents on the court file. The answer would turn on the construction of the reference in s 18(1)(c) to a 'report of the whole or any part of a proceeding or of any information derived from a proceeding'. Does this phrase mean that only information that has come to the attention of a publisher from what was said and done in a proceeding can be the subject of an order?[97] Even if the section does carry this meaning, a media organisation that had garnered the information from other sources would have the practical difficulty of proving to the court that it acquired this knowledge independently and not from the suppressed evidence in the court case.

C *Admissibility of the Evidence versus Publication of the Methods*

It is interesting to compare the courts' rulings on the admissibility of the evidence garnered as a result of the technique with their rulings regarding the publicity of the technique. The Victorian Court of Appeal, whilst declaring itself to be alive to the possibility that the crime boss technique can produce false confessions, has since upheld several convictions that were primarily based on

[93] Ibid 293 (Winneke P, Ormiston and Vincent JJA). By analogy, the media, in the context of a report that a Victorian court had issued a non-publication order and pointing out that the Canadian Supreme Court had refused to make similar orders, would be unable to publish, in Victoria, an outline of the facts of the Canadian cases.

[94] Ibid 292–3 (Winneke P, Ormiston and Vincent JJA).

[95] Ibid 293 (Winneke P, Ormiston and Vincent JJA).

[96] [1994] 3 SCR 835, 886 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ).

[97] The majority of the High Court posed, but did not need to answer, this question: *Re Application 2005* (2005) 214 ALR 422, 425 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). See Rodrick, above n 1, 193–4.

confessional evidence adduced as a result of this technique.[98] Yet the Court refused to impose a publication ban on the technique.[99] In one sense, there is no theoretical contradiction in upholding a method but at the same time insisting that it should be open to public scrutiny. However, it might be argued that there is an inconsistency in effect, insofar as trial judges, the Victorian Court of Appeal and, recently, the High Court, have on many occasions held that confessions elicited by means of the technique 'pass muster', yet have proceeded to allow details of the technique to be published despite police protestations that publicity would have a detrimental impact on the use of the technique in future cases.[100] This is to be contrasted with the position in Canada, where courts have been more wary of the technique and have, on occasions, acquitted accused persons as a result.[101]

II CONCLUSION

The response of Canadian and Australian courts to requests from the police for orders prohibiting the publication of details of the crime boss scenario technique is instructive in that it betrays a solidarity amongst judges regarding the importance to be placed on publicity rights in criminal trials in which a confession has been elicited by means of a covert technique. This article has identified a number of interesting and important issues that emerge from these cases and has sought to demonstrate the impact of these decisions on the principle of open justice. It remains to speculate on the ongoing effects of these decisions both in relation to the police method in question, and in relation to non-publication orders generally.

The impact of the rulings in Canada and Australia on the continued use of this method is unclear. Following the *Mentuck* and *ONE* decisions, a spokesperson for the Royal Canadian Mounted Police ('RCMP') anticipated that the force would probably have to change some of its tactics.[102] Yet it has been reported that the RMCP returned to using the tactics within six months of their expo-

98 The High Court has recently dismissed several appeals from decisions of the Victorian Court of Appeal. By a majority of 6:1, the Court held that the confessions that were the subject of the appeals were each made voluntarily and were admissible as evidence: *Tofilau v The Queen* [2007] HCA 39 (Unreported, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 30 August 2007).

99 *Re Applications 2004* (2004) 9 VR 275.

100 In fairness, in *Re Applications 2004* (2004) 9 VR 275, 291 (Winneke P, Ormiston and Vincent JJA), the Victorian Court of Appeal did point out that the situation would be equally problematic if a non-publication order was made and the Court subsequently set aside a conviction on the basis that the confession was involuntary, unfair or contrary to public policy.

101 See, eg, *R v Mentuck* [2000] MBQB 155 (Unreported, MacInnes J, 29 September 2000) [121]–[123]; *ONE* [2001] 3 SCR 478, 483 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ); *R v ONE* [2000] BCSC 1200 (Unreported, Edwards J, 8 August 2000) [69]–[71]; *R v CKRS* [2005] BCSC 1624 (Unreported, Morrison J, 28 November 2005) [113]–[115]; *Unger v Minister of Justice (Canada)* [2005] MBQB 238 (Unreported, Beard J, 4 November 2005) [48]; *R v Ciancio* [2006] BCSC 1673 (Unreported, Boyd J, 10 November 2006) [266]–[268], [272]–[274], [290].

102 CBC News, *Supreme Court Strikes Down Undercover Publication Bans* (15 November 2001) Canadian Broadcasting Corporation <http://www.cbc.ca/story/canada/national/2001/11/15/scoc011115.html>.

sure.[103] Following the public disclosure of the methods by *The Age* newspaper, a Victoria Police spokesperson was reported to have said that future operations would be jeopardised and that some investigations had already been stopped 'for fear they could be compromised by publicity about undercover methods'.[104] However, more recently it was reported that 'Victoria police … hope the publicity surrounding their techniques won't stop the methods working again.'[105] If crime boss scenarios are still being employed by police, despite being publicised, this suggests that the applications made by the Chief Commissioner lacked merit. By contrast, if the effect has been to stamp out the crime boss scenarios, leaving crimes unsolved that might otherwise have been solved, it raises the question whether the decisions have come at too high a price.

