CLOSED COURTS open door to justice

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ILLUSTRATION: CAROLYN RIDSDALE

Justice must be seen to be done. That's why open courts are a hallmark of the Australian legal system. However, there are cases, such as protecting people living with HIV against stigmatisation – where closed courts may be the only way that justice can be done.

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ONE OF THE PILLARS AT THE base of the Australian legal system is the long-standing principle of open justice, which requires that the business of the courts be open to the public and the media, who may attend with very limited exceptions.

This has implications for people living with HIV who come before the court system, either as offenders or as victims. It raises questions of what protections exist to prevent a person's HIV status being raised in a court or tribunal, and this information being more widely circulated to members of the public and to the media.

At common law, courts have the power to make suppression orders as part of their implied power. Now, a new NSW Act – the *Court Suppression and Non-Publication Orders Act 2010* – introduced late last year, makes it more straightforward for parties to get suppression orders. However, courts will still have to balance the public interest in open justice against preserving the confidentiality of an individual's HIV status.

Why suppress a person's HIV status in court?

Australia has a successful history of HIV prevention and management when compared to other developed countries.

The estimated prevalence of HIV in Australia is one sixth that of the US, and one third of that in Canada and France.

However, HIV remains a condition that is subject to stigma and discrimination in society. Many people living with HIV are very careful about when and to whom they disclose their HIV status. There are only very limited circumstances in which a person is required by law to disclose their HIV status.

The laws relating to HIV transmission and disclosure of positive status differ across Australian states and territories, with some jurisdictions including provisions regarding disclosure of HIV status in both criminal and public health statutes.[1] In NSW, for example, the *Crimes Act 1900* provides for offences in relation to the deliberate or reckless transmission of HIV, and the *Public Health Act 1991* makes it an offence to fail to disclose one's HIV status prior to sexual intercourse. Furthermore, across jurisdictions, a person's HIV status may be relevant in the sentencing process, as either an aggravating or mitigating factor.

The existence of a supportive legal system has assisted Australia's public health response to the HIV epidemic by fostering an environment where the rights of HIV-positive people are respected and protected. This supportive legal environment is referred to as the "enabling environment" and extends to maintaining confidentiality regarding a person's HIV status in the court system and other areas of life.

It is a vital part of the justice system that individuals are able to come forward and make a complaint where they have been subjected to injustice. For example, there will be many instances where a person living with HIV is the victim by virtue of experiencing discrimination or vilification, or in extreme cases, criminal complaints in relation to deliberate infection with HIV. In such circumstances, it is important that the person who has been discriminated against or vilified on the basis of their HIV status (or perceived HIV status) is able to come forward, make a complaint and seek an appropriate remedy without being deterred by the concern that their HIV status will become public knowledge during a hearing or be reported in the media.

There may be a number of high-profile cases where a person's HIV status will be considered by the media to be worthy of significant coverage. It is important a defendant's HIV status remains confidential in the event that they are ultimately found not guilty. Without such protections a person's confidential medical information will be allowed into the public domain, which can – and does – result in stigma and discrimination towards potentially innocent people and their families.

Recent court cases relating to HIV transmission have aroused considerable media interest. News coverage of such cases has often been sensationalised and designed to engender fear and panic in the reader. Such reporting has the potential to jeopardise and undermine successful public health measures by negatively affecting community perception of HIV and HIV-positive people. Hence the importance of suppression orders in such matters.

Suppressing information heard in a court or tribunal

Some powers to make suppression orders are clearly articulated within a statute. The *Court Suppression and Non-Publication Orders Act 2010* (NSW), *Public Health Act 1991* (NSW) and the *Administrative Decisions Tribunal Act 1997* (NSW) provide powers to close a court and/or to make suppression orders. In other instances, powers to make suppression orders are provided to courts in the common law.

There are three main types of protection under the umbrella of suppression orders:

- ❑ to close the courtroom to the public;
- ❑ to prohibit any publication of the details of the matter; and/or
- ❑ to provide for the use of pseudonyms for all parties and the exclusion of any other identifying information, so that when the decision is published or reported in the media, the HIV-positive person cannot be identified.

Suppression orders on their own do not prevent the public or media from attending a court hearing and observing proceedings. A closed court, with associated use of pseudonyms in any published decision, provides the greatest level of protection to the privacy of an HIV-positive person. However, a closed court impacts to the greatest extent on the principle of open justice. The courts ultimately have to balance the competing interests of the public interest in open justice and the importance of maintaining the confidentiality of a person's HIV status.

In the absence of any statutory authority, the ability to make suppression orders at common law is part of the implied power of the court. Courts can make such orders as are reasonably necessary to secure the proper administration of justice in the proceedings before them.[2] The test is one of necessity, namely, whether it is "really necessary to secure the proper administration of justice" in the proceedings.[3] The need for such measures would arise only in wholly exceptional circumstances – not merely where such measures would be useful or desirable[4] or would save embarrassment, distress or financial loss.[5]

Statutory powers to make suppression orders

General legislation

The *Court Suppression and Non-Publication Orders Act 2010* (NSW) came into force at the end of 2010. It should be considered in conjunction with the *Court Information Act 2010* (NSW). Both Acts consolidate the various powers contained in different legislation to make suppression and/or non-publication orders, such as in the *Civil Procedure Act 2005* (NSW) ss.71 and 72, the *Criminal Procedure Act 1986* (NSW) s.302 and the *Evidence Act* 1995 (NSW) s.126E.

The *Court Information Act 2010* promotes the principle of open justice and creates a statutory framework to govern access to documents and other court information held by NSW courts in connection with criminal and civil proceedings.

The Act divides all information held by a court as either "open access" or "restricted access". It then gives a framework by which these two categories of

COURT SUPPRESSION AND NON-PUBLICATION ORDERS ACT 2010

8 Grounds for making an order

1. A court may make a suppression order or non-publication order on one or more of the following grounds:
   (a) the order is necessary to prevent prejudice to the proper administration of justice,
   (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
   (c) the order is necessary to protect the safety of any person,
   (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),
   (e) 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.
2. A suppression order or non-publication order must specify the ground or grounds on which the order is made. ❑

court information can be accessed by the public, including victims of crime and others who are directly affected by criminal and civil proceedings, as well as the media. Such access is subject to any other restrictions imposed by a court under the *Court Suppression and Non-Publication Orders Act 2010*.

Public access to "restricted access" material is only allowed with leave of the court or as provided by the regulations. In deciding whether to grant leave, the court may consider a number of factors for example, the public interest in granting leave, the public interest in protecting a person's privacy, and the effect on the administration of justice.

On the other hand, wide-ranging access is given to the media under s.10 of the *Court Information Act 2010*. A news organisation is entitled to access a large amount of restricted information, unless the court orders otherwise in a particular case. The media therefore can get a hold of, for example, transcripts of proceedings held in a closed court, and information contained in a transcript of, and statements and evidence admitted into evidence in, proceedings before a court for an order to prohibit or restrict the publication or disclosure of information. It is therefore feasible that a hearing might be held in a closed court, but without associated pseudonyms and non-publication orders, the media might still be able to access and publish the names of the parties in a hearing, including their HIV status.

While access to information held in court records is an essential feature of an open justice system, it requires a balance between the competing interests of open justice and individual privacy. The *Court Suppression and Non-Publication Orders Act 2010* was introduced to consolidate powers of suppression contained in other legislative instruments and under the common law.

It confers powers on NSW courts to impose suppression orders and non-publication orders on certain defined grounds. Non-disclosure orders – by publication or otherwise – allow courts to order pseudonyms be used instead of parties' names, and for matters to be heard in closed court. Section 8 of the Act provides the grounds on which orders may be made.