On a more general note, in light of the fact that there is now a plethora of statutes that confer power on courts to make non-publication orders,[106] it is suggested that, in future, the preoccupation of Australian courts is less likely to be on the nature and extent of their inherent common law powers, and more likely to be on the interpretation of their statutory powers and on whether these powers are subject to any constitutional constraints. In the Australian Capital Territory and Victoria, which have each enacted a bill of rights,[107] the matter will arise on a more overt level as courts seek to reconcile their legislative powers with the right to freedom of expression conferred in these Acts. In jurisdictions that lack a statutory bill of rights, the issue is likely to turn on whether the High Court is prepared to find that Chapter III of the *Australian Constitution* contains implications of open justice. However, judicial exploration of the constitutional status of open justice in the context of Chapter III is still in its early days.

The decision of the Victorian Court of Appeal in *Re Applications 2004* was handed down at a time when non-publication orders were (and still are) on the increase in most Australian jurisdictions, despite the avowals of courts that such orders are 'wholly exceptional'.[108] Whilst South Australia has maintained its position as the nation's 'suppression capital', non-publication orders issued by Victorian courts have reportedly doubled in the last six years.[109] Although this

103 Geoff Wilkinson and Simon Lavaring, 'Undercover in the Open', *Herald Sun* (Melbourne), 8 September 2004, 9.

104 *Covert RCMP Tactics under Fire in Australia* (7 October 2004) Asian Pacific Post (Vancouver) <http://www.asianpacificpost.com/portal2/402881910674ebab010674f4ea99159f.do.html>.

105 ABC Radio, 'Undercover Police Tactic Causes Legal Row', *PM*, 21 April 2006 <http://www.abc.net.au/pm/content/2006/s1621416.htm>.

106 See, eg, *Criminal Procedure Act 1986* (NSW) s 292; *Law Enforcement and National Security (Assumed Identities) Act 1998* (NSW) s 14(1)(b), (2)(b); *Mental Health Act 2000* (Qld) s 426; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 75.

107 *Human Rights Act 2004* (ACT) s 16; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

108 *Re Application 2005* (2005) 214 ALR 422, 448 (Kirby J).

109 Norrie Ross, 'Court Suppression Orders on the Rise', *Herald Sun* (Melbourne), 14 December 2005, 25. See also Chris Merritt, 'Go Back to School, Judges Urged', *The Australian* (Sydney), 18 August 2005, 15; Natasha Robinson, 'Victoria Courts Greater Openness', *The Australian* (Sydney), 9 September 2005, 27. Precise information regarding the actual number of non-publication orders made by Australian courts is notoriously difficult to obtain. One reason is that many courts do not keep registers of non-publication orders, or have systems in place for notifying the media that such orders have been made. Moreover, in some cases, the fact that such an order has been made is itself the subject of a non-publication order. The Australian Press

increase in Victoria can be partly attributed to the high incidence of gangland murders and the prosecutions that arose out of the CEJA taskforce into police corruption,[110] it is not a mere aberration, but part of a wider trend, particularly amongst the lower courts. In an attempt to rectify the situation, the Supreme Court of Victoria commenced discussions with the Judicial College of Victoria about drafting a course on non-publication orders to educate members of the Victorian judiciary about the circumstances in which they can appropriately be made. A workshop on non-publication orders has since been conducted by the Judicial College.[111] It focused on the circumstances in which it is appropriate to make non-publication orders and on issues of form, content, and specificity in the making of such orders. Perhaps the recent decision of the Court of Appeal and its tacit approval by the High Court will herald a new era of restraint on the making of non-publication orders.

III EDITORS' NOTE

In the Introduction to Part One of this article it was stated that Part Two would consider whether there is any scope for the application of the evidentiary doctrine of public interest immunity to police methods and identities. However, it is understood that recent judgments in which this issue was considered, whilst initially available to the public, have since been made the subject of non-publication orders. The existence of these orders has prevented this issue from being discussed in Part Two of this article.

Council described the increased incidence of non-publication orders as an 'impression' shared by observers: Australian Press Council, *Report on Free Speech Issues 2005–2006* (8 November 2006) Australian Press Council <http://www.presscouncil.org.au/pcsite/fop/fop_ar/ar06.html>. The dearth of empirical studies on non-publication orders has prompted calls for greater empirical research: Andrew T Kenyon, 'Justice Seen to Be Done: Suppression Orders in Law and Practice' (Speech delivered at the Judicial Conference of Australia, Canberra, 6–8 October 2006).

110 Kenyon, above n 109, 15; Justice Geoffrey Eames, 'The Media and the Judiciary' (Speech delivered at the Melbourne Press Club Annual Conference, Melbourne, 25 August 2006). The large number of complex and interrelated non-publication orders made in the gangland murder and police corruption cases is attributable to the fact that there were often sequential trials involving the same persons and a wish not to prejudice the respective juries. In some cases, orders were made to protect personal safety, something Victorian judges are entitled to do under their statutory powers.

111 The workshop is described in Judicial College of Victoria, *Annual Report 2005–2006* (2006) 17.