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The Act is not intended to dilute any protections contained in existing legislation. Further, suppression orders can apply in NSW only or extend to the Commonwealth. The Act does not affect the operation of the common law or other specific legislative protections, and the courts maintain their discretionary power to weigh relevant interests in the particular case before them. Nevertheless, these legislative grounds will greatly assist the courts in balancing this difficult determination.

Public health legislation

Section 13 of the *Public Health Act 1991* (NSW) makes it an offence to fail to disclose one's HIV status prior to sexual intercourse, irrespective of whether safe sex practices are used. The recently reformed *Public Health Act 2010* (NSW), which is not yet in force, tempers the existing s.13 by providing a defence that the person charged took reasonable precautions to prevent transmission of a sexually transmitted infection.

Section 37 of the Act requires the local court to be closed when alleged offences under this section are heard. This is particularly important given that without such protection, a person found not guilty of the charge would have lost control over who had knowledge of their HIV positive status. This is an example of where suppression and non-publication orders would be crucial to prevent the media publishing any identifying information of the defendant, under the rights of access provided for in s.10 of the *Court Information Act 2010*.

The fact the *Public Health Act 1991* requires a closed court indicates the importance Parliament attaches to maintaining the confidentiality of a person's HIV-positive status. To that end, it would be a valuable addition if HIV were explicitly stated as a ground for suppression orders in the *Court Suppression and Non-Publication Orders Act 2010*.

Equivalent legislation in Victoria is broader in scope and more sophisticated. Section 133 of the *Public Health and Wellbeing Act 1998* (Vic) provides that a court or tribunal should make an order to close the court where evidence is proposed to be given in a matter before a court or tribunal of any matter relating to HIV, and where the court considers that the disclosure of the information would cause adverse social or economic consequences to the individual. This section appears to cover not only matters being heard under public health legislation, but any court or tribunal hearing any matter relating to HIV.

Anti-Discrimination Legislation

The *Administrative Tribunal Act 1997* (NSW) gives the Administrative Decisions Tribunal the discretion to make suppression orders if the tribunal is satisfied that it is desirable to do so due to the confidential nature of the matter or for any other reason. This is an important protection for people who have been discriminated against, victimised, or vilified as a result of their HIV-positive status.

Cases of suppression orders being used

The HIV/AIDS Legal Centre (HALC) has made – and continues to make – applications for suppression orders on behalf of HIV-positive clients. In the past, HALC successfully sought court orders to make anonymous the identities of all parties in a HIV vilification case against a gay HIV-positive couple in a small NSW town.[6] Appropriate non-disclosure orders were also made.

In the District Court, HALC has obtained, under the new *Court Suppression and Non-publication Orders Act 2010*, suppression orders in respect of all identifying features of a plaintiff and defendant, an order that the matter be heard in a closed court, and non-publication orders.

A clear example of when suppression orders might allow people to exercise their rights before the courts, without the risk and fear of discrimination or vilification as a result of their HIV status becoming widely known was in *'E' v Australian*

Red Cross Society (1991) 27 FCR 310. The plaintiff sought orders for non-publication for their HIV-positive status and appointment of a pseudonym on the basis of the stigma attached to persons with HIV. The court granted the application in accordance with s.50 of the *Federal Court Act 1976*. Following the making of the orders, an additional 42 applicants came forward to make complaints, indicating the importance of such orders in ensuring plaintiffs have access to justice.

In *X v Y* [1988] 2 All ER 648, a UK case, an injunction was sought to prevent a newspaper from publishing the names of two HIV-positive doctors working in a hospital. The news outlet had obtained the information from confidential hospital records and argued that there was an overriding public interest in disclosing the information because the community was entitled to know that the doctors had HIV. The court held that the public interest in preserving the confidentiality of hospital records outweighed the public interest in the freedom of the press to publish the information, because people with HIV must not be deterred from seeking appropriate testing and treatment. The court recognised that confidentiality in relation to a person's HIV status was important in order to protect the person's interests and also to reinforce public health strategies.

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Suppression orders have been obtained in a number of Australian criminal cases to protect the identity of victims and – at times by default – the accused. However, there are a number of instances where suppression orders were not allowed. In one case, an HIV-positive man was charged with deliberately infecting a number of partners with the virus. It was held that the public interest in alerting possible sexual partners of the accused so that they could seek immediate medical advice and testing outweighed the public interest in preserving the confidentiality of the accused's medical condition.[7]

Similarly, in a case in NSW where a man was charged and convicted of deliberately infecting his partner with HIV, suppression of the man's name was not allowed, even though this, by default, identified his partner and children who lived in a small town in NSW.[8]

As a recent case in Sydney shows, even when a person's HIV status had no direct bearing on the case, suppression orders were denied, resulting in sensationalised media coverage that arguably misled readers over the nature of the case. The matter involved a taxi driver who was charged and convicted of sexual assault. The judge took into account the accused's HIV status in determining his sentence (at the time of the offences the defendant was HIV negative, so it had no bearing on the assaults). The Supreme Court of Criminal Appeal agreed[9] with the District Court decision[10] to not allow suppression on the basis that the public interest in hearing the reasons for sentencing outweighed the interest in maintaining the confidentiality of medical information.

After the sentencing,[11] when the man's HIV status was revealed, the media picked up on the HIV aspect of the case, resulting in headlines such as, "A cruel discovery for victims – taxi driver who raped them had HIV".[12] The man's HIV status was not relevant to the offences since he did not have the virus at the time of the assaults. The headlines served no purpose other than to further stigmatise HIV and people who live with HIV.

It is important to note that it is unlikely that the *Court Suppression and Non-Publication Orders Act 2010* would have made any difference to the court's decision in this matter, even if it had been in force at the time. It would appear that the courts decided the public interest in open justice and hearing the reasons for sentencing outweighed the interest in maintaining the confidentiality of medical information in this instance.

In conclusion, the ability to make suppression orders is an extremely important power of the court. Without this power to protect the confidentiality of complainants' HIV status, they would, in many instances, be extremely reluctant to proceed with their complaints. However, the decision to allow or deny an application for suppression and/or non-publication orders requires a balancing of the public interest in favour of open justice and that of protecting confidential medical information and HIV-positive individuals from further discrimination and detriment as a result of the disclosure of their condition. ❑

ENDNOTES

1. For a more detailed discussion on the criminal laws surrounding HIV in NSW see "Criminal Transmission of HIV, A guide for Legal Practitioners in NSW" available at *www.halc.org.au/transmission.htm*, and also the online resource of the Australian Society for HIV Medicine, "Guide to Australian HIV laws and Policy for Health Professionals" at *www.ashm.org.au/HIVLegal/default.asp*.
2. *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 NSW* (1992) 26 NSWLR 131 at [160]; *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 per Mahoney AJ at [345]; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [24]–[37].
3. *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 per McHugh JA at [477].
4. *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 per Spigelman CJ at [45].
5. *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 per Mahoney JA at [347]; *John Fairfax Group Pty Ltd v Local Court of NSW* (1992) 26 NSWLR 131 per Kirby P at [142]–[143].
6. *JM and JN v QL and QM* [2010] NSW ADT 66.
7. *R v Mwale* (2008).
8. *R v Montgomery* (2008).
9. *Nagi v DPP* (NSW) [2009] NSWCCA 197.
10. *R v Hassan Nagi* [2009] NSWDC 77.
11. *R v Hassan Nagi* [2010] NSWDC 129.
12. Joel Gibson, "A cruel discovery for victims – taxi driver who raped them had HIV", *Sydney Morning Herald*, 23 June 2010. Available at: *www.smh.com.au/nsw/a-cruel-discovery-for-victims-taxi-driver-who-raped-them-had-hiv-20100622-yvrd.html* (accessed 17 December 2010). ❑